

The Debate about Métis Aboriginal Rights— Demography, Geography, and History

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Executive summary

In the 2015 federal election campaign, the Liberal Party promised to engage in “nation to nation” negotiations with the “Métis Nation” to establish Métis self-government and to settle unresolved land claims. Discussions are now under way with the provincial affiliates of the Métis National Council in Alberta, Manitoba, and Ontario. Success, however, will be difficult to attain for reasons of demography, geography, and history.

According to the census, the Métis population has grown explosively, from 178,000 in 1991 to 418,000 in 2011. Most of this growth is not from natural increase but from “ethnic mobility,” that is, people adopting new labels for themselves when they answer census questions. As a result of this particular form of population growth, social and economic indicators for the self-identified Métis population are now converging with Canadian averages. At the same time, the category of non-status Indians, which overlaps with the Métis, has grown even faster, from 87,000 in 1991 to 214,000 in 2011.

The Métis National Council claims to represent the historic Métis, whose roots go back to the fur trade in Rupert’s Land and the Canadian North-West. But these people today are only a minority of those who designate themselves as Métis or non-status Indians. If the government of Canada signs an agreement conferring substantial benefits on the historic Métis, it will be hard to exclude other groups with some degree of Indigenous ancestry. This particularly true now that the Supreme Court of Canada in the *Daniels* decision has held that Métis are Indians under section 91(24) of the Constitution Act, 1867. To determine who will be eligible for benefits, Canada may have to set up a Métis Registry similar in principle to the Indian Registry. That would be an unfortunate further step toward officially classifying Canadians by race.

Geography also poses barriers to Métis self-government. Indigenous self-government in Canada has always had a territorial basis—Indian reserves for the First Nations and the province of Nunavut for the Inuit. But the Métis, no matter how they are defined, are not concentrated in any one city, province, or region. Theoretically, a land base could be set up on unoccupied Crown land, but Métis who have chosen to live in Winnipeg or Edmonton are unlikely to move to a remote rural location for a life of farming, trapping, and lumbering. It may be desirable for provincial or regional Métis organizations to administer some educational, housing, or welfare programs, but that is far removed from genuine self-government and certainly not a basis for “nation to nation” negotiations.

History as well presents serious problems for these negotiations. Métis organizations claim that the distribution of land and scrip in the nineteenth century did not extinguish Métis Aboriginal rights, even though the enabling legislation for these programs justified them in terms of extinguishment. The Supreme Court of Canada has held that in one case, the distribution of land and scrip in Manitoba, administration was so slow and so many mistakes were made as to violate the “Honour of the Crown.” The Court, however, did not prescribe a remedy, nor did it find that Canada had a fiduciary duty to the Métis. Most importantly, the Court has never declared a Métis Aboriginal title to land in the sense of full ownership. The most that the Court has affirmed is harvesting rights in certain situations, which might be useful for a few Métis communities but are largely irrelevant to the hundreds of thousands of Métis and non-status Indians living in the towns and cities of modern Canada.

Governments like to say they have fulfilled their campaign promises but fulfillment in this case may do more harm than good. Implementing this promise threatens to further divide Canada by race, set up new forms of administration falsely labelled as governments, and recognize land claims that go beyond any existing judicial authority.

Preliminary note on terminology

The Manitoba Metis Federation does not use the acute accent on the word “Metis” in its own organizational title, but does use it in publications referring to the Métis people. I have tried to follow their usage in this paper.

The Liberal government elected in 2015 changed the name of the department previously known as Aboriginal Affairs and Northern Development Canada (AANDC) to Indigenous and Northern Affairs Canada (INAC). This corresponds with contemporary usage in the international sphere, where “Indigenous” is the most common term and “Aboriginal” usually refers specifically to the first inhabitants of Australia. However justified this linguistic change may be, it creates a problem for Canadian researchers and writers because the term “Aboriginal” is entrenched in the *Constitution Act, 1982*, as well as in recent court decisions and scholarly commentary. I use “Indigenous” where possible but sometimes use “Aboriginal” for clarity of meaning.

