

A New Era for Métis Constitutional Rights? Consultation, Negotiation and Reconciliation

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2015 CanLIIDocs 234

Since the recognition of Aboriginal rights in s. 35 of the *Constitution Act, 1982*,¹ Métis people have had to prove that their inclusion in s. 35 and the promise of scrip in the *Manitoba Act 1870*² was meaningful in law, and not just a matter of “political expediency”.³ They have had to prove their existence as an Aboriginal people and disprove the assumption that whatever rights they enjoy as an Aboriginal people were terminated prior to 1982. *R v. Powley*, decided by the Supreme Court of Canada (SCC) in 2003, was a significant victory because it affirmed Métis Aboriginal Constitutional rights to hunt for food and to engage in other

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Authors’ note: The authors gratefully acknowledge the Métis rights research conducted by Steven Carey, Scott McAnsh, and Laura Skorodenski while students at the University of Alberta; some of it informs this article. We also thank Delna Contractor (Gowling Lafleur Henderson LLP), the Gowlings Toronto Document Production Group, and Rebecca Ratcliffe and George Wong (University of Alberta, Law) for their editorial assistance, funded in part by the Social Sciences Humanities Research Council through the Métis Treaties Project online: <<http://www.metistreatiesproject.ca>>.

¹ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

² *Manitoba Act, 1870*, RSC 1985, Appendix II, No 8, s 31 [*Manitoba Act*].

³ See e.g. Thomas Flanagan, “The Case Against Métis Aboriginal Rights” (1983) 9:3 *Can Pub Pol’y* 314 (discussing the Métis’ inclusion in s. 35 of the *Constitution Act, 1982*); *Manitoba Métis Federation Inc et al v Canada et al*, 2007 MBQB 293 at para 656 (where the trial judge concluded that Canada’s promise of a land grant to the Métis was a “political expedient” successfully employed by Canada to ensure that the *Manitoba Act, 1870* was passed).

harvesting activities (fishing, trapping, and gathering) sourced in historical practices, customs, and traditions integral to a Métis community's "distinctive existence and relationship to the land."⁴ The SCC acknowledged for the first time that Métis are a distinctive Aboriginal people with constitutional rights analogous to First Nations and Inuit and the collective hunting rights of a Métis community in the environs of Sault Ste. Marie. The SCC also established a framework to identify s. 35 Métis Aboriginal rights and "rights-bearing" Métis communities, membership in such communities, and the relevant time frame for assessing the historical foundations of contemporary Métis constitutional rights.

Significantly, the SCC also recognized the potential existence of other Métis Aboriginal rights, such as fishing, based on post-contact pre-European control practices. It also held that Ontario's failure to recognize any Métis right to hunt for food, nor any "special access rights to natural resources" whatsoever infringed the Powleys' constitutional right to hunt for food.⁵ Because the Powleys established their rights before the court and did not consent to infringement, Ontario was required to meet the *R v. Sparrow* justification test for its hunting laws to continue to apply.⁶ That framework requires establishing that an infringement is in furtherance of a compelling and substantive legislative objective and compliance with Crown fiduciary obligations, including minimal impairment of the Aboriginal right and consultation with a view to substantially addressing Métis concerns.⁷ Although conservation is a compelling and substantive

⁴ *R v Powley*, 2003 SCC 43 at para 37, [2003] 2 SCR 207 [*Powley*].

⁵ *Ibid* at para 47.

⁶ *R v Sparrow*, [1990] 1 SCR 1075, [1990] 4 WR 410 [*Sparrow*].

⁷ *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot'in*], is the most recent decision of the SCC to elaborate on what the justification entails, commenting in that context on Aboriginal title. To justify infringement of s. 35 rights the Crown must prove "(1) that it discharged its procedural duty to consult and accommodate, (2) that its actions were backed by a compelling and substantial objective [in the broader public good]; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group" (para 77). The latter requirement means the Crown cannot "substantially deprive future generations" of enjoyment of the right (para 86). The Crown's fiduciary duty requires it to act in a way that respects the group's interest. Fiduciary duty also "infuses an obligation of proportionality into the justification process" (para 87). Proportionality requires: "that the incursion is necessary to achieve the government's goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment [and

legislative objective, the evidence in *Powley* did not support “blanket denial of any Métis right to hunt for food”.⁸ Given the existence of an internal limit on the right, the SCC suggested the Métis right to hunt for food could be accommodated through “a priority allocation to satisfy [Métis] subsistence needs.”⁹

In view of the SCC enunciating these principles, Métis rights advocates hoped that *Powley* would be the catalyst for broader Métis constitutional rights recognition and negotiation in the same way *Sparrow* was for First Nations.¹⁰ Not only did *Powley* provide analogous protection against government powers of infringement, it also provided a “constitutional base upon which subsequent negotiations” could take place.¹¹ It signalled a new era for Métis rights by articulating the principles underlying Métis inclusion in s. 35 and recognizing Métis as a distinctive Aboriginal people. It also clarified that Métis collective rights are not terminated by treaties with First Nations in overlapping territories absent “collective adhesion by the Métis community to the treaty” and that “the individual decision by a Métis person’s ancestors to take treaty benefits does not necessarily extinguish that person’s claim to Métis rights.”¹² *Powley* also created an analytical framework to prove Métis constitutional rights, imposing obligations on the Crown to justify infringement of proven Métis Aboriginal rights, and requiring good faith consultation and accommodation where necessary to minimize resulting impairment.

Before *Powley*, debates and uncertainty—about the possible nature and scope of Métis rights, the legal effects of scrip on Métis Aboriginal rights

accommodation)); and that the benefits that may be expected to flow from that goal are not outweighed by the adverse effects on the Aboriginal interest (proportionality of impact)” (para 87). We argue that Aboriginal rights other than title also lend themselves to concerns relating to ensuring they may be enjoyed by future generations because of their collective and continuous nature as integral features of Aboriginal people’s lives and to this more elaborated justification analysis

⁸ *Supra* note 4 at para 48.

⁹ *Ibid.*

¹⁰ See e.g. John Weinstein, *Quiet Revolution West: the Rebirth of Métis Nationalism* (Fifth House Ltd., 2007) at 58; Cristin Schmitz, “Historic SCC ruling affirms aboriginal rights of Métis” *Law Week* (3 October 2003) 1 at 24, cited in Catherine Bell & Clayton Leonard, “A New Era in Métis Constitutional Rights: The Importance of *Powley* and *Blais*” (2004) 41 *Alta L Rev* 1049 at 1050.

¹¹ *Sparrow*, *supra* note 6 at para 53.

¹² *Supra* note 4 at para 35.

and title, Métis constitutional identity, federal and provincial jurisdiction for Métis, and the appropriate modern legal entities with whom to negotiate Métis rights—created barriers to consultation and negotiation.¹³ In *Powley*, the SCC made clear that alleged uncertainties do not relieve governments of their obligation to make “a serious effort to deal with the question of Métis rights”, nor enable them to simply deny the existence of such rights.¹⁴ As Justice Sharpe of the Ontario Court of Appeal reasoned: “there is an element of uncertainty about most broadly worded constitutional rights. The government cannot simply sit on its hands and then defend its inaction because the nature of the right or the identity of the bearers of the right is uncertain.”¹⁵

Decided a year later, the *Haida Nation v British Columbia (Minister of Forests)*¹⁶ and *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*¹⁷ decisions bolstered arguments that the Crown has the duty to enter good faith negotiations with Métis regarding “credible but unproven claim[s]”¹⁸ These decisions held that the duty to consult and accommodate arises any time the Crown has knowledge, actual or constructive (that it should reasonably know) of the potential existence of

¹³ See e.g. John Giokas & Robert K Groves, “Collective and Individual Recognition in Canada: The Indian Act Regime” in Paul Chartrand & Harry Daniels, eds, *Who Are Canada’s Aboriginal Peoples? Recognition, Definition and Jurisdiction* (Saskatoon: Purich Publishing, 2002) 41 at 46-47; Bradford Morse, “Are the Métis in s.91 (24) of the Constitution Act, 1867? An Issue Caught in a Time Warp” in Fredrica Wilson & Melanie Mallet, eds, *Métis-Crown Relations: Rights, Identity, Jurisdiction, and Governance* (Toronto: Irwin Press, 2008) 121 at 121-128; Tom Isaac, *Métis Rights, Contemporary Themes in Aboriginal Law Monograph Series* (Saskatoon: Native Law Centre, 2008) at 49, 54; Royal Commission of Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol 4, c 5, “Métis Perspectives” (Ministry of Supply and Services: 1996) at 219, 245, 289, 334; John Weinstein, *Quiet Revolution West: the Rebirth of Métis Nationalism* (Calgary: Fifth House, 2007) at 34, 58-59, 103, 161.

¹⁴ *R v Powley*, [2001] OJ No 607 at para 166, 196 DLR (4th) 221 (Ont CA).

¹⁵ *Ibid.*

¹⁶ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida*].

¹⁷ *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 [*Taku River*].

¹⁸ *Haida*, *supra* note 16 at para 37 (Credible claims are those where there is a strong prima facie case). See *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 40, [2010] 2 SCR 650, citing *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 34, [2005] 3 SCR 388 [*Mikisew Cree*].

an Aboriginal right or title, and contemplates conduct that might adversely affect it.¹⁹ In this regard, “[a]ctual knowledge arises when a claim has been filed in court or advanced in the context of negotiations, or when a treaty right may be impacted.”²⁰ Constructive knowledge includes when “lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community” or an “impact on rights [or credibly asserted rights] may reasonably be anticipated.”²¹

Consultation forms part of an ongoing “process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution.”²² It is “[c]oncerned with an ethic of ongoing relationships” and seeks to further reconciliation by promoting negotiation.²³ It requires that Aboriginal rights “be determined, recognized and respected” which “in turn, requires the Crown, acting honourably, to participate in processes of negotiation.”²⁴ This duty to negotiate includes resolution of “claims to ancestral lands” and, in the case of nomadic or semi-nomadic Aboriginal peoples, it is now clear that such claims are not limited to areas that evidence intensive or permanent use.²⁵

Brian Slattery argues that *Haida* signalled a new approach to constitutional rights recognition and implementation intended to address injustices flowing from the old approach which emphasized the need to prove the existence of s. 35 rights before Crown obligations to consult, negotiate, and accommodate would be triggered. Under the former “proof of rights” paradigm “absent a definitive court ruling, Aboriginal peoples [were] not in a strong position to protect their rights from invasion or impairment, so that the existence of Aboriginal rights [was] often more

¹⁹ *Haida*, *supra* note 16 at para 35.

²⁰ *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 40, [2010] 2 SCR 650 [Rio Tinto], citing *Mikisew Cree*, *supra* note 18 at para 34.

²¹ *Ibid.*

²² *Haida*, *supra* note 16 at para 32; *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 SCR 447; *Tsilhqot’in*, *supra* note 7.

²³ *Rio Tinto*, *supra* note 20 at para 38, citing DG Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich Publishing, 2009) at 21.

²⁴ *Haida*, *supra* note 16 at para 25.

²⁵ *Tsilhqot’in*, *supra* note 7 at para 18 (In the case of a treaty, federal and provincial governments are presumed to be aware of the existence of the right asserted, therefore the duty to consult and negotiate is triggered by the potential adverse impact of contemplated government action); see *Mikisew Cree*, *supra* note 18 at para 34.

theoretical than real.”²⁶ As explained by the SCC in *Haida*: “[t]o unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.”²⁷

By emphasizing honour, reconciliation, and the duty to negotiate the SCC is also imputing what Slattery calls a “*generative* role to section 35.”²⁸

In other words, section 35 does not simply recognize a static body of specific Aboriginal rights, whose contours may be ascertained by the application of general legal criteria to historical circumstances—*historical rights* for short. Rather, **the section binds the Crown to take positive steps to identify Aboriginal rights in a contemporary form**, with the consent of the indigenous parties concerned—what we may call *settlement rights*. Settlement rights have two distinctive characteristics, not shared by historical rights. First, they represent contemporary restatements of Aboriginal rights in a form that renders them useful and commodious for indigenous groups in modern conditions. Second, settlement rights perforce take account of the interests of the broader society, of which Aboriginal peoples are also members.²⁹ [Emphasis added]

Despite this shift away from the need to prove rights before the courts to trigger Crown obligations and negotiation, the Métis have faced several obstacles. This paper considers some of the more significant barriers against the backdrop of the law of consultation and in light of more recent decisions implicating negotiation of Métis constitutional rights, including *the Manitoba Métis Federation Inc v Canada (AG)*.³⁰ We focus in particular on Alberta, where successive governments have adopted vastly different policies on Métis harvesting rights, and where the existence of a negotiated provincial statutory regime raises unique legal issues about Métis constitutional identity, the possible application of MMF outside Manitoba, the scope of the duty to consult and accommodate Métis constitutional rights, and the role of the federal and provincial governments in this process.

