Court File No.: 35945

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

HARRY DANIELS, GABRIEL DANIELS, LEAH GARDINER, TERRY JOUDREY and THE CONGRESS OF ABORIGINAL PEOPLES

Appellants
(Respondents on Cross-Appeal)

- and -

HER MAJESTY THE QUEEN as represented by THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT and THE ATTORNEY GENERAL OF CANADA

Respondents
(Appellants on Cross-Appeal)

FACTUM OF THE INTERVENER MÉTIS NATIONAL COUNCIL

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AGENT FOR THE INTERVENER MÉTIS NATIONAL COUNCIL

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1. This appeal is about removing a longstanding obstacle to reconciliation with the Métis Nation and its communities as required by s. 35 of the *Constitution Act, 1982*;[1] namely—the respondent's ("Canada") refusal to acknowledge that the Métis are included within s. 91(24) of the *Constitution Act, 1867*. The Métis National Council ("MNC") intervenes in support of this Court issuing: (i) the Federal Court of Appeal's ("FCA") declaration on Métis inclusion in s. 91(24), and, (ii) the appellants' ("CAP") proposed third declaration in a modified form.[2]

PART I – STATEMENT OF FACTS

2. The MNC accepts the facts in CAP's factum, but adds that this Court has previously acknowledged that in the late 1700s a distinct "[I]ndigenous people"—known as the Métis (*i.e.*, the Métis Nation)—emerged mainly on the prairies (present day Manitoba, Saskatchewan and Alberta). This Métis people developed its own group identity, language (Michif), culture and forms of self-governance throughout the inter-related communities and territory of their Homeland, an area that extends into Ontario, British Columbia, the Northwest Territories and the northern United States that are contiguous to the prairie provinces.[3]

3. The MNC is mandated to represent the Métis Nation within Canada at the national level.[4] The trial judge found that in March 1983 "the prairie Métis either left or were expelled" from CAP's predecessor organization and formed the MNC.[5] Since then, the MNC has been recognized by successive federal governments as the legitimate representative for engagement with the Métis Nation nationally, in particular regarding constitutional reforms that have the potential to affect the rights, interests and claims of the Métis.[6]

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[1] Twenty years ago, the Royal Commission on Aboriginal Peoples ("RCAP") identified three legal issues: recognition of Métis s.35 rights (*R. v. Powley*, [2003] 2 SCR 207 [*Powley*]); recognition of outstanding Métis claims (*Manitoba Métis Federation Inc. v. Canada*, [2013] 1 SCR 623[*MMF*]); and recognition of Métis inclusion in s. 91(24) (this appeal) as key to reconciliation with the Métis. See *RCAP Report*, Vol 4 at 217-220, 245-249, 209-210.

[2] The MNC makes no submissions on the non-status Indian issues raised in this appeal. If this Court reinstates that declaration, however, the MNC submits that the Métis and non-status Indian declarations should be issued separately in order to not confuse or conflate two distinct subjects (*i.e.*, 'Métis' and 'non-status Indians').

[3] *MMF* at paras 2, 21; *R. v. Blais*, [2003] 2 SCR 236 at para 9; *Alberta v. Cunningham*, [2011] 2 SCR 670 at paras 5-6, 54, 65-70. See also *RCAP Report*, Vol. 4 at 203-204, 220.

[4] The Métis Nation of Ontario, Manitoba Métis Federation, Métis Nation-Saskatchewan, Métis Nation of Alberta and the Métis Nation British Columbia form the MNC and mandate it as the Métis Nation's national body.

[5] Trial Decision at para 487.

[6] For ongoing federal recognition of the MNC see: Appeal Book, Vol 52, 4423; Appeal Book, Vol 101, 12688; Appeal Book, Vol 118, 15916; Appeal Book, vol 95, 11833; Appeal Book, Vol 118, 15948; Appeal Book, Vol 119, 1607. In 1992, as a part of the Charlottetown Accord constitutional process, the MNC negotiated the Métis Nation Accord with Canada, the five westernmost provinces and the NWT (RCAP, Vol. 4 at 206, 230, 376-382).