Even thornier issues are associated with the widespread replacement, starting in the 1980s, of the traditional word “Indian” by the new phrase “First Nations” (Flanagan, 2008: 67-88), to the point where “Indian” is now often considered an offensive slur and many writers avoid it altogether. But it remains anchored in the *Constitution Act, 1867*, all iterations of the *Indian Act*, many earlier court decisions, and a vast body of administrative law. Canada continues to maintain an Indian Register, to be listed on which requires meeting specific legal criteria to obtain a certain legal status. To be a Registered Indian is not the same as being a First Nations person; the two groups overlap, but not perfectly. For purposes of clarity in discussing law and administrative practice, there is often no alternative to using the word “Indian”. Similarly, the phrase “Indian band” is still found in legislation and administrative documents and often must be used, rather than “First Nation,” for clarity when discussing organizational topics.

Introduction

During the 2015 election campaign, Liberal Leader Justin Trudeau met with Métis leaders in Winnipeg to announce his “Reconciliation Plan for the Métis Nation.” Beyond some promises of increased funding for social programs, Trudeau said he would “work on a Nation-to-Nation basis with the Métis Nation” to achieve three major objectives:

- ∞ immediately establish a negotiations process between Canada and the Manitoba Metis Federation, in order to settle the outstanding land claim of the Manitoba Métis community, as recognized by the Supreme Court of Canada in *Manitoba Metis Federation v. Canada (AG)*;
- ∞ work with Métis groups, as well as the provinces and territories, to establish a federal claims process that recognizes Métis self-government and resolves outstanding claims; and
- ∞ convert current year-to-year funding, made available to provincial Métis communities for Métis identification and registration, to a permanent initiative. (Liberal Party of Canada, 2015)

Negotiations are now under underway on a province-by-province basis with affiliates of the Métis National Council (MNC) in Alberta (Hampshire, 2017), Manitoba (*CBC News*, 2016), and Ontario (Tasker, 2017). Given the different historical background and legal circumstances in the various provinces, organizing the negotiations on a provincial basis is probably the right way to proceed.

This publication will discuss some of the most important topics that will likely arise in negotiations either immediately or later on. The emphasis will be on complexities unmentioned in the Liberal campaign promises. These difficulties stem from demography (the heterogeneous nature of the Métis population); geography (the fact that Métis people are found in every province and most urban areas); and political history (the nineteenth-century distribution of land and scrip to the Métis, and the unclear nature of Section 35’s guarantee of Métis Aboriginal rights). At this stage, we cannot know what these newly negotiated agreements will look like, let alone whether any agreements will be reached. The purpose of discussing the complexities now is to provide a principled basis

for evaluating any new agreements when they are announced. In Aboriginal affairs, in which litigation and constitutional interpretation are so prevalent, it is essential that agreements have some defensible basis of principle beyond pure political bargaining.

This is an important topic for all citizens, not just for the Métis. In the 2011 *National Household Survey*, 418,380 respondents identified themselves as Métis, and 213,900 as non-status Indians.¹ The total of these two groups, 632,280, is not far from the number who identified themselves as status or treaty Indians—697,505. The federal government is now negotiating with organizations representing the historic Métis of the fur-trade North-West, who are only a portion of those who now identify as Métis. But, if the government offers valuable benefits such as money, land, and social programs to the historic Métis, the number of claimants will likely increase to include other Métis as well as those who now identify as non-status Indians, because there are no clear definitions for categories of Canadians of partly Indian ancestry. Self-identification responds strongly to incentives (Flanagan, 2017; Gwartney, Stroup, Lee, Ferrarini, and Calhoun, 2016). In the long run, Canada could find itself assuming expensive new responsibilities for groups of people whose aggregate numbers rival those of status Indians.

1. The 2011 *National Household Survey* (Statistics Canada, 2011a) was voluntary, which has raised questions about its reliability.

Demography and Destiny

Canada's historic Métis population grew out of the unique circumstances of the fur trade. From the late seventeenth century to the acquisition of Rupert's Land in 1870, northern Ontario, the three Prairie Provinces, and the North-West Territories constituted an immense hinterland dedicated to the fur trade. Marriages, or at least liaisons, with Indian women were required for success in the fur trade, giving rise to a mixed-race population, usually called "Métis" in French and "half-breed" in English.

