

## Better Late Than Never? Canada's Reluctant Recognition of Métis Rights and Self-Government

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**OVER THE PAST TWO YEARS**, Métis have signed an unprecedented number of agreements with the Crown, committing to new nation-to-nation, government-to-government relationships starting with regular meetings and dialogue. Métis have struggled for decades in order to be included in agreements like the Trudeau government's *Recognition and Implementation or Rights Framework* announced in February 2018. Just a few years ago Métis issues were still unilaterally treated by the federal government as a provincial responsibility, as has been the case through most of Canadian history.

Ostensibly the recent turn to recognizing Métis nationhood is positioned as an act of reconciliation. Justin Trudeau's government describes the Framework arising from "listen[ing] and learn[ing]" in order to "work together to take concrete action to build a better future and a new relationship."<sup>1</sup> It is important to note, though, that the federal government has not made this transition willingly. In fact, the impetus for such a decisive shift towards Métis inclusion is the result of decades of Métis litigation, political organizing, consciousness-raising, and institution-building to drag Canada to the table. Despite government pretention, Métis are included in this new rights framework largely because of two major Métis rights and jurisdiction victories in court, both of which now compel Canada-Métis dialogue on a scale and regularity not seen before.

**So while the emerging rights framework is certainly limited and based on the flawed presumption of Canadian sovereignty over Indigenous lands and peoples, this new channel of dialogue with the Crown for the Métis National Council, its five governing members, and the Métis Settlement General Council is itself a fairly profound development.**

It is best to understand this as what Janique Dubois and Kelly Saunders call a "window of opportunity": a key moment in time with the particular potential to advance the Métis rights and governance agenda in ways only now available, and likely to only open for a short time before a new status quo will once again work to limit and constrain Métis political action.<sup>2</sup> These developments offer opportunities to the Métis people outside of the traditional (and ultimately inadequate) relationship with provinces. To contextualize these developments, this Brief will first give a general overview of Métis-Canada relations and litigation concerning Section 35 Métis Aboriginal rights before providing a short analysis on the contemporary Métis – Crown Agreements themselves.

### A SHORT HISTORY OF MÉTIS RIGHTS AND CANADIAN JURISDICTION

In the Canadian imagination, Métis have always occupied a distinct policy category from "Indians." While Indigenous rights recognition has been fraught in general, Métis have had a unique—if particularly limiting—route to Canada's recognition of our rights. The genesis of the limited Métis rights dynamic can be traced to Canadian policymakers in the nineteenth century who either downplayed Métis indigeneity or only recognized Métis rights and title in order to extinguish them. For example, Métis rights and title were

recognized by Canada's Parliament in 1870 during the passage of the *Manitoba Act*, legislation that presumed to extinguish the Métis share of "Indian title" in the region in exchange for a 1.4 million acre land reserve.<sup>3</sup> Set aside for exclusive Métis occupation, this promise was ultimately replaced, without Métis consent or involvement, with a scrip policy. Scrip became the new federal strategy to extinguish Métis rights and title, this time in exchange for individual land grants ranging from 160-240 acres.<sup>4</sup>

**Much like the numbered treaties, there is scant historical evidence that Métis accepted these grants in exchange for the extinguishment of their rights and title—nor the rights and title of their descendants.**

Nonetheless, for over a century scrip was presumed by Canada to have extinguished Métis rights, therefore severing any federal responsibility to the Métis people. This slowly began to change with the patriation of Canada's constitution in 1982, which resulted in the inclusion of Métis in the newly defined legal category "Aboriginal" and protected the Métis people's "existing aboriginal and treaty rights" in Section 35.<sup>5</sup> Yet even then, many considered Métis Aboriginal rights to be extinguished through the scrip process and therefore this constitutional recognition was largely symbolic. In other words, the perception was that Métis possessed no *existing* rights.<sup>6</sup>

Then in 2003 the Supreme Court of Canada ruled on *R. v. Powley*, the first formal legal recognition of Métis Aboriginal rights. While *Powley*'s direct impact allowed broader Métis hunting on traditional territory and instituted a legal test for rights-bearing Métis communities, its significance was an affirmation of constitutional rights beyond the symbolic.<sup>7</sup> Because of Canada's jurisdictional division of powers, assigning land and resource management to the provinces, *Powley* was also a driver of provincial-level negotiations. This allowed Métis governments to negotiate the substantial implementation of *Powley*-based hunting rights in the five provincial jurisdictions that claim parts of the Métis homeland—Manitoba, Saskatchewan, Alberta, Ontario, and British Columbia.