4. The evidence shows that the CAP/MNC "split" was due to a fundamental disagreement about who the Métis are—their emergence, geography and identity:

> There is a serious dispute between MNC and the NCC [now CAP] as to which organization is the legitimate representative of the Métis people. In part, this turns on the definition of the term 'Métis'; the MNC argue for a definition based on the historical or geographic evolution of Métis. … The NCC would accommodate all individuals of mixed ancestry throughout Canada.[7]

5. This Court has rejected that the Métis are simply "mixed Aboriginal ancestry" individuals or groups.[8] At trial, CAP advanced a "mixed Aboriginal ancestry" approach to Métis for the purposes of s. 91(24).[9] The trial judge accepted that approach and issued a declaration based on it.[10] On appeal, the Métis Nation intervened to outline its concerns with that approach and the FCA issued a modified declaration.[11] The MNC supports the FCA's judgment and declaration.

PART II – APPEAL ISSUES

6. The MNC makes arguments on: (i) s. 91(24)'s purpose and role in Métis reconciliation; (ii) Métis inclusion in s. 91(24); (iii) the Métis in s. 91(24); and, (iv) the duty to negotiate.

PART III – ARGUMENT

A. Section 91(24)'s Purpose and Necessary Role in Reconciliation with the Métis

7. In 1867, Canada inherited from the Imperial Crown a series of legal and equitable obligations that required it to recognize, accept and honorably deal with prior Aboriginal occupation. These obligations burdened the country's settlement, development and expansion in the original colonies and acquired territories. They compelled the Crown to take positive and concrete steps to reconcile pre-existing Aboriginal interests with Canadian sovereignty, and they continue to obligate the Crown to this day.[12]

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7 Briefing Note for Constitutional Conference, 1984 (Appeal Book, Vol 35, 1431, Trial Exhibit P52 at 1435).

8 *Powley* at para 10; *Cunningham* at paras 80, 86.

9 CAP's Amended Statement of Claim, para. 17 (Appeal Book, Vol 2, 31 at 38-39).

10 See Trial Decision at paras 124-130 and the trial judge's declaration "that those persons who are Métis and those who are non-status Indians as set forth in the Reasons for Judgment" are within s.91(24).

11 The MNC and other Métis Nation governments intervened at the FCA. Appeal Decision at paras. 3, 5, 159.

12 These obligations included the honour of the Crown, the *Royal Proclamation*'s commitments, the common law's recognition of pre-existing Aboriginal law and customs, *etc*. See *R. v. Van der Peet*, [1996] 2 SCR 507 at paras 268-272; *Ross River Dena Council v. Canada*, [2002] 2 SCR 816 at paras 54-66; *Tsilhqot'in Nation v. British Columbia*, [2014] 2 SCR 257 at paras 14, 35, 41, 69. For the Métis Nation outside of the original province of Manitoba, these obligations were constitutionally entrenched in relation to their application to Rupert's Land and the Northwestern-Territory through the 1870 Imperial Order (which includes the 1867 Address) and operation of s.146 of the *Constitution Act, 1867* (Appeal Book, Vol. 36, 9872 and 9875).

8. Within these Crown obligations was the Imperial Crown's "responsibility" for treaty making with the "aboriginal societies" it encountered.[13] At confederation, Canada—as the national government—assumed this unique treaty-making responsibility on behalf of the Crown.[14] The federal Crown (*i.e.*, executive branch) was honour-bound—through the exercise of the royal prerogative—to conclude treaties or other arrangements that reconciled Aboriginal interests with Canadian sovereignty.[15] Section 91(24) was the corresponding federal power for Parliament to legislatively act in relation to these obligations with respect to the "welfare of Canada's aboriginal peoples"[16] and to give legal force and effect to treaties or other federal initiatives that attempted to fulfill the federal Crown's obligations owing to Aboriginal peoples.[17]

9. In modern times, Canada continues to be tasked with treaty making "in the interests of the Dominion as a whole." Parliament's "exclusive Legislative Authority" to deal with "Indians" endures in our constitutional architecture as the federal Crown's legislative partner in fulfilling its ongoing treaty-making responsibility.[18] Through modern day treaty settlement legislation, the federal Crown's obligations owing to an Aboriginal group that previously burdened the royal prerogative are transferred to ensuring honourable implementation of a treaty. Although other levels of government are now necessary treaty partners based on their respective spheres of jurisdictions and cooperative federalism,[19] federal leadership and participation in treaty-making remains essential because of Canada's inherited obligations and Parliament's unique legislative authority (*i.e.*, s. 91(24) to give legal force and effect to treaties with Aboriginal peoples.