²⁶ Brian Slattery, “Aboriginal Rights and the Honour of the Crown” (2005) 29 SCLR (2d) 433 at 435 [Slattery].

²⁷ *Supra* note 16 at para 27.

²⁸ Slattery, *supra* note 26 at 440.

²⁹ *Ibid.*

³⁰ *Manitoba Métis Federation Inc v Canada (AG)*, 2013 SCC 14, [2013] 1 SCR 263 [MMF].

I. BARRIERS TO NEGOTIATING CONTEMPORARY MÉTIS RIGHTS

As provinces have primary jurisdiction to manage and regulate natural resources through constitutional authority under the *Constitution Act, 1867*,³¹ and other constitutional arrangements such as the Natural Resource Transfer Agreements (NRTAs),³² the ruling in *Powley* affected them the most. In Ontario, Manitoba, Saskatchewan, and Alberta, provincial governments entered into negotiations and developed policies to accommodate *Powley* type rights to hunt, fish, and trap.³³ However, disagreement amongst lower courts and between provincial governments regarding the proper interpretation and application of *Powley* have resulted in the need for Métis to prove the existence and geographical scope of their rights through litigation on a case by case basis. In some instances, this has resulted in the unilateral imposition of accommodative arrangements or interpretation of negotiated ones.³⁴ A consequence is different treatment of Métis between provinces as legal and political approaches to defining Métis communities, rights and territories differ—

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

³² Passed as three separate acts in the Prairie Provinces: *Alberta Natural Resources Act*, SC 1930, c 3; *Saskatchewan Natural Resources Act*, SC 1930, c 41; *Manitoba Natural Resources Act*, SC 1930, c 29 [NRTAs].

³³ See e.g. summary of provincial and federal harvesting policies in Jean Teillet, *Métis Law In Canada* (Vancouver: Pape Salter Teillet LLP, 2013) at 2-33 to 2-37. Although Alberta's Interim Métis Harvesting Agreements with the Métis Nation of Alberta and the Métis Settlements General Council acknowledge "uncertainty in the law regarding Métis Harvesting in Alberta" and were not intended to "affect, abrogate, or derogate from or recognize or affirm any constitutional or aboriginal rights"; they were subsequently characterized by the Alberta Queens Bench Court as s.35 accommodation agreements. See e.g. *Interim Métis Harvesting Agreement*, online: <<http://www.ualberta.ca/~walld/gciha.pdf>>; *R v Kelley*, 2007 ABQB 41, [2007] 5 WWR 177 (examples of original harvesting agreements) [Kelley].

³⁴ See e.g. Métis Nation of Alberta, Press Release, "Métis Nation of Alberta Deeply Disturbed by Alberta Government's Actions on Métis Harvesting", online: <<http://www.albertametis.ca/getdoc/13c22ccc-05b4-4fd5-abd0-768c2796b189/MNAPressRelease2006-28-07FINAL3.aspx>>; *R v Beer*, 2011 MBPC 82, [2011] MJ No 405; *R v Beer*, 2012 MBPC 45, [2012] MJ No 158 (supplementary reasons); Teillet, *supra* note 33, at 8-6; *R v Laurin*, 2007 ONCJ 265, 86 OR (3d) 700 (discussed further below).

often driven by geographically restricted and fact-specific lower court decisions, rather than a coherent national policy of reconciliation mandated by the SCC.³⁵

Before and after *Powley*, some provincial governments entered into agreements with Métis communities and organizations, typically in relation to initiatives to improve cultural, economic, or social well-being, or as frameworks for negotiation in these and other areas, including delegated powers of governance.³⁶ The most comprehensive of these is found in the Alberta Métis Settlements, the modern origins of which is the settlement of litigation in relation to provincial statutory obligations to Métis.³⁷ However, these and later provincial initiatives were not predicated directly on judicial delineation, recognition, or accommodation of s. 35 Métis Aboriginal rights. Rather, they appear to assume that primary legislative authority in relation to Métis as an Aboriginal people, and their Aboriginal rights rests with the Government of Canada. Such provincial arrangements are sometimes identified as more directly flowing from historical or moral obligations to Métis, considered by federal and provincial governments at the time to be outside the scope of rights-based obligations.³⁸

These provincial arrangements, in turn, point to another barrier to negotiating contemporary settled rights—lack of jurisdictional clarity and the denial of jurisdiction to negotiate and implement s. 35 Métis rights south of the 60th parallel. After *Powley*, the federal government adopted

³⁵ As elaborated in the discussion of provincial harvesting and consultation policies in Alberta, below.

³⁶ See e.g. *The Métis Act*, SS 2001, c M-14.01; *Métis Settlements Act*, RSA 2000, c M-14; See also Tom Isaac, *Métis Rights, Contemporary Themes in Aboriginal Law Monograph Series* (Native Law Centre, 2008) at 50-65; Teillet, *supra* note 33 at 10-2 to 10-5.

³⁷ See Catherine Bell, *Alberta Métis Settlements Legislation: An Overview of Ownership and Management of Settlement Lands* (Canadian Plains Research Centre: 1994); Catherine Bell & Harold Robinson, "Government on Alberta's Métis Settlements: Foundations and Future Directions" in Yale D Belanger, ed, *Aboriginal Self-Government in Canada* (Saskatoon: Purich Publishing, 2008) at 260; Fredrica Wilson & Melanie Mallet, eds, *Métis-Crown Relations: Rights, Identity, Jurisdiction, and Governance* (Toronto: Irwin Press, 2008) at 437.

³⁸ See e.g. *Constitution of Alberta Amendment Act*, 1990, RSA 2000, c C-24, Preamble (regarding Alberta's Métis settlements); *Métis Act*, SS 2001, c M-14.01; Government of Manitoba, *From the Past into the Future: Manitoba Métis Policy* (2010), online: <http://www.gov.mb.ca/ana/major-initiatives/pubs/metis_policy_en.pdf> at 2.

interim guidelines to accommodate harvesting rights on federal land and of federal natural resources, such as wild birds.³⁹ However, the federal and provincial governments continued to deny any jurisdiction to recognize, and implement through legislation, a wider range of s. 35 Métis Aboriginal rights. At the time of writing, instead of *Powley* being mobilized to facilitate broader based s. 35 negotiations, it was being cited by the federal government, along with *Blais* (released by the SCC on the same day)⁴⁰ in the *Daniels v Canada* litigation to bolster arguments the federal government does not have jurisdiction over or legal obligations to the Métis.⁴¹

Among the issues currently on appeal to the SCC in *Daniels* is whether Métis are within the constitutional definition of “Indians” under federal s. 91(24) jurisdiction over “Indians and lands reserved for the Indians.”⁴² The Federal Court of Appeal (FCA) agreed with Justice Phelan’s findings at trial that the historical and expert evidence supported a broad interpretation of the word “Indians” as used in 1867 to include all Aboriginal peoples and that “the power that went with it, to be a broad power capable of dealing with the diversity and complexity of the native population, whatever their percentage of mixed-blood relationship, their economies, residency or culture” including “recognition,...control and dealing with...Métis who were seen as distinct in some respects from

³⁹ Teillet, *supra* note 33 at 2-34.

⁴⁰ *R v Blais*, 2003 SCC 44, [2003] 2 SCR 236 [*Blais*].

⁴¹ Canada has argued throughout the lower courts, and now in its cross-appeal before the Supreme Court, that to regard Métis as “Indians” within the meaning of 91(24) would be irreconcilable with the Supreme Courts’ holdings in *Powley*, *supra* note 4; *Blais*, *supra* note 40; *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37, [2011] SCR 670; and *MMF*, *supra* note 30; to the effect that Métis are distinct from Indians: see discussion of the issue in *Daniels v Canada*, 2013 FC 6, [2013] FCJ No 4, at paras 126, 569, 591-595; *Canada (Indian Affairs) v Daniels*, 2014 FCA 101, 371 DLR (4th) 725 at paras 87-124; *Canada (Indian Affairs) v Daniels*, 2014 FCA 101 (Memorandum of Fact and Law of the Appellants/Cross-Respondents); see also John Weinstein, *Quiet Revolution West: the Rebirth of Métis Nationalism* (Calgary: Fifth House, 2007) at 142-146 (denial of federal jurisdiction discussion); Fredrica Wilson & Melanie Mallet, eds, *Métis-Crown Relations: Rights, Identity, Jurisdiction, and Governance* (Toronto: Irwin Press, 2008) (in general).

⁴² *Canada (Indian Affairs) v Daniels*, 2014 FCA 101 at para 1, leave to appeal to SCC granted, 35945 (20 November 2014) [*Daniels*].

‘Indians.’⁴³ Further, he accepted that following Confederation, part of creating an “environment of safety and security for settlers” required addressing both Indian and Métis claims.⁴⁴ In addition to dealing with the Métis as part of the same nation-building exercises that led to treaties with First Nations, the federal government also exercised jurisdiction over Métis using “Indian power like methods” to further related objectives,⁴⁵ including prohibition of liquor sales, distribution of individual scrip exchangeable for land or money, treaty negotiation, and the creation of “half-breed reserves” such as St. Paul-de-Métis in Alberta.⁴⁶ The FCA also agreed that concerns about “financial consequences of recognizing this jurisdiction” after the inclusion of Métis in s. 35 of the *Constitution Act, 1982* contributed to a shift in federal policy to not deal with Métis, but had no impact on any underlying constitutional authority or obligation to do so.⁴⁷

Nevertheless, contemporary federal governments have interpreted the word “Indian” in s. 91(24) narrowly to include status Indians living on reserves and exclude Métis living within provincial boundaries and individuals of First Nations ancestry that have lost, or have not been granted, federal Indian status. They maintain that whatever rights to lands or resources Métis may have once had now fall within provincial land ownership and jurisdiction to negotiate and implement. Consequently, Métis and non-status Indians are deprived of many federal services available to status Indians, denied access to national treaty negotiation and dispute resolution processes, and treated differently from province to province.⁴⁸

Since the commencement of the *Daniels* litigation in 1999, the federal government has maintained this line of reasoning and has tried to have the action dismissed on the ground that a court declaration stating Métis

⁴³ *Ibid* at para 31.

⁴⁴ *Ibid* at para 38.

⁴⁵ *Ibid* at para 40.

⁴⁶ *Ibid* at paras 38-51.

⁴⁷ *Daniels v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FC 6 at para 501, [2013] FCJ No 4 [*Daniels* FC].

⁴⁸ *Daniels*, *supra* note 42 at para 70 (upholding the findings of the trial judge); see John Giokas & Robert K Groves, *supra* note 13 at 42; *Report of the Royal Commission on Aboriginal Peoples*, vol 4, c 5, “Métis Perspectives” (Ministry of Supply and Services: 1996) at 210, 219.

are under federal jurisdiction would be of no practical utility because, among other reasons: (1) it wouldn't compel any legal obligations, or address the more fundamental issues of exclusion from federal programs and services that motivated the litigation; and (2) the federal government may extend programs and services to Métis and non-status Indians, regardless of jurisdiction, by using its spending power.⁴⁹ Relying on the decision in *MMF*, the FCA disagreed, holding instead that declarations may be issued in aid of "extra-judicial negotiations with the Crown"⁵⁰ and that clarifying federal jurisdiction would have practical utility, given the role that jurisdictional avoidance has played in the failure of both levels of government to provide services and engage in meaningful consultation, negotiation and implementation of Métis Aboriginal interests.⁵¹ The FCA also disagreed with the appellants' argument "that granting a declaration that the Métis fall within section 91(24) will make provincial legislation vulnerable to challenge and may also have a detrimental effect on the ability of provincial governments to legislate in the future."⁵²

It is beyond the scope of this paper to go further into the details of *Daniels*, except to say that, in our view and read together with *MMF*, there are practical ramifications to federal jurisdiction and a range of constitutional arguments can be advanced to support the constitutionality of provincial Métis legislation such as Alberta's *Métis Settlements Act*, or at least significant aspects of that legislation, even if the Métis are under s. 91(24).⁵³ The discussion of jurisdiction in *Tsilhqot'in Nation v British*

⁴⁹ *Daniels*, *supra* note 42 at para 65.