Some Métis were absorbed into the Indian tribes of their mothers while a few were sent back to England or Quebec to join the White society of their fathers. But most stayed in the North-West to form an occupational caste serving the fur trade. Some worked in the forts, while others manned the boat brigades and cart trains, and provisioned the fur trade with their buffalo hunts. After the 1821 merger of the Hudson's Bay Company and the North West Company reduced the need for forts, many Métis moved to the Red River Colony while others established small settlements throughout the North-West. Today, their descendants number in the hundreds of thousands, although it is impossible to give a precise number, for reasons explained below. Like other Canadians, they have migrated to many parts of the country, though they are still generally concentrated in the Prairie Provinces. Their local and provincial organizations are affiliated with the Métis National Council (MNC), and their leaders generally refer to themselves as the Métis Nation, using nationalist terminology that reaches back to the 1816 Battle of Seven Oaks between Selkirk settlers and local Métis in what is now Manitoba (Ens and Sawchuk, 2016: 71–91).

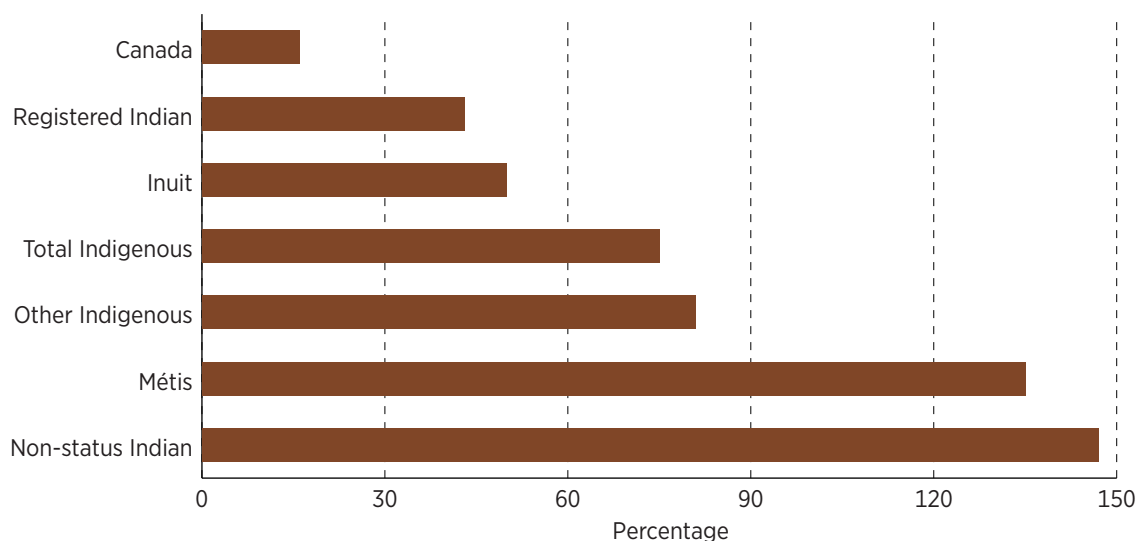
After the entry of Rupert's Land into Canada in 1870, White and Indian people continued to intermarry, with each other and with Métis.² When Indian men married non-Indian women, their wives and children became legally Indian; but Indian women who married non-Indian men (and their children) lost their Indian status under the rules of the *Indian Act*. Thus has arisen a mixed-race population, sometimes called non-status Indians, which overlaps with the historical Métis but is not identical with it. For many, the prime goal has been to regain Indian status, in which they have had some success through litigation and legislative amendment (Flanagan, 2017). Others have started to call themselves

2. Of course, people of Asian and African ancestry, as well as Inuit, also intermarry with Indians and Métis, but in much smaller numbers.

Métis, even though their genealogical links to the Métis of the North-West may be tenuous. Many of these individuals see their interests represented in politics by the Congress of Aboriginal Peoples, which claims to speak for Métis, non-status Indians, and status Indians who no longer live on reserve (Congress of Aboriginal People, undated).