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[13] Peter Hogg, *Constitutional Law of Canada* at 28-2; *Van der Peet* at 268, 270-272, 275.

[14] Today, there are nearly 100 recognized historic and modern day treaties with Aboriginal peoples across Canada. Since 1867, Canada has been a party to all of these treaties. For Canada's distinct treaty-making role "in the interests of the Dominion as a whole" see: *Canada v. Ontario*, [1910] AC 637 at 644-645. For Canada's necessary role in "surrenders" or "conversions" of Aboriginal title or rights in treaty making (being distinct from an infringement under s.35) see: *R. v. Howard*, [1994] 2 SCR 299 at 308; *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at para 173; *Paul v. British Columbia*, [2003] 2 SCR 585 at para 28.

[15] For the Métis Nation, Canada's "less clear" policies led to various "solemn promises" to deal with the Métis (*e.g.*, Treaty Commission Robinson's promises to Métis at Sault Ste. Marie (1850), s. 31 of the *Manitoba Act* (1870), the Treaty 3 Halfbreed Adhesion (1875), the 1870 Imperial Order and the resulting Métis scrip system (1872-1921), *etc.*) See *MMF* at paras 4, 44, 70-71, 92, 98; *Cunningham* at paras 6-8.

[16] *Delgamuukw* at para 176; *Mitchell v. Peguis Band*, [1990] 2 SCR 85 at 108-09; *Cunningham* at para 6.

[17] For example, see s. 31 of the *Manitoba Act, 1870*, which was passed by Parliament and directed at reconciling the Métis "Aboriginal interest" in Manitoba with "Crown sovereignty" (*MMF* at paras 9, 44).

[18] For this Crown/Parliament nexus in treaty-making and implementation today see: *Sahtu Dene and Métis Agreement* ["*Sahtu Agreement*"], ss. 3.1.2-3.1.3, wherein it states "Canada shall recommend to Parliament that this agreement be approved, given effect and declared valid by legislation" or the treaty shall be "null and void."

[19] Federally-led treaty-making processes now include relevant provinces and territories. Today, Parliament and other legislatures often pass concurrent legislation to implement modern day treaties (e.g., *Nisga'a Final Agreement Act*, SBC 1999, c. 2 and *Nisga'a Final Agreement Act*, SC 2000, c. 7).

10. Canada argues that the question of Métis inclusion in s. 91(24) is abstract, academic and antiquated in the age of s. 35.[20] Not so. While s. 35 provides the impetus for reconciliation and the "constitutional base upon which subsequent negotiations can take place," s. 91(24) endures as the means through which Parliament gives legal force and effect to the "just and lasting settlement[s]" (*i.e.,* treaties) that flow from these negotiations.[21] Over the last 40 years, Parliament has given legal effect to every modern day treaty negotiated with Aboriginal peoples (some that include the Métis) based on s. 91(24)'s certainty.[22] Without Métis inclusion in s. 91(24), s. 35's promise of renewed treaty making, which this Court has confirmed applies to *all* Aboriginal peoples,[23] will be thwarted or denied to the Métis south of 60°. Métis would be left with recognized claims and rights, but no meaningful remedy (*i.e.*, treaties). This cannot be. This is why the FCA's declaration is necessary and of great practical utility.

B. The Courts Below Correctly Concluded Métis Are Included in Section 91(24)

i. Section 35 Confirms Métis Inclusion in Section 91(24)

11. While the evidence in this appeal demonstrates that Canada historically legislated with respect to the "Indian title" of the Métis and continued to deal with these Métis interests for almost 50 years,[24] this Court has recognized that past government approaches either failed to deal with pre-existing, collectively-held Métis rights[25] (that continue as existing Aboriginal

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[20] Canada's Factum, paras. 82-83.

[21] *R. v. Sparrow*, [1990] 1 SCR 1075 at para 53; *Van der Peet* at 230; *Haida Nation v. BC*, [2004] 3 SCR 511.