⁵⁰ *Ibid* at para 68.

⁵¹ *Ibid* at paras 70-74.

⁵² *Ibid* at para 149.

⁵³ See e.g. Catherine Bell, "R v *Daniels*: Issues of Jurisdiction, Identity, and Practical Utility" (2014) 3:3 *Aboriginal Pol'y Stud* 132-149; and Catherine Bell, "R v. *Daniels*: Jurisdiction and Government Obligations to Non-Status Indians and Métis" *Queens University Institute of Intergovernmental Relations Working Paper*, online: <<http://www.queensu.ca/iigr/WorkingPapers/NewWorkingPapersSeries/Bellworkingpapersotf2013FINAL.pdf>>. Note, however, the SCC speaks only to the issue of Aboriginal rights in *Tsilhqot'in* and not the issue of Aboriginal status. The latter has been held to go to the core of the s. 91(24) power. See *Natural Parents v Superintendent of Child Welfare*, [1976] 2 SCR 751, [1975] SCJ No 101; *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 61, [2007] 2 SCR 3; *Four B Manufacturing Ltd v United Garment Workers of America*, [1980] 1 SCR 1031, 102 DLR (3d) 385. This, in turn, creates potential vulnerability to provincial laws directed at Aboriginal status,

Columbia also makes it more difficult for federal and provincial governments to continue to avoid the negotiation of Métis constitutional rights for jurisdictional reasons alone. The SCC has been clear that the issue of s. 91(24) jurisdiction does not determine who has the obligation to negotiate the accommodation of s. 35 Métis constitutional rights where they risk being infringed by government action. *Tsilhqot'in* takes the focus away from which government has jurisdiction, and puts it on the level of government that is actually or potentially impacting established or credibly asserted s. 35 rights.⁵⁴ If this is both federal and provincial governments, it logically follows that both governments are bound by their honour to be at the negotiation table and actively engaged in implementation of s. 35 rights much in the same way as for the negotiation and implementation of modern comprehensive treaties with First Nations, such as the Nisga'a Treaty.⁵⁵

One of the issues in *Tsilhqot'in* was whether the British Columbia *Forest Act* applied to Aboriginal title lands. The trial judge held it did not because “provisions authorizing management, acquisition, removal and sale of timber” on Aboriginal title lands were at “the core of federal power” over Aboriginal rights.⁵⁶ The SCC held that where the issue is how far a province can go in regulating, negotiating, and accommodating Aboriginal rights, the “appropriate constitutional lens” is s. 35 rather than s. 91(24).⁵⁷ However, it remains unclear how provincial governments can enter accommodation or other agreements that recognize, abrogate, or affect in other ways Aboriginal rights and title and that bind future governments with any degree of legal certainty, without the involvement of the federal Crown, as such agreements have yet to be recognized as treaties

including the provisions of the Métis settlement legislation that define Métis status. In order to avoid any resulting uncertainty, the better approach may for Canada and Alberta to establish a constitutional “carve out” for the Alberta Métis, as was contemplated in the failed *Charlottetown Accord of 1992*, which had proposed that “the Constitution should be amended to safeguard the legislative authority of the government of Alberta for the Métis and Métis settlement lands.” (Article 55, *Charlottetown Accord of 1992*).

⁵⁴ *Tsilhqot'in*, *supra* note 7 at paras 139-141.

⁵⁵ *Nisga'a Final Agreement Act*, SC 2000, c 7.

⁵⁶ *Ibid* at para 132.

⁵⁷ *Ibid* at para 152.

or land claim agreements⁵⁸ yet may nevertheless engage duties flowing from treaty-like promises and the honour of the Crown.⁵⁹

This raises another barrier to negotiating Métis rights—the position taken by federal and provincial governments that Métis people south of the 60th parallel do not have Aboriginal title or other Aboriginal entitlements to land.⁶⁰ For example, it has been argued that to the extent such rights, other than those established in *Powley*, existed as historical rights, they were terminated through valid federal scrip distribution to Métis living in what is now Manitoba, Alberta, and Saskatchewan.⁶¹ One reason MMF is a victory for Métis is because it challenges this assumption. Because the Crown did not act honourably in the distribution of scrip and

⁵⁸ Peter W Hogg, *Constitutional Law of Canada*, 5th ed, Supp vol 1 (Toronto: Carswell, 2007) at 28-2: “[t]he Royal Proclamation of 1763 had established that treaty-making with the Indians was the sole responsibility of the (imperial) Crown in right of the United Kingdom. After confederation, the federal government was the natural successor to that responsibility.” The general rule with respect agreements with the Crown is that they can be amended or repudiated unilaterally by the Crown and need not be honored. By law, a current legislature and/or executive cannot bind another to do (or to not do) something in the future in by legislation or agreement: see *Friends of the Canadian Wheat Board v Canada* (AG), 2012 FCA 183 at paras 82-83, 352 DLR (4th) 163; *Hayes and Jacobs v Smallwood et al*, 2000 BCSC 1665 at para 25, 101 ACWS (3d) 287. However, it may be possible to bind successors as to the procedures for amending and repealing agreements implemented by legislation. See R Elliott, “Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values” (1991) 29:2 Osgoode Hall LJ 215. Generally speaking, the usual only remedy available against the Crown for breach or repudiation of an agreement is monetary damages: see *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth*, [1977] HCA 71, (1977) 139 CLR 54. It has been argued that even the possibility of a court imposing damages on the Crown may, in and of itself, constitute an impermissible limit on future government action: see Dennis Rose, “The Government and Contract” in Paul Desmond Finn, ed, *Essays on Contract* (1987) 233.

⁵⁹ For a more detailed discussion on treaty-like promises, see Catherine Bell, “Developments in Aboriginal Law: the 2013-2014 Term – Honour, Equity and Crown Promises: Implications of MMF North of 60” (2015) 68 SCLR (2d) 1.

⁶⁰ See e.g., *R v Morin*, [1996] 3 CNLR 157 at para 58, (Sask Prov Ct), aff’d [1997] SJ No 529, [1998] 2 WWR 18 (Sask QB) at paras 41-42; Alberta, *Report of the Royal Commission Appointed to Investigate the Conditions of the Half-Breed Population of Alberta*, (Edmonton; Government of the Province of Alberta, Department of Lands and Mines, 1936) at 2-3 [Ewing Commission Report].

⁶¹ See *Dominion Lands Act, 1879*, SC 1879, c 31, s 125(e); *Dominion Lands Act, 1883*, SC 1883, c 17, ss 81(e), 83; *Manitoba Act, supra* note 2.

pursuit of its land promises to the Métis under s. 31 of the *Manitoba Act*, the SCC held that the national process and goal of reconciliation with the Manitoba Métis remains incomplete.⁶² *MMF* is important because it stands for the proposition that a promise aimed at reconciliation of Aboriginal interests, in that case s. 31 of the *Manitoba Act*, engages the honour of the Crown which in turn gives rise to a duty of purposive, diligent fulfillment. S. 35 is one—but not the only—source of duties flowing from the Crown’s honour, and also one—but not the only—constitutional foundation for compelling broader-based rights recognition and therefore, negotiations with the Métis.

Like *Powley* and *Haida*, *MMF* emphasizes the ongoing process of reconciliation by taking the focus away from proof of rights and putting it on negotiation and enforcement of solemn promises and the constitutional principle of the honour of the Crown. It also strengthens future claims arising from Métis Aboriginal interests in land because of the many failures of the scrip distribution system. Finally, it clarifies that judicial declarations on matters of constitutional law, including the constitutionality of Crown conduct, may be pursued for the purpose of facilitating negotiation.

These cases demonstrate an obvious and significant emphasis on defining rights through negotiation, but a question remains as to whether the shift from strict proof of rights to negotiation of credible rights claims is more theoretical than real for Métis. The answer to the question is one lawyers love and hate to give: “It depends.” It depends on at least three factors: (1) whether the focus and foundation for negotiating contemporary settled rights is the assertion of s. 35 Métis rights or fulfillment of solemn Crown promises to Métis; (2) how courts and provincial and federal governments choose to interpret and apply *Powley* from one situation to the next; and (3) how these same governments understand the application of the duty of diligent purposive fulfillment articulated in *MMF* outside Manitoba and their respective roles in fulfilling negotiated constitutional promises aimed at Aboriginal interests. These factors are relevant because both s. 35 rights and solemn promises made outside of s. 35—but aimed at an Aboriginal interest in lands and resources—may provide the foundation for consultation and negotiation.

⁶² *MMF*, *supra* note 30 at paras 9, 110.

To illustrate, we consider evolving law and policy as it relates to the duty to consult Métis. We focus in particular on harvesting and consultation policy in Alberta.

II. PROVINCIAL CONSULTATION POLICIES AND PROCESSES

The foundation of the duty to consult is the “Crown’s honour and the goal of reconciliation.”⁶³ As an unwritten constitutional principle, the Crown’s honour in this context is concerned with reconciling rights and interests of Aboriginal peoples, including Métis, with sovereign imposition of a “legal system that they did not share” and taking of lands and resources formerly in their control.⁶⁴ As elaborated earlier, the threshold for triggering consultation is low: “[w]hile the existence of a potential claim is essential, proof that the claim will succeed is not. What is required is a credible claim. Tenuous claims, for which a strong *prima facie* case is absent, may attract a mere duty of notice.”⁶⁵ However, what constitutes a strong *prima facie* case for the Métis has been interpreted differently from province to province.

The objectives of the law of consultation are to provide some interim protection of credibly asserted rights until proven, provide a framework for negotiation of rights rather than having them defined by a court, and is ultimately part of an ongoing process and goal of “reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution.”⁶⁶ To date, the law on consultation has emphasized process, depth, and adequacy in the short and medium term—how a

⁶³ *Haida*, *supra* note 16 at para 35.

⁶⁴ See *MMF*, *supra* note 30 at para 67. The honour of the Crown is engaged in a variety of other contexts including where there is a fiduciary duty arising from “discretionary control over specific Aboriginal interests” (*MMF* at para 49) in treaty making and settlement, and in the “intended purposes of treaty and statutory grants to Aboriginal people” (*MMF* at para 73).

⁶⁵ *Rio Tinto*, *supra* note 20 at para 40.

⁶⁶ *Haida*, *supra* note 16, at 32. See Slattery, *supra* note 26. For its interface with administrative consultation process see Janna Promislow, “Irreconcilable? The Duty to Consult and Administrative Decision Makers” (2003) 22:1 *Const Forum* 63, available online: <http://ejournals.library.ualberta.ca/index.php/constitutional_forum/article/view/19458>.

particular decision is made, rather than whether the substance of the decision is just.⁶⁷ Depth and adequacy varies with the strength of the claim and the seriousness of the potentially adverse effect upon it.⁶⁸ Therefore, it may be discharged to some extent by existing regulatory bodies and the procedural safeguards of administrative law.⁶⁹ So, for example, in some cases the duty to consult may be met through a public environmental impact assessment process established by the Crown, and in which Métis and First Nations are heard along with other affected stakeholders. The “precise requirements” of deep consultation “vary with the circumstances” but may be satisfied in some regulatory contexts through “the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision.”⁷⁰ Governments may also delegate “procedural aspects of consultation to industry proponents seeking a particular development”⁷¹, although the precise contours and limits of “reliance” on regulatory processes not directly involving the Crown and third-party delegation have not yet been explored by the Courts.

In conjunction with these developments and changes to federal law intended to streamline and speed up the environmental regulatory approval process,⁷² Alberta changed its regulatory regime for natural

⁶⁷ *Haida*, *supra* note 16 at para 63.

⁶⁸ *Ibid* at para 39.

⁶⁹ *Ibid* at para 41.

⁷⁰ *Ibid* at para 44.

⁷¹ *Ibid* at para 53.