Building from *Powley*, two more Supreme Court decisions, *MMF v. Canada*, 2013, and *Daniels v. Canada*, 2016, have recently challenged Canada's delegation of Métis issues to the provinces. In *MMF v. Canada* the court found that the federal government had failed in its constitutional obligation to protect Métis interests in the 1870s allocation of Manitoba lands. In effect, the court identified a duty to reconcile Métis interests in Manitoba lands and necessitated movement towards a bilateral relationship between the Manitoba Métis Federation and the Government of Canada.<sup>8</sup>

In response to the *MMF* decision and a growing awareness of federal obligations to Métis Section 35 rights, the Minister of Indigenous and Northern Affairs appointed Thomas Isaac in June 2015 to "meet with the Métis National Council, its governing members, the Métis Settlements General Council, provincial and territorial governments, and other Aboriginal organizations and interested parties to map out a process for dialogue on Section 35 Métis Rights."<sup>9</sup>

**The resulting "Isaac Report" listed 17 recommendations for the federal government to "re-calibrate their relationships with Métis, recognize and celebrate Métis rights and culture within the context of Canada's larger history, and resolve outstanding land claims."<sup>10</sup>**

Perhaps a broader—and wider reaching—recommendation in the Isaac Report is that the Government of Canada "engage with Métis on developing a Section 35 Métis rights framework."<sup>11</sup> In fact a full 15 pages of the report are dedicated to the explicit development of such a framework. It encouraged a review of the inclusion/exclusion of Métis from federal programs and services, which are currently as Isaac notes "devoted exclusively to First Nations and Inuit" or "framed under a general 'Aboriginal' framework";<sup>12</sup> a need for the identification of a senior office at the then Department of Indigenous Affairs responsible for overseeing Métis rights and interests;<sup>13</sup> as well as ongoing need for stable federal funding for Métis-run services.<sup>14</sup> Isaac concluded that "the focus should be on a fair, broad and transparent engagement process that will lead to a Section 35 Métis rights framework...to meet the needs of Canada and the respective Métis government organization or institution being engaged."<sup>15</sup> The Isaac Report built on Métis activism and his recommendations were

reinforced several months later when the Supreme Court ruled with finality on the Métis jurisdiction question.

In *Daniels v. Canada* the Supreme Court determined that despite years neglect, the federal government does indeed have jurisdictional responsibility for Métis relations and was thus constitutionally responsible for issues affecting the Métis people.<sup>16</sup> Like Powley, these two later decisions undermined the longstanding position taken by Canada that the federal government had limited responsibility for Métis relations.

**Without the judicial interventions in *MMF and Daniels*, underwritten by Métis activism, it is possible (perhaps even likely) that Trudeau's emerging rights framework would have continued to exclude Métis, as has long been the case with much federal Aboriginal policy.**

#### **THE CANADA-MÉTIS NATION ACCORD AND MÉTIS FRAMEWORK AGREEMENTS**

With the Isaac Report's proposal of a new and specific Métis rights framework, and the added emphasis on federal responsibility in the *Daniels* decision, Métis governments have been actively engaging the federal government to establish formal relationships. There is little doubt that Trudeau's yet-to-be-released *Recognition and Implementation of Rights Framework* was a major influence in these negotiations even as early as 2016. The first agreement was reached with the Manitoba Métis Federation in November of that year after the organization's victory in *MMF v. Canada* had necessitated a "formal process of reconciliation."<sup>17</sup> Soon after, on April 13, 2017, the Government of Canada and the Métis National Council—represented by its president and the five presidents of its governing members—signed the Canada-Métis Nation Accord. The Accord is purported to normalize Métis Nation relations with the federal government. An institutionalized "bilateral mechanism" that guarantees twice-annual meetings of the parties, the Accord promises Métis consultation on federal policy initiatives affecting Métis communities.<sup>18</sup>

Flowing from the Canada-Métis Nation Accord, the federal government also signed framework agreements with the five governing members of the Métis National Council, and has undertaken discussions with the Métis Settlements General Council for a framework agreement. The Métis Nation of Alberta signed an agreement in November 2017, which MNA President Audrey Poitras described as a process to "renew our nation-to-nation, government-to-government relationship and advance reconciliation between us." Beyond merely a rights framework, it would also provide for "formal negotiations to finally have... Métis self-government recognized" including commitments to meaningful progress in a number of policy areas.<sup>19</sup> The Métis Nation of Ontario signed a similar agreement with both the federal government and government of Ontario in December 2017, "establishing a process for discussions about developing a government-to-government relationship."<sup>20</sup> A few days later, the Métis Settlements General Council—representing the eight Métis Settlements in Alberta—signed an MOU to develop a framework agreement with Canada to "outline the areas for discussion and serve as the basis for negotiations of a reconciliation agreement."<sup>21</sup> Most recently, on July 20, 2018, the Métis Nation-Saskatchewan (MN-S) signed an agreement to develop a nation-to-nation relationship with the government of Canada, represented by Crown-Indigenous Relations Minister Carolyn Bennett. Summing up the importance of the agreement, MN-S president Glen McCallum announced that, "all the years that the Métis have been left on the sidelines, for the first time, the federal government and ourselves...have come to the point where real progress is being made."<sup>22</sup>