[22] Since 1973, all of the modern day treaties have been given legal force and effect by Parliament through settlement legislation (*e.g., Tłı̨chǫ Land Claim Act*, S.C. 2005, c. 1.). Notably, Métis north of 60° are included in modern day treaty making. The *Gwichin Agreement* (1992) and *Sahtu Agreement* (1993) include Métis, wherein they "cede, release and surrender" their claims in relation to "any Imperial or Canadian legislation … in relation to Métis or half-breed scrip…" in exchange for treaty rights (*Sahtu Agreement*, s. 3.1.12). The evidence also shows that the Northwest Territories Métis Nation is negotiating with Canada and NWT directly. The arbitrariness and inconsistency of Canada's approach, which excludes any negotiations with Métis south of 60° despite similar "historical circumstances", is readily acknowledged by federal officials (Appeal Book, Vol 43, 2956 at 2958).

[23] This Court has held that "treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35" (*Haida* at paras 20, 25). It has also held Métis communities hold Aboriginal rights *qua* Métis that are protected by s. 35 (*Powley* at para 18) and that outstanding Métis grievances rooted in the "reconciliation of the Métis people with Canadian sovereignty" exist (*MMF* at para 140). See also Appeal Decision at para 72.

[24] For example, see s. 31 of the *Manitoba Act, 1870* (Métis land grants "towards the extinguishment of the Indian title"), which this Court recognized was specifically made to the Métis as an "Aboriginal group" (*MMF* at paras 91-95) as well as the Métis scrip system based on 1870 Order's commitments (*i.e., Dominion Lands Act, 1879*, 42 Vict c 31, s. 125, "to satisfy any claims existing in connection with the extinguishment of the Indian title, preferred by half-breeds resident in the North-West Territories…" and with 1899 amendments [s. 90(f)]). Within western Canada, these Métis land grant and scrip processes operated from 1870 to 1921.

[25] *Powley* at paras 35, 46; *Cunningham* at para 7. For example, Métis argue that scrip, which dealt with Métis on an individualized basis, was not capable of extinguishing collectively-held Métis title or rights flowing from their pre-existing relationship to the land. For this type of Métis claim see: *Morin v. Canada*, SKQB No. 619/1994.

rights *qua* Métis) or failed to honourably implement the commitments that were made to the Métis (that continue as a "constitutional grievance").[26] In *Powley*, *Cunningham* and *MMF*, s. 35 informed this Court's final determinations. In this appeal, s. 35 also provides an answer to the question before this Court as set out below.

12. In 1939, a majority of this Court confirmed that the term "Indians" in s. 91(24) was meant to include *all* "aborigines" that were within Canada in 1867 as well as those within territories subsequently acquired.[27] In 1982, with that judicial clarity on s. 91(24)'s scope, Canada constitutionally confirmed the pre-existing fact that the Métis were *always* one of this country's "Aboriginal peoples." With s. 35, any uncertainty about the Métis as "Aboriginal," "aborigines," "Indigenous" or "Indians within s. 91(24)" disappeared. Parliament has already spoken. This Court is only confirming the historic fact that s. 35 validates. This approach to Métis inclusion does not expand s. 91(24)'s scope in any way. It simply confirms the Métis were *always* within s. 91(24), as one of Canada's constitutionally-recognized "Aboriginal peoples."

ii. This Court's Relevant Precedent on Section 91(24) Supports Métis Inclusion

13. Canada's arguments that the Métis are excluded from s. 91(24) because of their "distinctiveness as an Aboriginal people" are inconsistent with the legal analysis and practical effects of this Court's only analogous precedent in interpreting s. 91(24)—*Re Eskimo*. In 1939, this Court confirmed that s. 91(24)'s scope is not limited to those Aboriginal peoples who had historic treaties, who were under the *Indian Act* or who had "lands reserved" for them prior to the 20th Century. It also confirmed that inclusion in s. 91(24) is not limited to Aboriginal groups who are historically, culturally or ancestrally connected to "Indian peoples" in any way.[28] Canada conveniently ignores how its "lack of Indianness" and "continuity of language" concerns with respect to Métis inclusion apply equally to the Inuit; yet, the Inuit have been recognized as "Indians" within s. 91(24) for 76 years without constitutional calamity or unworkable results.