⁷² Canada Bill C-38, *An Act to Implement Certain Provisions of the Budget Tabled in Parliament on March 29, 2012 and Other Measures*, 1st Sess, 41st Parl, 2012; Canada Bill C-45, *A Second Act to Implement Certain Provisions of the Budget Tabled in Parliament on March 29, 2012 and Other Measures*, 1st Sess, 41st Parl, 2012 as elaborated in *Mikisew Cree First Nation v Canada (Minister of Aboriginal Affairs and Northern Development)*, 2014 FC 1244, 248 ACWS (3d) 491 at para 4, “[T]he Omnibus Bills made significant changes to Canada’s environmental laws. The Omnibus Bills amended the *Fisheries Act*, RSC 1985, c F-14, the *Species At Risk Act*, SC 2002, c 29, the *Navigable Waters Protection Act*, RSC 1985, c N-22, including renaming the latter act as the *Navigation Protection Act*, RSC, 1985, c N-22 and finally repealing the *Canadian Environmental Assessment Act, 1992*, SC 1992, c 37, and replacing it with the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19. The effect of the amendments to those Acts is arguably to reduce the number of bodies of water within Canada which are required

resource development and released a new 2013 consultation policy.⁷³ The regime included, as in the past, delegations to industry and regulatory bodies and expressly excluded approximately 80,000 Métis in Alberta and 8,000 Métis settlement members. The policy and guidelines apply only to First Nation treaty rights and what Alberta calls First Nation “traditional uses”—a distinction which Treaty First Nations tend to reject.⁷⁴ However, as we elaborate, exclusion of Métis resulted in litigation, including litigation by the Peavine Métis Settlement against Alberta in relation to an alleged failure to consult in connection with oil and gas development on lands adjacent to settlement lands.⁷⁵

to be monitored by federal officials thereby affecting fishing, trapping and navigation.” As some of these waters are located within the Mikisew’s Treaty No. 8 territory the FCA held at para 93 that “on the evidence, a sufficient potential risk to the fishing and trapping rights” was shown so as to trigger the duty to consult on those aspects of the Omnibus bills that reduced the federal monitoring in Treaty No. 8 lands.

⁷³ Alberta Aboriginal Relations, *The Government of Alberta’s Policy on Consultation with First Nations on Land and Resource Management, 2013*, online: Alberta Aboriginal Relations <<http://www.aboriginal.alberta.ca/1036.cfm>>. For discussion of the new regulatory regime under review at the time of writing, see Lorraine Land, “Creating the Perfect Storm for Conflicts Over Aboriginal Rights: Critical New Developments in the Law of Aboriginal Consultation” prepared for The Commons Institute 27 January 2014, online: <<http://www.oklaw.com/wp-content/uploads/2014/02/lylPerfectStorm.pdf>>; Kirk N Lambrecht, “Alberta Consultation and the Resource Development Process in Alberta” prepared for Center for Constitutional Studies and Law Society of Alberta Constitutional Symposium 4 October 2013 Edmonton Alberta, online: <www.lesaonline.org/samples/61892_04b_p1.pdf>; David Laidlaw & Monique Passelac-Ross, “Alberta First Nations Consultation and Accommodation Handbook”, Canadian Institute of Resource Law, Occasional Paper No 44, online: <<http://www.cirl.ca/files/cirl/consultationhandbookop44w.pdf>> [Laidlaw and Passelac-Ross].

⁷⁴ The policy makes artificial distinctions between Treaty rights and other traditional land uses such as burial and ceremonial uses. “The suggestion that traditional uses such as the use of lands for gathering or for religious and ceremonial uses are not protected by section 35 as Treaty rights is legally questionable. These uses are actually part and parcel of Treaty rights to a culture and to a way of life.” Laidlaw and Passelac-Ross, *ibid* at 26. For contrary arguments see e.g. *West Morberly First Nation v B.C. (Chief Inspector of Mines)*, 2011 BCCA 247, 18 BCLR (5th) 234 leave to appeal refused, 2012 CanLII 8361 (SCC) and *R v Lefthand*, 2007 ABCA 206; [2007] 10 WWR 1 leave to appeal refused, 2008 CanLII 6384 (SCC).

⁷⁵ See *Peavine Métis Settlement v Alberta (Energy)*, 2011 ABQB 472, [2012] AWLD 1

In 2013, Alberta also announced that the province would work with the Métis Nation and the Métis Settlements General Council to develop a consultation policy.⁷⁶ While negotiations on Métis-specific policies are ongoing, Alberta's website provides that it will consult "with Métis peoples where there may be potential adverse impacts to credibly-asserted aboriginal rights" and that the province will "determine, on a case-by-case basis, whether consultation is necessary with Métis communities who may credibly assert constitutionally protected rights."⁷⁷

Alberta's approach to harvesting rights and consultation has been significantly different from other provinces with large Métis populations, such as Saskatchewan, Manitoba and Ontario, and where lower court decisions have affirmed the existence of Métis harvesting rights. Each of these provinces have adopted diverse interpretations of *Powley* and the corollary duty to consult. For example, in Saskatchewan a Memorandum of Understanding (MOU) was entered in 2010 that contemplates identifying Métis harvesting areas.⁷⁸ At the time of writing, *Powley* rights in Saskatchewan were still assessed on a case-by-case basis, except in two northern regions where court decisions were previously won by Métis harvesters.⁷⁹ In Ontario, after negotiations "described variously by both sides as 'bitter', 'fractious' and 'adversarial'" in the *Laurin* case,⁸⁰ an interim agreement was reached wherein Ontario would respect the

(pleadings and legal briefs).

⁷⁶ Shari Narine, "Government to work with Métis, industry on consultation policy" (2013) 20:3 Alberta Sweetgrass, online: <<http://www.ammsa.com/publications/alberta-sweetgrass/government-work-m%C3%A9tis-industry-consultation-policy>>.

⁷⁷ Alberta Aboriginal Relations, "Aboriginal Consultation Office Q&As", online: Alberta Aboriginal Relations <<http://www.aboriginal.alberta.ca/573.cfm>> [emphasis added]. Arguably, this general directive is contrary to the direction by the SCC in *R v Adams*, [1996] 3 SCR 101 at para 54, 138 DLR (4th) 657 that it is not open for governments to "simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance." This is also the state of affairs in British Columbia and other provinces where there is an absence of explicit and sufficient policy, guidelines, regulations or other transparent ordering of the duty to consult Métis and negotiate, where possible, agreement on contemporary settled rights.

⁷⁸ Robert Doucette, "Harvesting", online: Métis Nation Saskatchewan <<http://www.mns.ca/pages/harvesting.html>>.

⁷⁹ *Ibid.*

⁸⁰ *R v Laurin*, 2007 ONCJ 265 at para 10, 86 OR (3d) 700.

issuance of up 1250 Métis harvester cards and conduct joint research on Métis harvesting rights in the southern and eastern parts of the province. Each Harvester Card identifies the harvesters and traditional harvesting territory for that individual as designated by the Métis Nation of Ontario (MNO). This agreement was interpreted by Ontario to apply only to Métis communities in northwest areas of the province on the basis that there was insufficient evidence of the presence of “Métis communities that would meet the *Powley* test in areas south and east of Sudbury”, where approximately 950 harvester cards had been issued.⁸¹ However, the Ontario Court of Justice ruled against this interpretation of the negotiated accommodation agreement with the MNO and since then it has been implemented as intended and remains in place.⁸² In 2012, the MMF entered into a Harvesting Agreement with Manitoba that recognizes that individuals with a Métis Federation harvesting card have the right to hunt in a “very large specified area, which amounts to approximately 2/3rds of the province.”⁸³

Given these examples of tacit recognition of s. 35 Métis harvesting rights, not surprisingly, Métis people are also included in Aboriginal consultation policies for these provinces. Further, the “trigger areas” for Métis consultation and negotiation are not dependent on the existence of settled areas or limited geographically to the environs of settled Métis communities. For example, the Saskatchewan policy provides as follows:

The Métis Aboriginal right that is *most often* engaged in connection with the duty to consult is the Aboriginal right to hunt, fish and trap for food. One of the challenges associated with meeting the duty to consult for the Métis is the lack of consensus on the definition of a rights-bearing Métis community. To date, the courts suggest that *these communities should be defined on a regional basis, as opposed to an individual community or a province-wide basis*. The Government will consult with Métis leadership in communities or regions where Métis Aboriginal rights have already been recognized, such as in Northern Saskatchewan. Where Métis Aboriginal rights have not yet been recognized, the decision to consult will be made on a case-by-case basis. Government will take into account the strength of the claims supporting the asserted rights and the extent of the potential impact on the exercise of the asserted rights.⁸⁴

⁸¹ *Ibid* at para 13.

⁸² Teillet, *supra* note 33 at 2-33.

⁸³ *Ibid*.

⁸⁴ Saskatchewan, *First Nation and Consultation Policy Framework* (June 2010), online:

A significant barrier to negotiation of contemporary Métis harvesting rights in Alberta has been the emphasis on credibility (*prima facie* strength) of claims, and what we argue is an erroneous interpretation and application of *Powley*.⁸⁵ Unlike Saskatchewan, Ontario, and Manitoba, Alberta emphasizes historic and contemporary “site-specific” occupation, rather than regional or provincial land use patterns in recognizing Métis rights and the communities to whom those rights relate. Alberta policy limits the geographical scope of Métis harvesting rights to a 160 km radius from settled Métis communities, and does not assume that there may be an obligation to consult within those 160 km. It also maintains that members of communities which Alberta recognizes as “Métis” do not presumptively meet the *Powley* criteria.⁸⁶ This approach has promoted litigation and, in our view, is highly problematic in light of subsequent lower court decisions interpreting *Powley*, the ruling in *MMF*, the unique history of the Alberta Métis settlements, and the fact that historic rights-bearing Métis communities tended to be highly mobile throughout their traditional territories.

As a consequence of disagreement over the existence and geographical scope of *Powley* and other Métis constitutional rights, consultation with Métis in Alberta has rarely been based on Crown recognition of credibly asserted s. 35 Aboriginal rights, and when it occurs, it is largely through public consultation processes, public and political pressure against

Government of Saskatchewan
<<http://www.publications.gov.sk.ca/details.cfm?p=30532>> at 15.

⁸⁵ See e.g. Métis Settlement General Council, “Harvesting Guidelines for Métis Settlement Members”, online: <<http://www.msgc.ca/media/default/documents/Harvesting%20guidelines%20Oct%202010.pdf>>; the Métis Nation of Alberta, online: <<http://www.albertametis.com/MNAHome/InterimHarvestingAgreement.aspx>> (This issue was central in the *Hirsekom* litigation discussed *infra* note 92). See also Shari Narine, “Right to hunt crosses provincial borders, says lawyer” (2012) 30:8 *Windspeaker*, online: <<http://www.ammsa.com/publications/windspeaker/right-hunt-crosses-provincial-borders-says-lawyer>>.

⁸⁶ Alberta Ministry of Environmental and Sustainable Resource Development, “Métis Harvesting In Alberta”, July 2007 updated June 2010, online: <<http://esrd.alberta.ca/fish-wildlife/fishing-hunting-trapping/documents/MétisHarvestingAlberta-Jun2010.pdf>>; Teillet, *supra* note 33 at 2-34; *supra* note 85.

industry,⁸⁷ or as a consequence of successful petitioning by Métis political organizations for special standing before regulatory bodies.⁸⁸

So how did we get to a place where provincial policies on Métis harvesting rights and consultation are so diverse? What is the correct approach to understanding *Powley* based s. 35 rights and the Crown's legal obligation to engage in consultation with the Métis? The answers are revealed through more in-depth consideration of the law of consultation as it applies to the Métis and judicial consideration of these rights.

III. APPLICATION OF CONSULTATION LAW IN MÉTIS CONTEXTS

To achieve honour and reconciliation in Métis contexts, the SCC has directed that Aboriginal rights law must be applied in a modified form. Such modification is to be in light of the purpose of the inclusion of Métis in s. 35, and should not result in application of legal tests, developed largely in the context of First Nations claims, in a way which prevents or avoids Métis rights recognition. *Powley* sets the objects to which such modifications are to be aimed:

The inclusion of the Métis in s. 35 is based on a commitment to recognizing the Métis and enhancing their survival as distinctive communities. 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.⁸⁹

Later in the decision, the SCC also emphasized that the rights of Métis are not sourced in historical practices of their First Nation or Inuit ancestors, and that imposing such limits would not respect the "full status

⁸⁷ Shawn Denstedt QC, "Métis Consultation Plays Key Role in Land Use and Natural Resource Development Planning" (1 September 2009), online: <<http://www.mondaq.com/canada/x/85364/Environmental+Law/Mtis+Consultation+Plays+Key+Role+In+Land+Use+And+Natural+Resource+Development+Planning>>.