Contemporary demographic trends must be interpreted against this historical backdrop. The numbers of Métis and non-status Indians are growing much faster than any possible natural increase from a surplus of births over deaths. The increase is mainly due to what sociologists call demographic or ethnic mobility, that is, people choosing new ethnic labels for themselves. Professional demographers estimate that 70% to 80% of the growth in the reported Métis population between 1996 and 2011 is the result of ethnic mobility rather than natural increase (Thomas, 2015: 29). **Table 1** shows Statistics Canada's estimates for the so-called Aboriginal Identity population for the census years from 1996 to 2011; **figure 1** presents a more easily understood bar graph showing relative increases for these years.

Figure 1: Cumulative growth (1996 = 100%) of the six Aboriginal categories and the overall Canadian population, 1996–2011



Sources: INAC's Core Tabulations, 1996 to 2006 Censuses and 2011 NHS. Prepared by Statistics Team, Strategic Research and Statistics Directorate, INAC, July 14, 2016. <<http://www12.statcan.gc.ca/census-recensement/2011/dp-pd/hlt-fst/pd-pl/Table-Tableau.cfm?LANG=Eng&T=103&S=50&O=A>>.

People choose how to label themselves when answering census questions. In the 2011 *National Household Survey* (Statistics Canada, 2011a), the first question dealing with Aboriginality is: "Is this person an Aboriginal person, that is, First Nations (North American Indian), Métis or Inuk (Inuit)?" If the answer is yes,

Table 1: Indigenous populations, 1996–2006 censuses and 2011 National Household Survey

	1996	2001	2006	2011	Change 1996–2011 Number	Percentage
Total Aboriginal population	799,010	976,310	1,172,785	1,400,685	601,675	75.3%
Registered or Treaty Indian	488,045	558,175	623,780	697,505	209,460	42.9%
Non-status Indian	86,595	104,160	133,155	213,900	127,305	147.0%
Inuit only, not Registered	39,480	44,150	49,115	59,110	19,630	49.7%
Métis only, not Registered	178,360	262,100	355,505	418,380	240,020	134.6%
Other Aboriginal	6,525	7,720	11,235	11,790	5,265	80.7%

Sources: INAC's Core Tabulations, 1996 to 2006 Censuses; 2011 NHS. Prepared by Statistics Team, Strategic Research and Statistics Directorate, INAC, July 14, 2016.

respondents can then designate themselves as First Nations (North American Indian) or Métis. For self-designated Indians, another question asks whether or not the respondent is “a Status Indian (Registered or Treaty Indian as defined by the *Indian Act* of Canada).” The total of non-status Indians is then estimated by subtracting the number of self-designated Status Indians from the overall number of self-designated Indians.

What people choose to call themselves depends not only on social cachet and respectability but on economic incentives that may be attached to identity. If an agreement promises economic advantages for being Métis, such as receipt of public money or special legal status, the numbers of self-designated Métis are bound to swell, and then official membership lists similar to the Indian Register (INAC, 2011) will have to be created.

Provincial organizations affiliated with the MNC already maintain such lists, which they style “citizenship” registers. These are linked to their organizational claims that as governmental representatives of their Métis citizens they can negotiate with Canada on a nation-to-nation or government-to-government basis. Enrolment in such lists is based on the three criteria enumerated in the *Powley* decision: descent from historic Métis ancestors, self-identification as Métis, and community acceptance (*R. v. Powley*. [2003] 2 S.C.R. 207). At the present time the economic benefits of being on a Métis citizenship register are relatively minor: special hunting or fishing privileges in certain situations, and eligibility for Métis housing or economic development programs in some provinces. If negotiations with the Canadian government lead to more robust benefits, such as eligibility for affirmative-action hiring, a share of resource revenues,

or supplementary health insurance like that enjoyed by Status Indians, applications for Métis membership will swell, and the membership lists will have to become more like the Indian Register, with legal definitions, bureaucratic administration, and judicial review.