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[26] *MMF* at paras 128, 140. Métis also assert the scrip system was implemented in a manner that effectively defeated the 1870 Order's "solemn promise" and results in an outstanding claim against the federal Crown. "[T]he history of scrip speculation and devaluation [as] a sorry chapter in our nation's history" (*R. v. Blais*, [2003] 2 SCR 236 at para 34) has been acknowledged by this Court as well as Canada (*e.g., Sahtu Agreement*, s. 3.1.12).

[27] *Reference re: BNA, 1867 (U.K.), s. 91*, [1939] SCR 104 at 106-107,114-119 ["*Re Eskimo*"] (*e.g.*, "in these documents, "Indians" is used synonymous with "aborigines"; the term "Indian" was employed by well established usage including these [Eskimo] and other aborigines"; "Indians .. included the present and future aborigines" *etc*.)

[28] *Re Eskimo* at 116-117. For Canada's arguments on this point see Canada's Factum at paras 88, 143.

14. Contrary to Canada's concerns, this Court's inclusion of the Inuit in s. 91(24) validated their unique history and identity as a distinct Aboriginal people, and encouraged meaningful reconciliation with them. While the recognition and settlement of Inuit rights and claims did not begin in earnest until the 1970s, this country is now witness to five Inuit land claims agreements, which span their vast territory and provide the basis for ongoing reconciliation with them for generations to come.[29] All of these Inuit agreements—given legal force and effect by Parliament with s. 91(24)'s legislative certainty—confirm Inuit are a "distinct Aboriginal people"; they "did not identify as Indians"; they "do not identify as Indians"; yet, they are "Indians" within s. 91(24).[30] Canada expresses no concern and, in fact, accepts that these somewhat conflicting historic, legal and constitutional realities can be easily reconciled for the Inuit. It asserts, however, these same realities become unworkable for the Métis. Nonsense. This Court has already confirmed that Inuit—as a distinct Aboriginal people—can fit soundly within s. 91(24). So too can the Métis.

iii. The Practical Need for Métis Inclusion in Section 91(24)

15. While s. 91(24) is the necessary legislative complement to Canada's treaty-making responsibility, there are other practical reasons why s. 91(24) is needed for reconciliation with the Métis in modern times. Firstly, in the cases recognizing Métis harvesting rights, courts have consistently found Métis communities and their territories cross provincial boundaries.[31] Canada is the only government that has the ability and capacity to bring Métis and provincial jurisdictions together to deal with these issues in a coordinated way as well as pass legislation that recognizes Métis rights across present day provincial boundaries. This is a unique role that only the national government can play.[32] If Canada does not play this role, a "crazy patchwork" of legislation on Métis rights will emerge between provinces, which will effectively deny the full scope of Métis rights and ignore the Métis perspective on their rights.[33]

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[29] *James Bay Northern Quebec Agreement* (1975), *Inuvialuit Agreement* (1984), *Nunavut Land Claims Agreement* (1993), *Labrador Inuit Agreement* (2003), *Nunavik Agreement* (2006) and *Nunavut Act*, S.C. 1993, c. 28.

[30] See *e.g.*, *Labrador Inuit Agreement*, Preamble and s. 2.3.1.

[31] See *e.g.*, *R. v. Goodon*, 2008 MBPC 59 at paras 33-36; *R. v. Laviolette*, 2005 SKPC 70 at paras 21-30.

[32] Notably, Canada already plays this role in trans-boundary negotiations between provinces and territories in order to ensure Aboriginal rights are fully recognized (*e.g.*, *Carcross/Tagish First Nation Final Agreement*, Ch. 25).

[33] Modern day provincial boundaries cannot arbitrarily define Métis s.35 rights, but without Canada playing a coordinating role the full scope of Métis rights may be denied or defeated through "awkward patchworks" (*R. v. Coté*, [1996] 3 SCR 139 at para 53). This effectively denies the Métis perspective on their rights and is inconsistent with this Court's s. 35 jurisprudence (*Van der Peet* at para 287; *Tsilhqot'in* at paras 32, 34-36, 49, 81).