⁸⁸ In some instances, this is in the face of strong resistance by government. For example, Fort Chipewyan Métis Local 125 recently received standing in front of the new Alberta Energy Regulator ("AER") and have filed a notice of question of constitutional law which Alberta strongly resisted.

⁸⁹ *Powley*, *supra* note 4 at para 13.

[of the Métis] as distinctive rights-bearing peoples whose own integral practices are entitled to constitutional protection under s. 35(1).”⁹⁰

These are very important points that are often repeated, but perhaps just as often lost in the interpretation and implementation of *Powley*. What we observe in lower court decisions is an unevenness in the direction that the distinctiveness of Métis peoples is to be respected. The result in some instances is a narrow construction (or outright denial) of Métis Aboriginal rights and a reluctance to engage in meaningful discussions around other potential credibly asserted Métis constitutional rights. Examples include the erroneous view that Crown fiduciary relationships and duties are dependent on proof of communal Aboriginal title; overemphasis on a substantive connection to a particular site in assessing claims of nomadic peoples; and the application of tests for proving Aboriginal title without a purposive consideration and adjustment for the unique individual, collective, and alienable nature of some historical forms of Métis land holding within a wider Métis territory.⁹¹

It is beyond the scope of this article to go into further examples here. The point is that when considering an application of Aboriginal rights jurisprudence to the Métis, the question to ask is: “To what extent does the law need to be modified to accomplish the purpose of the Métis’ inclusion in s. 35, the historical and contemporary nature of Aboriginal rights, and the distinctiveness of Métis people?”⁹² The question is not:

⁹⁰ *Powley*, *supra* note 4 at para 38. See also *Manitoba Métis Federation Inc v Canada (AG) et al*, 2010 MBCA 71 at paras 379, 383-384, 255 Man R (2d) 167 [MMF CA].

⁹¹ See e.g. MMF CA, *ibid* at para 440 and *Manitoba Métis Federation Inc et al v Attorney General of Canada et al*, 2007 MBQB 293 at paras 577-578, 585-594. As we elaborate later in this paper, in the Métis context, the issue of mobility has been raised in *R v Hirsekorn*, 2013 ABCA 242, [2013] 8 WWR 677, leave to appeal to SCC refused, 35558 (January 1, 2014) [*Hirsekorn* CA]. In the First Nations context, a similar issue relating to the degree of site specific occupation required to found a claim in Aboriginal title was decided favorably in *Tsilhqot’in*. Indeed, in *Hirsekorn* CA, the Alberta Court of Appeal adopted the B.C. Court of Appeal’s reasoning in *Williams v British Columbia*, 2012 BCCA 285, 217 ACWS (3d) 1, in acknowledging the mobile nature of Métis rights (at para 89).

⁹² See e.g. *Hirsekorn* CA, *ibid*, at paras 87-88 (the Alberta Court of Appeal applied *Williams v British Columbia* and reasoned: “over-emphasizing the importance of ‘place’, in the form of a specific tract of land, risks rendering illusory the rights guaranteed to nomadic peoples” therefore it adopts a “modified approach that takes into account the aboriginal perspective and the distinctive way of life of the plains Métis” and the

“What is the strictest historical interpretation that we can apply without violating existing law on Métis Aboriginal rights, with a view to avoiding an obligation to consult?” Such an approach is contrary to the SCC’s direction in *Haida* and *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, where it held that the threshold to trigger the duty to consult should be low and the content of the duty, once triggered, is to be treated flexibly.⁹³ It is also contrary to the SCC’s direction that the duty to consult is to be carried out in a generous and purposive manner,⁹⁴ and conversely, that “[t]he Crown’s honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).”⁹⁵

The 2013 decision of the Northwest Territories Supreme Court in *Enge v Mandeville et al* provides a recent example of the application of the law of consultation to Métis.⁹⁶ In that case, the North Slave Métis Alliance (NSMA) sought judicial review of a decision by Department of Environment and Natural Resources of the Northwest Territories (ENR). The ENR consulted with and accommodated the Tlicho and Yellowknives Dene First Nation, but refused to consult with the NSMA in connection with the management of a declining caribou herd in an area where the NSMA asserted a right to hunt caribou. Justice Smallwood held the NSMA had made out a credible claim that gave rise to a duty to consult, and that ENR had erred in not conducting a preliminary analysis of the strength of the NSMA claim,⁹⁷ and thus improperly approached the issue of whether equivalent funding should be provided to the NSMA to engage in consultation.⁹⁸ The government failed to engage in meaningful consultation,⁹⁹ thus precluding any ability to assess whether the duty to accommodate the NSMA had been met.¹⁰⁰

The *Mandeville* decision applied *Powley* to assess whether the assertion to Aboriginal rights by NSMA to the caribou herd was sufficiently credible

purpose of their inclusion in s.35).

⁹³ *Mikisew Cree*, *supra* note 18 at para 34.

⁹⁴ *Rio Tinto*, *supra* note 20 at paras 43-44.

⁹⁵ *Taku River*, *supra* note 17 at para 24.

⁹⁶ *Enge v Mandeville et al*, 2013 NWTSC 33, [2013] 8 WWR 562 [*Mandeville*].

⁹⁷ *Ibid* at para 264.

⁹⁸ *Ibid* at para 269.

⁹⁹ *Ibid* at para 271.

¹⁰⁰ *Ibid* at para 282.

to trigger the duty to consult. However, it is evident that there is some ambiguity in *Powley* about the nature or degree of connection to a particular place necessary to support Aboriginal harvesting rights, and the geographic area to identify the existence of a Métis community and site of the right. These uncertainties are among several issues that have generated different judicial and government understandings and responses to Métis rights and, in turn, impacts the understanding of what constitutes a credible Métis rights claim sufficient to trigger consultation and negotiation. Equally significant is the failure to take into account rights and obligations of consultation that arise from sources that may technically be outside of s. 35 but nonetheless readily engage the honour of the Crown, such as statutes or negotiated agreements aimed at reconciliation of Aboriginal interests. It is here that the decision in *MMF* holds some promise of a new approach.

IV. MÉTIS S. 35 RIGHTS, CROWN PROMISES AND THE DUTY TO CONSULT: THE ALBERTA EXAMPLE

In 2004, following *Powley*, the Métis Nation of Alberta (MNA) and the Alberta Métis Settlements General Council (MSGC) signed the Interim Métis Harvesting Agreements (IMHAs).¹⁰¹ While the express terms of the IMHAs state they are not intended to “affect, abrogate or derogate from or recognize or affirm” s. 35 Aboriginal rights, they were nevertheless later characterized by the Alberta Court of Queen’s Bench in *R v Kelley* as accommodation agreements reached pursuant to s. 35 consultation obligations, and therefore grounded in the honour of the Crown.¹⁰² These agreements permitted MNA and Métis settlement members to “hunt, trap or fish at all seasons of the year...on lands known as ‘Harvesting Lands’” for subsistence purposes.¹⁰³

One might argue that the IMHAs attempted to adopt a purposive interpretation of s. 35 Métis constitutional rights flowing from *Powley*, both in terms of who could exercise Métis harvesting rights and the geographical scope of such rights. These agreements recognized the

¹⁰¹ See e.g. “Agreement with Métis Settlements General Council”, online: <<http://www.ualberta.ca/~walld/gciha.pdf>>; *Kelley*, *supra* note 33 at para 9.

¹⁰² *Kelley*, *supra* note 33 at para 9.

¹⁰³ *Ibid.*

practical difficulties of locating Métis within narrowly defined geographical regions given their high degree of mobility, family interrelatedness, and the historical pattern of relations between Métis peoples and the government of Alberta to achieve settlement on contentious issues through results-oriented negotiation. What is evident from the government actions which gave rise to the litigation in *Kelley*, and more recently in 2009 and 2013, respectively, in the *R v Lizotte* and *L'Hirondelle v Alberta (Sustainable Resource Development)* cases, is a far more adversarial approach requiring proof of rights before honourably-negotiated accommodations or other determinations occur.¹⁰⁴

Relevant to the negotiation of the original IMHAs was a history of provincial law and policy that Métis who lived a sustenance lifestyle similar to First Nations had the right to hunt for food at any time of year on unoccupied Crown land pursuant to the terms of the *Alberta Natural Resource Transfer Agreement (NRTA)*.¹⁰⁵ However, the same year that the

¹⁰⁴ *R v Lizotte*, 2009 ABPC 287 at para 32, 484 AR 372 [*Lizotte*] (the Alberta Court of Appeal overturned the Alberta Provincial Court's decision in which Judge Hougestol held that in Alberta, holding membership in one of Alberta's eight Métis settlements under the Métis Settlements Act is proof of an individual's entitlement to *Powley* rights); *L'Hirondelle v Alberta (Sustainable Resource Development)*, 2013 ABCA 12, 225 ACWS (3d) 889, leave to appeal to SCC refused, [2013] SCCA No 110 [*L'Hirondelle*] (*Lizotte* overturned by the Alberta Court of Appeal; at issue was whether membership in a Métis settlement, in and of itself, is sufficient proof to claim accommodated s. 35 rights under Alberta Métis harvesting policies).

¹⁰⁵ *Alberta Natural Resources Act*, SC 1930, c 3. See *R v Ferguson*, [1993] 2 CNLR 148, 19 WCB (2d) 151 (Alta Prov Ct) [*Ferguson*], aff'd [1994] 1 CNLR 117, 1993 CarswellAlta 935 (QB) which pre-dates *Powley*. The trial court held that a man charged with hunting without a license and unlawfully possessing wildlife who claimed to be a "non-treaty Indian" (who, interestingly, was also referred to in both judgments as "Métis" and a descendant of a person who received scrip) was an "Indian" for the purposes of s. 12 of the *NRTA*, and therefore entitled to hunt "for food at all seasons of the year on all unoccupied Crown lands" (para 27). Key to this finding was the court's reference to the definition of "non-treaty Indian" in the definition section of the *Indian Act* that was in force at the time the *NRTA* was enacted, which included a person who was of Indian blood, and followed "the Indian mode of life" (para 19). On the facts, the Court found that the defendant met this test, and was a person contemplated by s. 12 of the *NRTA*. He was therefore acquitted. See also *R v Desjarlais* (1995), [1995] AJ No 1320, [1996] 3 CNLR 113 (Alta QB) where a similar result was reached after applying the *Ferguson* test.

SCC decided *Powley*, it also held in *Blais*¹⁰⁶ that Métis in Manitoba were not “Indians” for the purpose of exercising harvesting rights on unoccupied Crown lands pursuant to the Manitoba NRTA. Because the same language is used in the Alberta and Saskatchewan NRTAs, an assumption held by many is that *Blais* also applies in those provinces, thereby calling into question Métis rights to hunt, fish, or trap for food on unoccupied Crown land where they are unable to establish a credible s. 35 *Powley* claim.¹⁰⁷

Subsequent to negotiating and signing the IMHAs, pressure was also brought to bear on Alberta by First Nations and non-Aboriginal stakeholder groups, including the Alberta Fish and Game Association, the Trappers Association, other provincial governments with Métis populations, and various conservation and wildlife protection groups. All of these opponents argued that the accommodations provided by the IMHAs exceeded the rights recognized by the Supreme Court in *Powley*. Finally, in 2006, the MLA Committee on Métis Harvesting recommended the negotiation of a new harvesting agreement that would (1) restrict access to harvesting rights only to those Métis who could establish that they meet the *Powley* criteria; (2) only recognize harvesting rights when they are exercised in discrete, site-specific areas around areas with a significant Métis presence; and (3) if agreement could not be reached with the Métis to this end, that a unilateral policy should be imposed.¹⁰⁸

¹⁰⁶ *Blais*, *supra* note 40.

¹⁰⁷ At least one court has since wondered whether the Alberta decisions referenced above which affirm a right to hunt under the NRTA would be more properly considered (and favorably decided) under the *Powley* rubric today: see *R v Acker*, 2004 NBPC 24 at para 75, 281 NBR (2d) 275. We also note the SCC’s comment in *Blais*, *supra* note 40 at para 26: that “Placing para. 13 in its proper historical context does not involve negating the rights of the Métis. Paragraph 13 is not the only source of the Crown’s or the Province’s obligations towards Aboriginal peoples. Other constitutional and statutory provisions are better suited, and were actually intended, to fulfill this more wide-ranging purpose.” By way of background, the NRTAs were passed as three separate Acts. Paragraph 12 of the *Alberta Natural Resources Act*, SC 1930, c 3 and paragraph 13 of the *Manitoba Natural Resources Act*, SC 1930, c 29 read as follows: “In order to secure the Indians of the Province the continuance of the supply of game and fish for their support and subsistence...the said Indians shall have the right...of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands to which the said Indians have a right of access.”