Socio-economic indicators such as income, employment, formal education, housing quality, life expectancy, and morbidity are generally better for the census category of “Métis” than for First Nations people, especially those living on reserve, but below the level of the non-Aboriginal population (Frideres, 2016: 33; Flanagan, 2008: 229; Garner et al., 2010; Statistics Canada, 2010; 2011b: 20; 2015). But, because of ethnic mobility, Métis levels on standard socio-economic variables are moving closer to those of non-Aboriginal Canadians. As Thomas points out:

When individuals switch their reported identity from non-Aboriginal to Métis, they bring their previous group’s socio-economic characteristics with them. Thus, as individuals migrate into the Métis population, they are likely to alter the aggregate estimates of socio-economic development in their new group. As the aggregate measures and indicators change in response to ethnic mobility, monitoring progress over the long-term becomes increasing difficult, since it is impossible to know whether progress is the result of ethnic mobility or whether it is the result of actual improvement in the population’s outcomes. (Thomas, 2015: 27–28)

The median reported income of census Métis increased from 72.9% of the non-Aboriginal median in 2000 to 86.7% in 2010 (Thomas, 2015: 37). The median Métis age in the 2011 *National Household Survey* was 31, compared to 41 for non-Aboriginal Canadians (Thomas, 2015: 22). Income tends to rise with age, as workers acquire skills and experience (Sowell, 2015: 97–99). It may seem, therefore, that, if we allow for age differences, the economic difference between the Métis and the general population would be negligible. To take another example, the proportion of Métis living in crowded housing as defined by Statistics Canada in 2011 (more than one person per room) was not only lower than for other Aboriginal groups, but also lower than for the non-Aboriginal population (Statistics Canada, 2015: chart 9). Also in 2011, 69.7% of Métis over the age of 12 rated their health as very good or excellent, compared to 69.9% for the non-Aboriginal respondents (the younger average age of Métis may be a factor here, as health problems increase with age).

Overall, cross-tabulation of census categories against social and economic indicators suggests that the Métis standard of living, after controlling for age differences, is not far off the Canadian average. Ethnic mobility, however, makes

it hard to reach a firm conclusion because the self-designated Métis transferring from the non-Aboriginal population may be swamping the previously self-designated Métis in the statistics.

Ethnic mobility and population increase are a two-edged sword for the Métis political movement. Growth in numbers seems to make it more important to achieve “reconciliation” with the Métis because larger groups are more politically significant in a democracy. But if, after the data are adjusted for age differences, the Métis are doing almost as well in socio-economic terms as the non-Aboriginal population, the argument for devoting scarce public money to special programs on their behalf becomes harder to sustain unless the programs are targeted to those in need.

The Age of Extinguishment

The United Province of Canada did not recognize mixed-race people as a legally distinct category, as shown in the 1850 precursor to the *Indian Act*. According to this statute, people of partly Indian ancestry could be considered Indians if “residing among such Indians” (13 & 14 Vict., c. 42, s. 5); otherwise they were simply British subjects. Recognition of the Métis of the North-West as a separate category grew out of the circumstances surrounding the transfer of Rupert’s Land to Canada (Flanagan, 1991: 29–51). Louis Riel and his Métis followers seized control of the Red River settlement in late 1869. Riel’s main demand was that Rupert’s Land enter Confederation as a self-governing province with control of its public lands. Unwilling to meet this demand because it would interfere with his national vision, Sir John A. Macdonald authorized Sir George-Etienne Cartier to work out a deal with Riel’s chief emissary, Father N.-J. Ritchot. The compromise included provincial status for a “postage-stamp” province of Manitoba, federal control of public lands, and a land grant of 1.4 million acres written into s. 31 of the *Manitoba Act, 1870*, for “the children of the half-breed heads of families.” The land grant was justified, rather obscurely, as being “... expedient, towards the extinguishment of the Indian title to the lands in the province.”