16. Secondly, it is Canada that is implicated in many outstanding Métis claims. In *MMF*, this Court declared that the "federal Crown" breached the honour of the Crown in the implementation of s. 31 of the *Manitoba Act, 1870*.[34] As discussed above, other outstanding Métis claims such as those flowing from the Métis scrip system, the Treaty 3 Halfbreed Adhesion or Treaty Commissioner Robinson's unfulfilled commitments to the Sault Ste. Marie Métis similarly implicate Canada.[35] As with First Nations, Inuit and the Métis north of 60°, the settlement of outstanding Métis claims will require Canada's participation and s. 91(24)'s legal force.[36]

C. The Court Below Correctly Modified the Trial Judge's Declaration on Métis

17. The FCA's modified declaration is consistent with this Court's judgment in *Re Eskimo* and should be upheld. The MNC disagrees with Canada's submissions on this issue. It also disagrees with CAP that the FCA took "an unduly narrow approach to Métis [in s. 91(24)]."[37] The fundamental question underlying this declaration is whether the Métis—as a subject matter—are included in s. 91(24). This Court need not go further than answering that question. A Métis people or community, along with the members of those collectives, are within s. 91(24)'s scope by virtue of: (1) meeting the *Powley* test, or, (2) through Crown recognition as Métis.[38] Accordingly, the declaration need only state that "the Métis" are included in s. 91(24).

18. In this appeal, CAP attempts to reinvigorate the trial judge's confusion and lack of clarity in the first declaration, which is grounded on a "mixed Aboriginal ancestry" approach to Métis. CAP argues that "s. 91(24) Métis" need not be connected to Métis collectives and that Métis inclusion in s. 91(24) can be understood through their heredity to "Indian peoples."[39] These approaches should be rejected by this Court for the reasons that follow.

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[34] *MMF*, *supra* at paras. 154, 137. [Emphasis added.]

[35] For a few examples see MNC Factum at para 11 (failure of Métis scrip system to fulfill commitments in the 1870 Order made to Métis); Appeal Decision, para 42 (Treaty 3 Métis being denied their promised reserves and rights *as* Métis); *R. v. Powley*, [1998] O.J. No. 5310 (Ct J) at paras 54-57 (Treaty Commissioner Robinson's commitments to allow Sault Ste Marie Métis 'free & full possession of their lands on which they now reside.').

[36] As noted above, Canada has resolved Métis claims flowing from "Métis or half-breed scrip or money for scrip" through treaties (*Sahtu Agreement*, s. 3.1.12). Similarly, First Nations and Inuit deal with their outstanding historic claims against the federal Crown and their existing s.35 Aboriginal rights in modern treaties.

[37] CAP's Factum at paras 61-76.

[38] For example, a Métis community or group need not first establish Métis rights in judicial proceedings in order to be recognized by the Crown as Métis for the purposes of a negotiated agreement or legislative recognition (*e.g.*, *Métis Settlements Act*, RSA 2000, c. M-14, *The Métis Act*, SS 2001, c M-14.01).

[39] CAP's Factum at paras 15, 68, 71-73.

i. Section 91(24) Includes Aboriginal Collectives, Not Individuals

19. The historic relationship between Canada and Aboriginal peoples—as collectives—"stretches back through the ages."[40] These obligations—owing to Aboriginal groups—are consistently reflected in constitutional obligations and commitments both old and new.[41] This constitutional constant must inform any interpretation of s. 91(24).

20. CAP's attempt to define the Métis included in s. 91(24) as "individuals" with some "Indian" heredity or filiation is inconsistent with s. 35, which recognizes distinct Aboriginal peoples.[42] This type of "derivative" approach to Métis identification and rights was rejected in *Powley*.[43] It must not be reinvigorated through s. 91(24). Moreover, CAP's approach will lead to unworkable constitutional results. For example, "s. 91(24) Métis" (who only need to self-identify as Métis and demonstrate "Indian" heredity) and "s. 35 Métis" (who self-identify as Métis and are ancestrally connected to and accepted by a Métis community) could be entirely different individuals and groups. If adopted, these "dueling tests directed at answering the same question"—namely, 'who are the Métis for constitutional purposes'—will produce "uneven, undesirable and unpredictable results."[44] This approach must be rejected in the age of s. 35.