**But not all framework agreements are created equal. There are effectively two versions of the agreements, each with different degrees of enforcement and permanency.**

The Canada-Métis Nation Accord is the more formalized of the two as it establishes a "permanent bilateral mechanism" that institutionalizes bi-annual meetings between the ministers of the government of Canada and ministers of the MNC, including an annual meeting with the Prime Minister of Canada.<sup>23</sup> The Accord also includes several agreed-upon "areas for co-development and negotiation" which provide high-level oversight of on-going policy concerns by all parties. And while each agreement includes the language of a "nation-to-nation, government-to-government" the Accord identifies the Métis National Council's governing structure as enabling the Métis nation itself. In its permanency and focus on meetings between the executives of each party, the Accord serves as a kind of

high-level framework for other, sub-national Métis-Canada frameworks. Moreover, the Accord is signed by the six presidents of the Métis National Council and its governing members and the Canadian Prime Minister, whereas the other agreements are signed by the Minister of Crown-Indigenous Relations. The sub-national organization-specific frameworks seem focus on much more practical concerns of policy, governmental mechanics, and commitments to “interest-based negotiation processes,” with meetings every 6-8 weeks to discuss areas of common concern that will culminate ideally in a Final Agreement.<sup>24</sup> In these negotiations there is less emphasis on executive involvement and much more of a focus on engaging policymakers and civil servants in discussions.<sup>25</sup>

**While none of the frameworks “create any legally enforceable obligations,” as stated above, they do provide opportunities for dialogue and negotiation between Métis organizations and the government of Canada.<sup>26</sup>**

Indeed, these agreements have the potential to begin discussions on Métis rights with the government of Canada, a reality that only a few years before was virtually impossible. While the outcome of these processes is uncertain – and it is easy to be cynical given First Nations experiences with similar processes as limiting and prone to stalemate – there is cause for some hope. This moment, or “window”, may allow Métis to move the bar and change the discourse on Métis rights. To date there have been so few opportunities for Métis-federal dialogue to produce a stalemate, let alone consensus on how to produce a limited form of reconciliation between Canadians and Métis. As such, the Accord and related framework agreements is likely a necessary and advantageous process to engage in.

#### THE FUTURE OF MÉTIS-CANADA RELATIONS

The emerging *Recognition and Implementation of Rights Framework* presents Métis with a “window of opportunity,” a landmark moment like the recognition and affirmation of Métis Aboriginal rights in Section 35. Yet, there is a trend to be cautious of here. History shows us that every time one of these windows of opportunity opens, the immediate effect is to ease tension, usher relief and optimism, and then soon after the window begins to close, returning to a new but equally stubborn status quo in the relationship. The aspirations of Indigenous peoples are once again limited by Canadian institutions that seek only “clarity and certainty” of Indigenous rights in ways that nest Indigenous self-determination firmly in the Canadian constitutional order and not as independent peoples.<sup>27</sup>

Indeed, after constitutional patriation in 1982, and the recognition of “existing aboriginal and treaty rights”, optimism gave way to frustration as few Canadian governments were willing to work to give this new relationship meaning. Indigenous involvement in the Royal Commission on Aboriginal Peoples in the early 1990s produced a more optimism on the future of self-government, only to have the report mostly shelved by a Chretien government. The optimism of our current moment – from the *United Nations Declaration on the Rights of Indigenous Peoples* to the Truth and Reconciliation Commission – is also in danger of waning and giving way, once again, to a potential reality that few substantial changes will result from the dramatic shift in reconciliatory rhetoric, the growing number of Canadians for whom Indigenous self-determination matters, and new government policy on recognition.

**If history is any indication, Métis governments will make some important gains in administrative control and a regularized relationship with Canada’s federal government. But ultimately Canada’s insistence on reinforcing its own sovereignty will also work to limit Métis governance capacity and jurisdiction on areas important to Métis people.**

Nonetheless, these are important steps to take, as Métis political futures require that we formalize our relationship with Canada and that we work towards the growth of our political independence, not least because there have been precious few opportunities for Métis-Canada negotiation since 1870. Perhaps the ultimate question to ask, beyond the pragmatic need for increased funding and service delivery capacity, is whether a Canadian recognition framework can ever really accommodate Métis dreams of our collective freedom.