No real principle lay behind that wording; Macdonald and Ritchot simply needed a formula to defend their pragmatic compromise. Ritchot said to the Métis when he returned to Red River: “The Half-breed title, on the score of Indian blood, is not quite certain. But, in order to make a final and satisfactory arrangement, it was deemed best to regard it as certain.” Macdonald later said: “Whether they [the Métis] had any right to those lands or not was not so much the question as it was a question of policy to make an arrangement with the inhabitants of the Province ... That phrase was an incorrect one, for the half-breeds did not allow themselves to be Indians” (citations in Flanagan, 1990: 74). It was a political necessity for Macdonald to offer a justification because many Members of Parliament in 1870 skeptically regarded the Métis land grant as a give-away of valuable public land.

Subsequent political pressures led to expansion of the grant, first to the “half-breed heads of families” in Manitoba, then subsequently to Manitoba Métis who had left the province, and finally to people of mixed-race all over the North-West as the Numbered Treaties were gradually negotiated (Ens and Sawchuk, 2016: 133–189). The medium of the grant was changed from a patent for land to scrip that could be redeemed for Dominion Lands or else sold to a private

purchaser, then finally to a direct cash grant to Métis accompanying Treaty 11 (Flanagan, 1990). Something like a theory was articulated in 1898 by the civil servant J.A.J. McKenna:

It is, therefore, clear that whatever rights the half breeds have, they have in virtue of their Indian blood. Indian and half breed rights differ in degree, but they are obviously coexistent. When the Indian rights in a certain territory are extinguished, the half breed rights should be extinguished; and if the Government fails as it failed in the past to pursue such a policy then the half breed right should be held to exist up to the date at which it is extinguished. (cited in Flanagan, 1990: 82)

Whatever the legal metaphysics, there was one recurrent theme: the word “extinguish” appeared in every statute and order in council dealing authorizing grants to the Métis. The government of Canada considered these grants of land, scrip, and money to be in satisfaction of inherited Métis rights to land, forestalling future claims in virtue of these rights.

With Canada refusing further action, western Métis organizations were formed in the 1920s and 1930s to lobby provincial governments. Their biggest success was Alberta’s *Métis Population Betterment Act, 1938*, which provided land for 12 (now eight) Métis settlements in northern Alberta. As these settlements succeeded, their legal status was improved in stages, and they have become self-governing local communities with a land base now constitutionally protected through agreement with the provincial government (Pulla, 2013: 409–410). They were, however, created through the discretion of the provincial Crown, not in recognition of Aboriginal rights or title. Métis organizations were established in other provinces as well, but attempts to create a single national organization foundered on the differences between Métis and non-status Indians, as well as on the desire of MNC-affiliated organizations to represent only descendants of the historic Métis.

Ambiguous Entrenchment

The Aboriginal rights of the Métis are a case study in “policy-making by exegesis” (Flanagan, 1985), that is, adopting abstract legal language without considering what it might mean in the real world. The political circumstances of how the abstract language of the Métis’ Aboriginal rights was inserted into the Constitution in 1982 are described below.

Prime Minister Pierre Trudeau devoted himself to the cause of constitutionalizing French language rights in Canada, thinking it would block the separatist movement in Quebec. In a series of constitutional conferences during the 1970s, he fruitlessly sought agreement from the provinces for a package of constitutional amendments including language rights, a charter of individual rights, and a formula for amending the Constitution. When he could not get agreement from the provinces, he decided to go it alone with a federal request for passage by the British Parliament.

The precursor to Section 35 appeared at this time through the work of the Special Committee of the Senate and the House of Commons on the Constitution of Canada (Smith, 2000: 5). If the federal government could not get the provinces on side, it needed other allies, and the native organizations were eager to be included. But then, in September 1981 in the *Patriation Reference*, the Supreme Court of Canada ruled that an amendment without “substantial” provincial support would be a violation of constitutional convention.

Discussions with the provinces resumed in the famous constitutional conference of early November 1981. The Aboriginal rights clause was quickly dropped because the provinces had never had a chance to discuss it and did not know what it meant. But it was reinstated after intense external lobbying by Aboriginal organizations as well as the New Democratic Party. The Prime Minister’s personal opinion was that it was reckless to write Aboriginal rights into the constitution without knowing what the wording meant (Sheppard and Valpy, 1982: 161); but this was his final chance to come away with a victory on what to him was the more important issue of bilingualism. At the last minute, on the suggestion of Alberta Premier Peter Lougheed, yet without serious consultations with their own officials, the premiers approved insertion of the word “existing” in what became s. 35 of the *Constitution Act*, 1982:³

3. Quebec at this point was opposed to the entire package of constitutional amendments.

35.(1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.