21. While CAP cites examples of federal legislation focused on "individuals," it ignores that these individuals were within s. 91(24)'s purview because they *were connected* to Aboriginal groups.[45] If not, these individuals may not have been Aboriginal at all.[46]

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[40] "Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles" (*Reference re Quebec*, [1998] 2 SCR 217 at para 49).

[41] For example, the *Royal Proclamation* sets out the Crown's obligations to "the several Nations and tribes of Indians with whom We are connected." This Court has recognized the honour of the Crown flows from "the assertion of sovereignty over an Aboriginal people and de facto control of the land and resources that were formerly in control of that people" (*Haida* at para 32; *MMF* at para 91). Section 35 recognizes "aboriginal peoples" and this Court has consistently recognized the "special relationship of the Crown and Aboriginal peoples as peoples", including, constitutional duties owing to Aboriginal collectives—not individuals (*Beckman v. Little Salmon/Carmacks First Nation* at paras 35, 122; *Behn v. Moulton Contracting* at para 30). [Emphasis added.]

[42] CAP Factum, paras 67-76.

[43] *Powley* at para 10; *Cunningham* at paras 5-6, 70, 75, 80. For a discussion on why this type of "derivative" approach must be rejected based on s. 35 see: *R. v. Powley*, [2001] 53 OR (3d) 35 (CA) at paras 98-105.

[44] *Tsilhqot'in* at paras 146-147. While different parts of the Constitution do not need to mean the same thing, they must inform each other and not lead to illogical and unworkable results: *Reference re Quebec* at para 50; *Reference re Senate Reform*, [2014] 1 SCR 704 at para 26.

[45] CAP Factum, para 68. Individuals were reinstated under Bill C-31 because their ancestors were historically connected to First Nations—not simply because they had some "Indian" blood. Individuals that moved between Indian treaty and Métis scrip made choices about which group they identified with at a given time.

[46] *Cunningham* at para 86. See also RCAP which concludes "[m]any Canadians have mixed Aboriginal/non-Aboriginal ancestry, but that does not make them Métis or even Aboriginal" (*RCAP Report* at 202).

ii. *Powley* is Not "Restrictive" and Must Inform Section 91(24)

22. In *Powley*, this Court established a workable and durable framework for identifying the Métis and their rights for the purposes of s. 35. *Powley* allows for Métis "diversity," however, it confirms that Métis are not simply "mixed Aboriginal ancestry" individuals or groups that now self-identify as Métis.[47] This *Grundnorm* of Métis constitutional law must inform s. 91(24).

23. Contrary to CAP's claims that *Powley* is too "restrictive" and "[v]ery few Métis communities" have met success, Métis rights have been recognized or accommodated in significant parts of Ontario, Manitoba, Saskatchewan, Alberta and the Northwest Territories.[48] While litigants in other parts of Canada may not have met success, the case law suggests that the problem may be the facts of history for those groups—not the *Powley* framework.[49]

iii. *Canard*'s Approach to Section 91(24) is Not Required

24. CAP urges this Court to follow *Canard*, which adopts a racial affiliation approach to s. 91(24). *Canard* was decided in 1976—before s. 35's recognition of Indians, Inuit and Métis as distinct Aboriginal peoples. Its approach, which involves defining Métis in s. 91(24) through their heredity or filiation to "Indian peoples", is inconsistent with s. 35, this Court's jurisprudence and international norms.[50] It also denies the important role the Métis have in defining their communities.[51] *Canard* need not and should not be followed in this appeal.

D. The Third Declaration on the Duty to Negotiate Should Be Modified and Issued

25. As outlined above, the uncontested evidence in this appeal is that modern day treaty making and reconciliation between Canada and the Métis south of 60° is not happening. This is the fundamental injustice that animates this important litigation.

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47 *Powley* at paras 10-11; *Cunningham* at paras 80-82.

