



MINISTERIAL SPECIAL REPRESENTATIVE ON SECTION 35 MÉTIS RIGHTS KEY FINDINGS

JULY 2016

Métis Section 35 Rights

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

The Ministerial Special Representative on Métis Section 35 Rights

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

Summary of Recommendations

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

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



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

Key Themes and Considerations

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

“Not every person of mixed European-Aboriginal ancestry is Métis for the purposes of Section 35. Rather it is the combination of self-identification as Métis, along with membership in larger distinct and historical communities with their own unique culture, practices, traditions and language that makes Métis distinct Aboriginal peoples and distinct from their European and other Aboriginal ancestors. ... The starting proposition for the development of any Section 35 Métis rights framework must be that it deals with Métis coming within the meaning of Section 35.” – (MSR Report, p. 6)
- **Reconciliation Demands that Métis Rights Be Determined, Recognized and Respected through Negotiations and Agreements between the Crown and Métis Communities—Platitudes and Symbolic Gestures Are Not Sufficient:**

“The lack of existing processes and structures to address Métis Section 35 rights claims and issues is apparent ... Absent clear direction, addressing Métis issues or claims outside of an express policy or framework cannot be expected or implied. INAC officials, while sometimes willing to take a flexible approach to policy interpretation, are reluctant to go beyond the clear parameters of their respective mandates, policies or procedures. Express policies relating to Métis claims and Section 35 rights-based issues are required to further reconciliation and clear dialogue.” – (MSR Report, p. 29)
- **There Are Rights-Bearing Métis Communities from Ontario Westward as well as Outstanding Métis Claims Against the Crown that Must Be Addressed:**



“Some of the examples of unresolved Métis claims (some federal and some provincial) include, the Métis land claim in North-West Saskatchewan, concerns regarding the Cold Lake Weapons Range and its effects on Métis harvesting activities, implementation of Dominion Lands Act related scrip commissions, the Treaty 3 [Halfbreed] Adhesion, harm caused by the Federal Pasture Lands Policies where Métis communities in Manitoba and Saskatchewan were removed in the 1930s, and various claims against governments regarding the failure of the Crown to consult the Métis, among others. Addressing outstanding Métis claims is inextricably tied to a Section 35 Métis rights framework.” – (MSR Report, p. 30).

- **There is a Lack of Knowledge about Métis Section 35 Rights Across Both Levels of Government—Education on Métis Section 35 Rights is Essential to Advancing Reconciliation:**
“In order for reconciliation to be meaningful, and in order for Canada to pursue a Section 35 Métis rights framework and process relating to the MMF Decision, representatives of the Crown must have a basic knowledge of Métis issues and Section 35 Métis rights. There is a clear need for education within INAC and Canada more generally, along with a number of provincial governments with whom I met, on Métis-related law and is essential in order for Canada to carry out the processes contemplated by the Mandate effectively.” – (MSR Report, p. 12)
- **Métis and Non-Status Indians Are Different People—Canada Should Not Continue to Lump Them Together:**
*“Many of the programs presently available to Métis offered by INAC and Canada are framed under a general “Aboriginal” framework indeed, in many instances the use of the terms “non-status” and “Métis” are used together as if there was an automatic connection between the two groups. These terms should **not** be used together and Métis representatives stated repeatedly that the mixing of these two peoples is offensive and underscores a fundamental misunderstanding or misinformation regarding the nature of Métis as a distinct Aboriginal peoples under Section 35.” – (MSR Report, p. 25)*
- **There is No Hierarchy of Rights amongst the Aboriginal Peoples included in Section 35—First Nations Rights do not have priority over Métis Rights:**
*“...a few individuals noted the misconception that treaty rights “trump” Métis rights, even though there is **no** law that supports, and existing law contradicts, this proposition. ... There was a suggestion that there is some form of hierarchy of rights within Section 35, e.g. the rights of First Nations supersede the rights of Métis, even though there is **no** law supporting this proposition.” – (MSR Report, p. 12)*
- **Maintaining Credible and Objectively Verifiable Métis Registries is in the Public Interest—Canada Should Provide Permanent and Stable Funding for Métis Government Registries that Identify Rights-Holders:**



*“It is laudable that Canada initiated the Powley initiative. It is now time to ensure that this “Initiative” becomes part of the on-going provision of resources to ensure an objective and transparent Métis registry(ies) for the purposes of Section 35. **This work is essential to implementation of any meaningful Section 35 Métis rights framework because it goes to the core of who actually possesses such Section 35 rights.**” – (MSR Report, p. 18)*

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

*“This is an **opportunity** for Canada to re-examine how it is spending its resources and whether such expenditures are fulfilling the objectives of reconciliation. In no way is that to suggest that Métis should, or even want, to be treated the same as with First Nations on the issue of programs and services. It is about **equitable** treatment of Métis as one of three Aboriginal peoples in Canada and to which the honour of the Crown fully applies. Canada has an opportunity to play a leadership role nationally to ensure that Métis get the “hand up” which they seek, and is ultimately good for the country as a whole.” – (MSR Report, p. 26)*

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

*“In order for reconciliation to take hold and relationships to flourish, it is essential that Canada, and the provinces and territories as appropriate, have duly mandated, democratically elected and transparent Métis governments with whom to deal. **Offering stable and predictable political and financial support to Métis governments is an important element of overall reconciliation, and should be considered as Canada progresses down the road of developing a Section 35 Métis rights framework.** It is in all of our interests the Métis have distinct democratic representation as Section 35 rights-bearing peoples.” – (MSR Report, p. 27)*

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

*“I heard concerns from within INAC that, with the exception of the Métis Settlements in Alberta, the other forms of Métis governance such as those found in the Governing Members do not necessarily fall within the typical range of governance examples seen elsewhere in Canada, e.g. land-based, clear geographic parameters to governmental authority. While non-land based forms of governance are different, that does not mean they are illegitimate or that they can or should be ignored. The federal inherent right of self-government policy contemplates non-land based forms of governance. **Rather, different forms of governance are not only practical by represent an opportunity for Canada to engage and not to be bound by past historical models of governance.**” – (MSR Report, p. 14)*



Important Issues and Findings Specific to the Métis Nation of Alberta

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

“...MNA stated that, like other Governing Members, it has a backlog of applications and could use additional and more stable and predictable long term funding to this important exercise. MNA also provided an extensive briefing on its well-developed health, education social services and housing programs.” – (MSR Report, p. 23)
- **A provincial harvesting policy in Alberta based on mutual agreement is needed:**

“The 2004 interim Métis Harvesting Agreement (2004 Agreement) between Alberta and the MNA recognized the Métis right to harvest for food by members of the MNA at all times of the year on all unoccupied Crown lands throughout Alberta without a licence. In 2007 this agreement was terminated by Alberta and replaced unilaterally with a policy that recognized 17 Métis communities north of Edmonton to harvest generally within a 160km radius of the community. The termination of the 2004 Agreement is a significant irritant for the Métis in Alberta. This in turn affects who Alberta consults with regarding potential adverse effects to Métis harvesting rights. Alberta, the MNA and the Métis Settlements General Council should discuss and attempt to resolve the termination of the 2004 Agreement so that the ultimate framework to manage Métis harvesting rights in Alberta is based on Mutual agreement, as the 2004 Agreement contemplated.” – (MSR Report, p. 24)