¹⁰⁸ See Denise Ducharme, Frank Oberle & Neil Brown, “Report of the MLA Committee

Despite the existence of the IMHAs, wildlife officers also continued to lay charges against Métis hunters, irrespective of whether the individual held a membership in the MNA or a Métis settlement, requiring the accused to instead prove they were Métis in strict accordance with factors set out in *Powley*. The IMHAs remained in place for close to three years, but were ultimately terminated by Alberta in July 2007 after the Alberta Provincial Court, and later the Court of Queen's Bench, confirmed in *Kelley* (discussed below), that the IMHAs had a constitutional character as negotiated accommodation agreements flowing from s.35.¹⁰⁹

Key to understanding the issues in *Kelley* and Alberta's position is the process for determining and respecting Métis s. 35 constitutional identity as articulated in *Powley*. "Important components" of this are self-identification and acceptance by, and ancestrally based membership in, a contemporary Métis community with links to the relevant historic rights bearing community.¹¹⁰ A Métis community is defined as a "group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life."¹¹¹ Although membership in a Métis political organization is certainly relevant in determining acceptance by an identifiable contemporary community, it is not determinative "in the absence of a contextual understanding of the membership requirements of the organization and its role in the Métis community."¹¹² In articulating these considerations, the SCC was clear it was not purporting to "enumerate the various Métis peoples that may exist",¹¹³ "set down a comprehensive definition of who is Métis for the purpose of asserting a claim under s. 35"¹¹⁴ nor insisting on a continuity requirement beyond a minimum threshold of "some degree of continuity and stability."¹¹⁵ As Justice Sharpe of the Ontario Court of Appeal had similarly observed, *Powley* was not "the appropriate case to determine

on Métis Harvesting" (March 2006), online: Alberta Justice and Solicitor General <https://justice.alberta.ca/programs_services/aboriginal/Documents/RecommendationsmetisHarvesting.pdf#page=5> at 5 [MLA Report].

¹⁰⁹ *Kelley*, *supra* note 33 at para 85.

¹¹⁰ *Powley*, *supra* note 4 at para 30.

¹¹¹ *Ibid*, at para 12.

¹¹² *Ibid* at para 33.

¹¹³ *Ibid* at para 12.

¹¹⁴ *Ibid* at para 30.

¹¹⁵ *Ibid* at para 23.

whether or not proof of ancestry is necessary” as the Powleys were able to trace their ancestry to the historic Sault Ste. Marie Métis community and thereby could satisfy the “most demanding test.”¹¹⁶

In *Kelley*,¹¹⁷ Mr. Kipp Kelley was teaching his children to trap squirrels without a license near Hinton and was charged with contravening the *Wildlife Act*.¹¹⁸ He was a member of the Métis Nation of Alberta, but could not establish on the evidence that he fell within the definition of a Métis person pursuant to the criteria in *Powley*. On appeal, in concluding that the IMHAs were enforceable accommodation agreements flowing from s. 35 obligations to consult, Justice Verville drew on *Haida*¹¹⁹ and *Taku River*,¹²⁰ the honour of the Crown, and the anticipation in *Haida* that enforceable accommodation agreements defining contemporary settlement rights may be negotiated without proof of infringement of a s. 35 right. He held instead that s. 35 creates an obligation to consult and to negotiate credible Aboriginal rights claims, and that negotiated settlements, agreements, accommodations, and treaties have a common feature in that all are viewed as mechanisms to achieve reconciliation.¹²¹ Where the Crown has knowledge of the potential existence of an Aboriginal right and contemplates state conduct, such as charges and prosecutions that might adversely affect those rights, it has a duty to take action toward addressing the problem. In essence, he reasoned, the government, MNA, and the MSGC were doing what the SCC had impliedly instructed them to do in *Powley*. The honour of the Crown arose not only in the process of negotiation, but also in respecting the terms of the resulting accommodations.¹²² However, in this instance the agreement was temporary so it could be changed.

The Alberta government responded to the *Kelley* decision by not renewing the IMHAs and, when agreement on the scope of Métis harvesting rights and role of Métis governments could not be reached,

¹¹⁶ *R v Powley* (2001), 53 OR (3d) 35 at para 155, 196 DLR (4th) 221 (CA).

¹¹⁷ *Kelley*, *supra* note 33.

¹¹⁸ *Wildlife Act*, RSA 2000, c W-10.

¹¹⁹ *Haida*, *supra* note 16.

¹²⁰ *Taku River*, *supra* note 17.

¹²¹ *Kelley*, *supra* note 33 at para 18.

¹²² See e.g. *MMF*, *supra* note 30 at para 73.

unilaterally imposing a new harvesting policy.¹²³ That policy listed twenty-five communities that Alberta would be prepared to consider as historical and contemporary Métis communities for the purposes of recognizing Métis harvesting rights: the eight Métis Settlements, and seventeen other Métis communities in areas north of Edmonton where there continues to be a discrete, settled Métis community and ongoing significant Métis presence.¹²⁴ Rights to harvest are specific to each of these communities, and exercisable within a notional traditional territory of 160 km radius from those communities. This approach appears to be derived from a strict application of *Powley* on its facts, which found a similarly-sized notional traditional territory around the settlement of Sault Ste. Marie. Today, Métis harvesters in Alberta must still be prepared to produce evidence when asked by wildlife officers that demonstrates:

- 1) That they self-identify as Métis, and for how long.
- 2) That they have an ancestral connection to a historic Métis community in Alberta including proof of genealogical history, including where ancestors lived and when they lived there as far back as possible, and in any event, to the late 1800s;
- 3) That they belong to a contemporary Métis community in Alberta by naming that community and demonstrating acceptance by and involvement in that community; and
- 4) That they are a resident of Alberta.

Application of this policy to Alberta Métis settlement members is problematic for a number of reasons, including its apparent failure to adopt the contextual understanding of s. 35 Métis constitutional identity required by *Powley*. This requires: consideration of the factual reasons for the genesis for the Métis settlements; the rationale for the negotiation of the Métis Settlements Accord;¹²⁵ and the goals of preserving distinctive

¹²³ “Métis Harvesting in Alberta” (2010), *supra* note 86. This policy fails to recognize other established northern Métis communities; for example: in and around Edmonton, St. Albert (see Anne Anderson, *The First Métis...A New Nation* (Edmonton: UVISCO, 1985)) and elsewhere in Alberta such as Franc Cache (see Joe Sawchuk, Métis Association of Alberta, & Patricia Sawchuk, *Métis Land Rights In Alberta: A Political History* (Edmonton: Métis Association of Alberta, 1981) at 215).

¹²⁴ The communities are Fort Chipewyan, Fort McKay, Fort Vermilion, Peace River, Cadotte Lake, Grouard, Wabasca, Trout Lake, Conklin, Lac La Biche, Smoky Lake, St. Paul, Bonnyville, Cold Lake, Lac Ste. Anne and Slave Lake.

¹²⁵ For further discussion of Métis settlement history, see Catherine Bell & Métis

Métis culture, Métis self-determination, and political autonomy contemplated by s. 35, recognized as they are in the preambles to the Métis settlements legislation and the amendment to the Alberta Constitution made pursuant to the Métis Settlement Accord.¹²⁶ For these reasons, in *Lizotte*, Provincial Court Judge Hougestol dismissed illegal hunting charges brought against a member of Paddle Prairie Métis Settlement who had produced proof of settlement membership, but refused to produce any genealogical records to prove that he had ancestral connection to a historic Métis community.¹²⁷ Mr. Lizotte had been hunting off settlement, but within the 160 km radius described by the relevant policy.

Settlement legislation and membership laws administered by settlement governments since 1990 require proof of Métis identity through genealogical records or affidavits of Métis recognized as elders.¹²⁸ However, these criteria are not applied retroactively to those transitioned in who identified as Métis and chose to join the settlements but, given changes in policy and amendments to federal Indian legislation, may now qualify to apply for recognition as status Indians. On this point, Judge Hougestol reasoned that *Powley* anticipated negotiation of standardized membership requirements, such as those found in the MSA, and emphasized that the relevance of membership in political organizations in defining s. 35 communities depends on the context within which membership criteria are developed.¹²⁹ He also noted that establishing criteria for Métis settlement identity was the product of the extensive negotiations and that the MSA “delegate[s] to the various settlement structures a very formalized framework for determining membership...with

Settlements Appeal Tribunal, *Contemporary Métis Justice: The Settlement Way* (Saskatoon: Native Law Centre, 1999); Catherine Bell, *Alberta Métis Settlements Legislation: An Overview of Ownership and Management of Settlement Lands* (Regina: Canadian Plains Research Centre: 1994); Tom C Pocklington, *The Government and Politics of the Alberta Métis Settlements* (Regina: Canadian Plains Research Centre, 1991); John Weinstein, *Quiet Revolution West: the Rebirth of Métis Nationalism* (Calgary: Fifth House, 2007).

¹²⁶ *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37, [2011] SCR 670 at paras 62-69 [Cunningham].

¹²⁷ *Lizotte*, *supra* note 104.

¹²⁸ See *Métis Settlements Act*, RSA 2000, c M-14 s 76.

¹²⁹ *Lizotte*, *supra* note 104 at para 28.

built-in safeguards and appeals.”¹³⁰ Through this delegation, and the recognition and inclusion of the lands and MSA legislation within the Alberta Constitution, the people of Alberta “recognized that they trusted the Métis Settlements to decide for themselves, within the framework provided, who was a ‘Métis.’”¹³¹ He also decided that the fact that “the crown [sic] wants to create a parallel world of unnamed bureaucrats to analyze Métis genealogical records and second guess the work of the Settlements...[was] inconsistent with the Act, and with common sense.”¹³²

Also rejected was the Crown’s position that Mr. Lizotte was required to prove his genealogical antecedents to the late 1800s. In Judge Hougestol’s opinion:

In Alberta, the unique experience of the founding of the statutory Settlements breaks the chain of historical links with the land for many Métis people. It was designed to ameliorate their plight not steal any prior aboriginal connection with the land.¹³³

However, the Alberta Court of Appeal did not adopt the same reasoning when these issues were raised before it in 2011 in the *L’Hirondelle* case.¹³⁴ Mr. L’Hirondelle was refused a fishing license under the current Alberta Métis Harvesting policy on the basis that his Métis settlement membership was insufficient proof of entitlement. He commenced an application for judicial review, arguing primarily that: (1) the government was bound by the decision in *Lizotte*; (2) *Powley* called for the creation and standardization of membership requirements to identify Métis rights holders as an “urgent priority”; and (3) that such lists, once established, created some certainty in terms of s. 35 identification.¹³⁵ The Court of Appeal disagreed and held that downplaying the differences between the membership requirements of the MSA and the *Powley* test would “[undermine] the importance of those differences.”¹³⁶ For the Court of Appeal, settlement membership was centrally concerned with statutory

¹³⁰ *Ibid* at para 29.

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid* at para 31.

¹³⁴ *L’Hirondelle*, *supra* note 104 at para 28.

¹³⁵ *Ibid* at para 35.

¹³⁶ *Ibid* at para 38.

rights and benefits unique to settlement members, such as voting rights and the right to reside on settlement lands.¹³⁷

This focus on “lists” by the Court of Appeal obfuscates the real issue, which in our view is the relationship between Métis settlement identity, s. 35 identity, and the parallel purposes of the Métis Settlements Accord (implemented through MSA regime) and the inclusion of Métis in s. 35, as stated by the SCC in the *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham* case.¹³⁸ Those purposes are to “protect practices that were historically important features” of “distinctive” Métis communities “that persist in the present day as integral elements of their Métis culture.”¹³⁹ While we believe there are many persuasive arguments against the reasoning and ultimate disposition in *L’Hirondelle*, leave to appeal to the SCC was denied. However, the Court of Appeal, and later the SCC, does not appear to have had the benefit of a full analysis required to achieve the “contextual understanding of the membership” as mandated in *Powley*, or the SCC’s decision in *MMF*.¹⁴⁰

The starting point in contextually understanding the Métis settlements regime is Canada’s scrip system, the failure of which contributed to the socio-economic conditions resulting in a need to create the settlements. This is one area where *MMF* is relevant, and we begin to see how a shift in emphasis from proof of s. 35 rights to fulfillment of Crown promises and honour strengthens claims by Métis settlement members to harvest outside settlement areas, and their governments to be consulted and accommodated in relation to those rights.