## ENDNOTES

- <sup>1</sup>“Government of Canada to create Recognition and Implementation of Rights Framework,” *Press Release*, February 14, 2018.
- <sup>2</sup> See Janique Dubois and Kelly Saunders, “Explaining the resurgence of Métis rights: Making the most of ‘windows of opportunity,’” *Canadian Public Administration* 60(1): 48-67. March 2017: 60.
- <sup>3</sup>Section 31 of the *Manitoba Act, 1870* reads: “And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents...”
- <sup>4</sup>For a more detailed analysis see Adam Gaudry, “‘free men consenting to unite with Canada’: A shared vision for Manitoba,” in *Kaa-tipeyimishoyaak – ‘We are those who own ourselves’: A Political History of Métis Self-Determination in the North-West, 1830-1870*. Dissertation, University of Victoria, 2014: 316-366.
- <sup>5</sup>S.35 reads in part: “(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.” Canada, *Constitution Act, 1982*.
- <sup>6</sup>See Darren O’Toole, “Manitoba Métis Federation Inc. v. Canada (Attorney General): Breathing New Life into the ‘Empty Box’ Doctrine of ‘Indian Title,’” *Alberta Law Review* 52(3): 669-688. 2015.
- <sup>7</sup>Supreme Court of Canada, *R. v. Powley*, 2003: 43.
- <sup>8</sup>Supreme Court of Canada, *MMF v. Canada*, 2013: 14.
- <sup>9</sup>Thomas Isaac, *A Matter of National and Constitutional Import: Report on the Minister’s Special Representative on Reconciliation with Métis: Section 35 Métis Rights and the Manitoba Métis Federation Decision*. Indigenous and Northern Affairs Canada, 2016: 1.
- <sup>10</sup>Isaac, 2016: 3.
- <sup>11</sup>Isaac, 2016: 14.
- <sup>12</sup>Isaac, 2016: 25.
- <sup>13</sup>Isaac, 2016: 27.
- <sup>14</sup>Isaac, 2016: 28-29.
- <sup>15</sup>Isaac, 2016: 34.
- <sup>16</sup>Supreme Court of Canada, *Daniels v Canada (Indian Affairs and Northern Development)* 2016: 12.
- <sup>17</sup>“Canada and Manitoba Métis Federation Celebrate Key Milestone on Road to Reconciliation,” *Press Release*, Government of Canada, November 15, 2016.
- <sup>18</sup>More recently, on March 19, 2018 the Métis National Council discussed the implementation of the Trudeau government’s budget priorities using this bilateral mechanism, in a number of policy areas that represent over \$800 million in federal funding allocated to Métis-specific programs. “Canada and the Métis Nation move forward on Canada-Métis Nation Accord,” *Press Release*, Government of Canada, March 19, 2108
- <sup>19</sup>Audrey Poitras, “A new Chapter in Canada’s Relationship with Alberta’s Métis, Opinion Editorial, *Edmonton Journal*, November 24, 2017.
- <sup>20</sup>“Canada, Ontario and Métis Nation of Ontario sign Framework Agreement for Advancing Reconciliation,” *Press Release*, Indigenous and Northern Affairs Canada, December 11, 2017
- <sup>21</sup>“Canada and the Métis Settlements General Council moving forward on reconciliation with signing of Memorandum of Understanding,” *Press Release*, Indigenous and Northern Affairs Canada, December 14, 2017.
- <sup>22</sup>Betty Ann Adam, “Métis Nation, Ottawa sign historic agreement to negotiate,” *Saskatoon Star-Phoenix*, July 20, 2018.
- <sup>23</sup>Canada-Métis Nation Accord, Government of Canada and the Métis National Council, April 13, 2017.
- <sup>24</sup>Framework Agreement for Advancing Reconciliation, Government of Canada and the Métis Nation of Alberta, 16 November, 2017: 5, 8.

<sup>25</sup>Several of these frameworks also involved parallel frameworks with the provinces, including the governments of Alberta and Ontario, to cover a broader range of jurisdictional and policy areas. So this shift may also foster more engaged relationships with other governments as well.

<sup>26</sup>Framework Agreement for Advancing Reconciliation, Government of Canada and the Métis Nation of Alberta, 16 November, 2017: 8.

<sup>27</sup>Hayden King and Shiri Pasternak, *Canada's Emerging Indigenous Rights Framework: A Critical Analysis*, Yellowhead Institute, 2018.