48 See Ontario [*Powley*; *R. v. Laurin*, 2007 ONCJ 265]; Manitoba [*Goodon*]; Saskatchewan [*R. v. Morin*, [1996] SJ No 262 (Prov Ct), aff'd [1997] S.J. No. 529 (Sask. Q.B.); *Laviolette*; *R. v. Belhumeur*, 2007 SKPC 11]; Alberta [*L'Hirondelle v. Alberta*, 2011 ABQB 646 (Appendix A: Alberta's Métis Harvesting Policy); *R. v. Hirsekorn*, 2010 ABPC 385 at para 115; *Métis Settlements Act*, R.S.A. 2000, c. M-14, ss. 19, 132]; Northwest Territories [*Sahtu Agreement*, ss. 1.1.1(f); *Wildlife Act*, S.N.W.T. 2014, c. 31, ss. 4-7, 26].

49 For three recent eastern Canada examples of many over the last decade see *Québec c. Corneau*, 2015 QCCS 482; *R. v. Vautour* 2015 NBQB 94; *R. v. Babin*, 2013 NSSC 434. Notably, the "Labrador Métis" no longer assert "Métis" rights, but claim Inuit rights: *Nunatukavut v. Newfoundland et al.* 2011 NLTD(G) 44 at para 2.

50 *Powley* at paras 10-11; *Cunningham* at paras 67, 75-76, 80-82; UN Declaration on the Rights of Indigenous Peoples, Resolution 61/295, 13 September 2007, Art. 33(1).

51 *Cunningham* at paras 79-88.

26. In this appeal, Canada has suggested that even if Métis are found to be included in s. 91(24) it may choose to do absolutely nothing.[52] While it is acknowledged that jurisdiction under s. 91(24) does not require that any specific federal legislative action be taken, s. 91(24)'s nexus to treaty making and reconciliation means complete federal inaction is not an option.

27. Over the last 30 years, this Court has recognized that the honour of the Crown, s. 35 and specific fact situations (*i.e.*, both pre- and post-proof of Aboriginal rights and claims) give rise to legally enforceable Crown duties over the continuum of reconciliation.[53] Within this continuum, it has always been assumed that following proof of an Aboriginal right or outstanding claim, the appropriate Crown actor would negotiate with the rights-bearing group. The unchallenged evidence in this appeal, however, shows that this is not happening with the Métis.

28. In order to fill this gap in the constitutional duties recognized by this Court, the MNC submits that the following types of situations give rise to the Crown's duty to negotiate: (i) there is a judicially-recognized Aboriginal right or outstanding legal claim; and, (ii) there is no negotiation process available to that Aboriginal group to have their right or claim meaningfully addressed. This "narrow and circumscribed" duty is rooted in s. 35's purpose and is supported by this Court's existing jurisprudence.[54] It does not give rise to a duty to agree or to ultimately reach a mutually agreeable settlement between the Crown and the Aboriginal group. It does, however, require the Crown to establish and participate in a meaningful negotiation process, in good faith, and in a manner that upholds the honour of the Crown.

29. Very likely, if this corresponding declaration with respect to the Crown's duty to negotiate is not issued, s. 35's purpose and promise to the Métis will continue to be denied.[55] Accordingly, the MNC submits that the proposed third declaration should be issued, but modified as follows: "this Court declares that following judicial recognition of an Aboriginal right or outstanding claim, the Crown has a duty to negotiate, in good faith, with the rights-bearing group in a manner that upholds the honour of the Crown."

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52 Canada's Factum at paras 52, 66-67.

53 For a consolidation of these recognized Crown duties to date see *MMF* at para 73.

54 *MMF* at para 81; *Delgamuukw* at para 186; *Haida* at para 25; *Tsilhqot'in* at para 17.

55 Section 35's structure—as a whole—contemplates the exchange of Aboriginal rights for more clearly defined treaty rights. Without any negotiation process being available to the Métis with rights and claims, s. 35's purpose is defeated. Notably, in *Peepeekisis Band v. Canada*, 2013 FCA 191, paras 59-60, the FCA recognized that the declaration in *MMF* was granted because, unlike First Nations, the Métis had no other recourse available to them (*i.e.*, a negotiation process) in order to "give effect to the honour of the Crown."

PART IV – ORDER REQUESTED

30. The MNC requests that the above-described declarations be issued and that it be granted an opportunity to provide oral argument in this appeal for fifteen (15) minutes.

All of which is respectfully submitted, this 22nd day of July, 2015.

Jason T. Madden

for Clément Chartier, Q.C.

for Kathy Hodgson-Smith

for Marc LeClair

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