A. Application of *MMF* Outside Manitoba

So how does *MMF* strengthen the position of Métis settlements to s. 35 rights recognition and negotiation? In two ways: first, by providing a lens with which to examine the similarly problematic scrip distribution systems in both Manitoba and Alberta; and second, by emphasizing the proper characterization of the Métis settlements regime as a solemn promise derived from negotiations aimed at reconciliation and partially protected in Alberta’s Constitution.

¹³⁷ *Ibid.*

¹³⁸ *Supra* note 126.

¹³⁹ *Powley*, *supra* note 4 at para 13.

¹⁴⁰ *Ibid* at para 33.

In MMF, the SCC held that Canada failed to deliver on the promise it made to the Manitoba Métis to provide them with land due to delay, inappropriate methods of allotment, and exposure to land speculation.¹⁴¹ Because of this failure, the Métis were soon displaced by new settlers and forced to move further west.¹⁴² In 1881, Métis located at Fort Edmonton petitioned Canada for scrip owed to them pursuant to the promise made under the *Manitoba Act, 1870*. The names on the petition are striking—it is comprised largely of Métis individuals with surnames such as Cunningham, Auger, and L’Hirondelle¹⁴³—names which are still familiar to northern Alberta because many of their descendants now obviously populate the Alberta Métis settlements. The *Dominion Lands Act* of 1883 gave the Governor in Council the power to issue scrip to satisfy any claims made by Métis in relation to “Indian title”, provided that they had been resident in the Northwest Territories prior to July 15, 1870.¹⁴⁴

These and other mechanisms were unsuccessfully employed at various time to attempt to provide the Métis with land, including in northern Alberta, through the issuance of scrip under the *Dominion Lands Act* in a manner not unlike that employed by the *Manitoba Act, 1870* concurrently with the negotiation and signing of Treaty 8 in 1899.¹⁴⁵ However, all of these initiatives failed,¹⁴⁶ and by 1930 Alberta and Canada tellingly considered the question of who had “responsibility for indigent half-breeds.”¹⁴⁷ In 1934, the Alberta legislature established a Royal

¹⁴¹ MMF, *supra* note 30 at paras 128, 150.

¹⁴² *Ibid* at para 39.

¹⁴³ Canada, Parliament, 48 Vict, No 116 (1885) at 44-46 and attached as exhibit P346 to trial record in *Daniels*, *supra* note 47.

¹⁴⁴ *Dominion Lands Act, 1883*, SC 1883, c 17, s 81(e).

¹⁴⁵ *Daniels FC*, *supra* note 47 at paras 415, 418, 437-438, 518.

¹⁴⁶ *Ibid* at paras 439, 519.

¹⁴⁷ *Ibid* at para 56. In and around the mid-1930s, there also exists a variety of correspondence between Alberta’s then-Minister of Telephones and Health George Hoadley and TG Hoadley, who variously held the positions of Superintendent General of Indian Affairs and Minister of the Interior, with the latter explaining that while the federal government would accede to any judicial decision to the contrary, the dominion was of the view that the Métis did not fall under their responsibility. See Fred V Martin, “Alberta’s Métis Settlements; A Brief History” in Richard Connors & John M Law, eds, *Forging Alberta’s Constitutional Framework* (Edmonton: University of Alberta Press in association with the Centre for Constitutional Studies, University of Alberta, 2005).

Commission led by Justice Albert Ewing to inquire into the problems of “health, education, relief and general welfare of the half-breed population” and to make recommendations based on its investigation.¹⁴⁸

The *Métis Population Betterment Act*¹⁴⁹ was enacted as a result of that commission’s findings and recommendations which, while not tasked with assigning blame *per se*, acknowledged the intent of the federal scrip system to address and special rights Métis may have had in land, its obvious failure, and the need to nonetheless set land aside for Métis colonies as a matter of provincial policy.¹⁵⁰ Some Métis settlements were in fact created in areas where discrete Métis communities were either already settled, or there was a substantial historical Métis presence (e.g. Kikino, Fishing Lake, and Gift Lake). In this regard, historical and contemporary kinship relationships existed between Kikino and the rights-bearing Métis community in northern Saskatchewan, as was noted by Judge Kalenith in *R v Laviolette*.¹⁵¹ Important considerations in the selection of settlement lands also included not only supporting traditional pursuits, but given the destitute situation of the Métis in the 1930s, obtaining land suitable for farming and access to timber to erect homes.¹⁵² Other important factors included separation from white settlers and proximity to fisheries.¹⁵³

¹⁴⁸ *Cunningham*, *supra* note 126 at para 8.

¹⁴⁹ SA 1938, (2nd Sess), c 6 as repealed and replaced by *Métis Population Betterment Act*, SA 1940, c 6, s 23.

¹⁵⁰ *Ewing Commission Report*, *supra* note 60 at 2-3; *Cunningham*, *supra* note 126 at para 10.

¹⁵¹ *R v Laviolette*, 2005 SKPC 70 at paras 36-37, 267 Sask R 291 [*Laviolette*].

¹⁵² *Ewing Commission Report*, *supra* note 60 at 11.

¹⁵³ *Hirsekom CA*, *supra* note 91 (Evidence, Dr. Arthur Ray expert report at 65-72). The trial judge would have largely based his finding of fact on Dr. Ray’s finding that there was historical Métis community present in northern Alberta (though not in southern Alberta). He explained that as of the 1820s, there was a territory where game was harvested throughout the Athabasca Country extending westward from Île-à-la-Crosse toward Lesser Slave Lake, and the presence of fisheries on Lesser Slave Lake, Lac la Biche, and Utikuma Lake. As Dr. Ray explains at page 72 of his report: “[a]s noted above, Métis and Cree maintained fisheries at Utikuma Lake (Whitefish Lake). It is likely, therefore, that these Cree were related to the Métis at the latter lake and those who lived part of the year at Lac la Biche.” Utikuma Lake is located along the eastern boundary of Gift Lake Métis Settlement. Justice Ewing recommended at page 2 of his report, *supra* note 60, that, *inter alia*, the Métis colonies he recommended be created “should contain or be adjacent to a lake or lakes from which a supply of fish could be obtained.”

Following a period of gradual delegation of governance, and after a process of extensive litigation and negotiation in the 1970s and 80s relating to provincial statutory obligations to set aside money from resources extracted from settlement lands for the benefit of settlement members, the Alberta Federation of Métis settlements and the province entered into the Métis Settlement Accord, which evolved into the modern MSA regime.¹⁵⁴ As noted above, the solemn constitutional nature of this negotiated agreement is also reflected in amendments that were made to the *Constitution of Alberta Act*¹⁵⁵ to protect the land base and existence and composition of Métis settlement government.

In MMF, the SCC held that obligations grounded in Crown promises aimed at reconciliation attract the honour of the Crown where owed to an Aboriginal group, but they need not necessarily depend on proof of a pre-existing s. 35 Aboriginal right or title grounding the promise.¹⁵⁶ Aboriginal “interests” is a much broader term, and like the land grant promise to the Métis contained in the *Manitoba Act, 1870*, the Alberta Métis settlement land grant is a negotiated and solemn promise aimed at reconciliation of Aboriginal interests with sovereignty and the broader interests of the Alberta citizenry. As the SCC explained in *Cunningham*, the Métis settlements regime is “the result of a negotiation process between the Métis of Alberta and the Province and the outcome of an ongoing struggle for self-preservation” enacted following a “commitment to recognizing the Métis and enhancing their survival as distinctive communities” consistent with their inclusion in s. 35.¹⁵⁷ As such, we suggest on the strength of MMF that the Crown is required to “act with diligence to pursue the fulfillment of the purposes” of these commitments.¹⁵⁸ On this argument alone the Alberta government should recognize members of the eight

¹⁵⁴ *Supra* note 127.

¹⁵⁵ *Constitution of Alberta Amendment Act, 1990*, RSA 2000, c C-24.

¹⁵⁶ MMF, *supra* note 30 at para 72. Here we note that the recitals to the *Métis Settlements Act* say that it was enacted “recognizing the desire expressed in the *Constitution of Alberta Amendment Act, 1990* that the Métis should continue to have a land base to provide for the preservation and enhancement of Métis culture and identity and to enable the Métis to attain self-governance under the laws of Alberta”. For further reference, see also Resolution 18 passed by the Alberta legislature and the Alberta-Métis Settlements accord.

¹⁵⁷ *Cunningham*, *supra* note 126 at paras 66-67, 80.

¹⁵⁸ MMF, *supra* note 30 at para 83.

Métis settlements as “Métis” for the purposes of s. 35, and at a minimum assess the duty to consult and negotiate with them when the purpose of the settlements regime, or harvesting activities within the 160 km of notional traditional territory currently recognized under Alberta policy, are potentially adversely affected.

B. Intersection of *Powley*, *MMF* and the Duty to Consult in Alberta

At the time of writing, Alberta was negotiating an agreement with the Métis settlements which recognizes consultation obligations where the Alberta government has real or constructive knowledge of harvesting rights or traditional use rights exercised on unoccupied Crown land, and makes a decision on land and natural resource management that has the potential to adversely impact these uses. Constructive knowledge would arguably be attributed to government approved activities within the 160 km of notional harvesting traditional territory around each Métis settlement per Alberta’s Métis harvesting rights policy. However, a problem remains if it is assumed that credible claims are restricted to this area, as Alberta’s current harvesting policy erroneously conflates the geographical dimensions of community and the area of the right’s exercise, contrary to the reality of Métis communities and judicial interpretations of *Powley*.

Both the rights claimed as Métis Aboriginal rights, and the communities entitled to these rights, have geographical dimensions which may not precisely align. That is, rights based on customs, practices, and traditions are limited in their exercise within geographical boundaries (e.g. area where a community historically hunted and continues to hunt). The definition of “community” also clearly has geographical dimensions because we need to know where to look for evidence of a Métis group and their activities on the land. However, nowhere in *Powley* is there a definitive determination on the appropriate extent of geographic territory to exercise harvesting rights, the geographic dimensions for assessing the existence of a Métis community, or the relationship between these two elements of *Powley*. This continues to be a matter of contention and litigation. The three main approaches post-*Powley* are as follows: (1) a narrow focus that defines community in terms of discrete Métis villages, towns, cities, or other settlement areas and their surrounding environs (e.g. as in Alberta policy’s 160 km around a given Métis community); (2) a

regional approach which defines boundaries based on mobility patterns within a district, regional consciousness, and inter-connections (e.g. trade and familial) between Métis populations; and (3) a rejection of the latter approach in favour of one that considers Métis mobility patterns across regions and borders within the larger territory of a larger “Métis Nation”. The latter two approaches acknowledge, albeit in different ways, that land-based rights do not exist “at large” but also, for example, that the site-specific “nature of a hunting or fishing right will look quite different for an Aboriginal group whose ancestors fished in a particular lake near their settlement than for a primarily nomadic people whose distinctive culture involved hunting across an expansive territory.”¹⁵⁹

One of the first debates arising after *Powley* was whether “community” (and the region within which harvesting rights may be exercised) should always be defined in terms of Métis villages, towns, or cities and their immediate surrounding areas because of the reference in *Powley* to the “environs” of Sault Ste. Marie. In *Lavolette*, this approach was rejected in favour of a broader “regional” approach.¹⁶⁰ At issue in *Lavolette* was a member of the contemporary Meadow Lake Métis community who was ice fishing at Green Lake during a closed season. He did not live in and was not a member of the Green Lake Métis community. The Court held that the Métis community was to be defined much more broadly than the area around Green Lake. In identifying the relevant historical and contemporary Métis community, the Court looked to a broader region based on evidence showing patterns of historic and contemporary trade, marriage, movement and kinship ties of Métis between historic settlements at Lac la Biche, Île-à-la-Crosse, and Green Lake.

The third approach maintains that the area for exercising a site-specific right, and the area for determining the existence of a community need not be the same (e.g. a small group with numbers that call into question its identification as a community, may have hunted in an area and continue to do so, but form part of a larger Métis community or people that may be present in a wider geographic area). This is the approach taken by the Manitoba Provincial Court in *R v Goodon*.¹⁶¹ Mr. Goodon (who lived in Brandon at the time) shot and killed a ring neck

¹⁵⁹ *Hirsehorn CA*, *supra* note 91 at paras 85-86.

¹⁶⁰ *Lavolette*, *supra* note 151 at paras 27-30.

¹⁶¹ *R v Goodon*, 2008 MBPC 59, 234 Man R (2d) 278.

duck near Turtle Mountain in southwestern Manitoba. Judge Combs held that there are two geographic elements to consider in correctly applying the *Powley* test:

Firstly, the right being claimed has to be site specific. Secondly, in identifying the historic rights-bearing community, the geographic extent of that community will have to be identified. These are two different components of the *Powley* test and may result in two different geographic areas...The right being claimed in this case is hunting and the “site” specific “requirement of the test is where the hunting actually occurred.”¹⁶²

As was cautioned by the Alberta Court of Appeal in the more recent decision of *R v. Hirsekorn*, emphasis on a particular place (as we note, parenthetically, Alberta does in its current approach to assessing the extent of harvesting rights), places too much focus on the degree of individual connection to the site where a right is claimed and whether a particular place, rather than a practice, is integral to a contemporary Métis community which has some degree of stability and continuity to a larger area. In such an approach, there is a “danger of creating an artificial barrier to the rights recognition of nomadic people whose ancestral lands are vast” and this danger is particularly attendant given “the distinctive way of life of the plains Métis.”¹⁶³ We agree. However, in the same case, the Court of Appeal left open whether it is appropriate to apply regional approaches crossing provincial boundaries to plains Métis peoples, given that it also held it was “not clear on the evidence of [the] case...whether there was essentially one regional Métis community across the prairies at this point in history (characterized by the appellant as the Métis of the Northwest), or more than one community encompassing smaller regions”.¹⁶⁴ The Court reasoned as follows:

Powley itself dealt with a different context – a historic Métis community at Sault Ste. Marie which remained relatively stable. Hunters may have ranged over their traditional hunting territory, but they returned to the settlement. The right being claimed in *Powley* was the right to hunt in the environs of that settlement. Here, we have somewhat the reverse of *Powley*. The plains Métis lived a more nomadic lifestyle, sometimes rarely or never returning to an established settlement.¹⁶⁵

¹⁶² *Ibid* at para 16.

¹⁶³ *Hirsekorn CA*, *supra* note 91 at para 88.

¹⁶⁴ *Ibid* at para 63 (The issue of whether Métis are one people was one of several raised in leave to appeal to the Supreme Court which was ultimately denied).

¹⁶⁵ *Ibid* at para 77

At the heart of this case was the issue of whether hunting for food in the environs of the Cypress Hills was integral to the distinctive culture of the plains Métis. In addressing this question, the Court stated the proper legal questions as follows: “Did the historic Métis community include the disputed area within its ancestral lands or traditional hunting territory? In other words, did they frequent the area for the purpose of carrying out a practice that was integral to their traditional way of life?”¹⁶⁶ Because the Court concluded that the evidence was insufficient to prove a right to hunt in the environs of the Cypress Hills prior to European control, the Métis Nation of Alberta applied for leave to appeal to the SCC on the issue. However, leave was denied.¹⁶⁷

The current harvesting policy in Alberta also runs contrary to the intent of the SCC in *Powley* in the emphasis it places on genealogical connection to prove Métis ancestral connection to a community. Once a Métis rights-bearing community is established, the SCC stated that evidence of acceptance in that community may be proved by “birth, adoption, or other means.”¹⁶⁸ Even if we were to assume that all members of a Métis settlement ought to meet a separate ancestral connection test, a well-established statutory recognition may well be sufficient “other means”, especially one that was characterized by the SCC as a statutory scheme designed to enhance and preserve the identity, culture, and self-governance of the Métis.¹⁶⁹ Important also is the fact that the Métis settlements regime is not “ordinary” legislation. As outlined above, the MSA has important, solemn and constitutional aspects, and is steeped in historical promises unmet by the federal Crown that give rise to arguments of equitable estoppel and engage the honour of the Crown. Finally, as noted above, the issue of proof of connection to a historic Métis community was not truly at issue in *Powley*.

Debates around proper identification of community and territory inevitably spill over into provincial assessments of their duty to consult. Geographic components of community and territory help identify the community to consult and the proper role of Métis political organizations

¹⁶⁶ *Ibid* at para 95.

¹⁶⁷ *R v Hirsekorn*, 2012 ABCA 21, leave to appeal to SCC refused, 35558 (January 23 2014).

¹⁶⁸ *Powley*, *supra* note 4 at para 32.

¹⁶⁹ *Cunningham*, *supra* note 126 at paras 75, 77.

in the consultation process.¹⁷⁰ Because of the debate over the role of Métis political organizations and the absence of a Métis consultation policy, consultation in Alberta has largely occurred with local groups, and not always the elected representatives of their respective parent political bodies, the MNA, MSGC, or settlements themselves. However, if Métis individuals and communities are considered part of larger, regionally widespread Métis rights-bearing community, this means—as *Mandeville* and *MMF* tend to suggest—then surely regional political representatives of a contemporary rights-bearing community are proper parties to consult.

Here, the decision of the SCC in *Cunningham* gains some importance in that it recognizes Métis settlement governments are much more than political organizations and implicitly supports the need to consult with both settlement governments and the MSGC in light of the objects of the Métis settlements regime to preserve Métis settlement land, self-government, and culture.¹⁷¹ Métis settlement governments are, after all, democratically-elected governments. As the holder of *fee simple* title, and as the body responsible for fee simple title to all settlement lands, MSGC is charged with enacting policies (which have the force of provincial law) and negotiating intergovernmental and other agreements in a range of areas related to the collective interests of the settlements. Even though the settlement legislation may not be intended to recognize s. 35 Aboriginal rights *per se*, the history and purpose of the legislation and the comments made by the SCC in this regard ought to inform the answer to the question of whom the Crown must consult with, and when.

Cunningham and *MMF* also have implications for the duty to consult with respect to developments that directly or indirectly affect land, sustenance, resource, and other rights negotiated and recognized through the Alberta Métis settlements legislation. A program regarded as “ameliorative” within the meaning of s. 15(2) of the *Charter* by the SCC is certainly much less effective if protection of the land base and surrounding areas does not allow settlement members to meaningfully practise a

¹⁷⁰ See Dwight Newman, “The Duty to Consult Doctrine and Representative for Consultation with Métis Communities and Non-Status Indian Communities” (2010), online: Institute on Governance <http://iog.ca/wp-content/uploads/2013/01/March2010_TheDutytoConsultDoctrine-Newman.pdf> (The author canvasses this and associated issues thoroughly).

¹⁷¹ *Cunningham*, *supra* note 126 at paras 75-78.

traditional lifestyle. The so-called “ameliorative purpose” of the Métis settlement regime supports ongoing consultation between Métis settlement governments and Alberta to ensure that the ameliorative purpose is not lost. Again, it is therefore not surprising that serious negotiations for a consultation policy have apparently finally emerged.

V. CONCLUSION

In the spring of 2015, the newly elected Alberta government embarked on several major policy initiatives affecting Alberta’s energy sector, including a review of its relations with First Nations and Métis peoples and Aboriginal consultation policy and processes. At the time of writing, reforms included repealing the controversial *Aboriginal Consultation Levy Act*¹⁷² and a directive to all departments to review policy and practice in light of the aspirational principles of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)¹⁷³ including through consultation with First Nations and Métis.¹⁷⁴ UNDRIP includes the principle of free, prior and informed consent by Indigenous peoples before taking action that affects their property rights. Although there is debate on whether this includes a veto in some contexts,¹⁷⁵ it is derived

¹⁷² SA 2013, c A-1.2. See e.g. Lorraine Land, “Creating the Perfect Storm for Conflicts Over Aboriginal Rights: Critical New Developments in the Law of Aboriginal Consultation” *paper prepared for the Commons Institute* (27 January 2014) at 13-17, online: <<http://www.oktlaw.com/wp-content/uploads/2014/02/lylPerfectStorm.pdf>>; Darcy Henton, “Aboriginal Relations minister vows repeal of controversial consultation bill” *Calgary Herald* (29 July 2015), online: <<http://calgaryherald.com/news/politics/aboriginal-relations-minister-vows-repeal-of-controversial-consultation-bill>>.

¹⁷³ *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA Res 61/295 (adopted 13 September 2007). In 2010, Canada issued a statement supporting UNDRIP as an aspirational document, but does not view it as legally binding and has noted its concerns with various provisions, including provisions dealing with lands, territories and resources and free, prior and informed consent if understood as a veto.

¹⁷⁴ See e.g. Meagan Wollberg, “Alberta has ‘long way to go’ in implementing UNDRIP: lawyer” *Northern J*, online: <<http://norj.ca/2015/08/alberta-has-long-way-to-go-in-implementing-undrip>>.

¹⁷⁵ There is disagreement on whether this includes a right of veto: Canada, Permanent Mission of Canada to the United Nations, “Canada’s Statement on the World Conference on Indigenous Peoples Outcome Document”, (New York, 22 September 2014), online: <http://www.canadainternational.gc.ca/prmny-mponu/canada_un-

from earlier international instruments that anticipate at a minimum this requires negotiating toward consent.¹⁷⁶

In 2013, significant changes were also made to the environmental assessment and First Nation consultation processes in Alberta, which included the collapsing of environmental monitoring into a single body primarily concerned with promotion of resource and energy development.¹⁷⁷ The Alberta Energy Regulator (AER) assumed the responsibilities of the Energy Resources Conservation Board and Alberta Environmental and Sustainable Development, which were tasked with granting regulatory approvals for energy development and administering environmental protection legislation in relation to such development. The AER is also under review and is being restructured to separate these two functions. Currently, it does not have jurisdiction to rule on the adequacy of consultation and has been criticized for having “little appetite” for dealing with consultation issues raised by First Nations and Métis.¹⁷⁸ It is unclear whether or to what extent these concerns will also be addressed in the new government’s wider Aboriginal relations policy review.

However, disagreement on the application of *Powley* to Métis in Alberta remains a challenge for developing Métis consultation policy. We have argued that the current approach to Métis harvesting rights in Alberta relies on a narrow and erroneous interpretation of this decision. MMF may be helpful in moving past this problem by giving rise to a duty to consult where actions of the Crown have the potential not only to impact credibly asserted Aboriginal rights, but also its promises under the Métis Settlement Accord implemented through the Métis settlement legislation. The SCC emphasized in MMF that “[t]he unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter

canada_onu/statements-declarations/other-autres/2014-09-22_WCIPD-PADD.aspx?lang=eng>.

¹⁷⁶ *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO No 169) 27 June 1989, Geneva, 76th ILC session online: <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312314>.

¹⁷⁷ See e.g. *Laidlaw and Passelac-Ross*, *supra* note 73; Darcy Henton, “Alberta Energy Regulator faces changes under NDP as Notley wants to review its mandate” *Calgary Herald* (23 June 2015), online: <<http://calgaryherald.com/news/politics/alberta-energy-regulator-faces-changes-under-ndp-as-notley-wants-to-review-its-mandate>>.

¹⁷⁸ See e.g. *Laidlaw and Passelac-Ross*, *supra* note 73 at p 54.

of national and constitutional import”¹⁷⁹ and was unwilling to allow the claim to be defeated due to the application of statutory and equitable limitation periods. In doing so, it pointed to the absence of other meaningful processes for reconciliation available to the Métis, such as access to federal land claim processes or the specific claims tribunal available to First Nations.¹⁸⁰ In our view, the current lack of a national federal process and inconsistency in provincial negotiation and consultation policy to address Métis claims derived from diverse interpretations and applications of *Powley* is a significant part of the “the unfinished business of reconciliation of the Métis people with Canadian sovereignty” and continues to be an outstanding matter of national and constitutional importance.¹⁸¹

¹⁷⁹ MMF, *supra* note 30 at para 140.

¹⁸⁰ *Peepeekisis Band v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FCA 191 at paras 59-60, 448 NR 202.

¹⁸¹ MMF, *supra* note 30 at para 140.