35.(2) In this Act, “Aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

Mel Smith, former Deputy Minister of Justice for British Columbia concluded: “Sad to say, the full import of what they [the prime minister and premiers] were agreeing to was not even understood, much less discussed” (Smith, 2000: 9). And if that was true of Aboriginal rights in general, it was doubly true of the word “existing,” which was added at the last minute, and of the declaration that the Métis were an Aboriginal people. The complexities of Métis history, identity, and demographics were not considered, nor whether non-status Indians were to be regarded as Métis, nor whether Métis Aboriginal rights had been extinguished in Manitoba and the North-West through the distribution of land and scrip. Everything was left to future negotiations, and when those failed, to litigation.⁴

A number of litigants from the three Prairie Provinces have argued that Métis should be considered Indians under the Natural Resource Transfer Agreements (NRTA) of 1930 and should share the right, guaranteed to Indians by the Agreements, to be exempt from provincial game regulations if they were hunting for food on provincial Crown land (Peach, 2013: 280–285). In *Blais* ([2003] 2 S.C.R. 236), the Supreme Court held that Métis were not Indians and did not share the same harvesting rights, thereby making the NRTA a blind alley for Métis litigants.

In the same year, however, the Métis won a major victory in the Supreme Court of Canada based on Section 35 of the *Constitution Act, 1982*. In *R. v. Powley* ([2003] 2 S.C.R. 207), the Court ruled that a group of Métis living in the area of Sault Ste. Marie still had an Aboriginal right to hunt for food as they were an Aboriginal community that had been established since fur-trade days and hunting had always been part of their way of life. The decision was “site-specific” because it applied only to that one group; future claims would have to be tested against each community’s particular facts. The Court endorsed a three-part test for membership that had been developed in the lower courts and that corresponded to the practice

4. Disclosure: I was personally involved in three of the cases discussed below. I was a peripheral witness for the federal Crown in *Blais* and a major witness for the federal Crown in *Manitoba Metis Federation*. I also wrote a consulting report for the federal Crown in *Daniels*, but I was not asked to testify as a witness.

of Métis organizations in developing their citizenship lists: “self-identification, ancestral connection, and community acceptance” (para. 30). Possible extinguishment of Aboriginal rights through acceptance of scrip was not at issue because the Crown, not having ownership of public lands in Ontario, had never distributed scrip redeemable in Dominion Lands to Ontario Métis. Also, the decision applied only to the historic Métis rooted in the North-West fur trade and not to non-status Indians or to others who today might label themselves as Métis.

Another decision relevant to a particular community was *Manitoba Metis Federation* ([2013] 1 SCR 623). The Manitoba Metis Federation (MMF) had challenged the distribution of land in the 1870s to the “children of the half-breed heads of families” under Section 31 of the *Manitoba Act, 1870*. The MMF lost at trial and in the Manitoba Court of Appeal, but won a partial victory when the Supreme Court issued a declaratory judgment that the distribution of land had been marred by so many errors and delays that it had violated “the honour of the Crown.” It did not find that the Métis had a pre-existing Aboriginal title to land, so the federal Crown had no fiduciary duty in respect of a non-existent title (para. 59). It did not specify any particular remedy, and it did not hold that the s. 31 distribution of land had failed to fulfill the purpose of s. 31 (except for 993 late recipients who got scrip after the 1.4 million acres were exhausted). Although extinguishment was not directly raised as an issue, the decision did not say that extinguishment had never taken place because the distribution of land was invalid. In that sense, the question of the extent to which the Métis’ Aboriginal rights are still “existing” in Manitoba remains open.

If legally weak, the Supreme Court’s opinion was politically portentous, because it appeared to endorse modern-day negotiations between the Métis and the federal government:

What is at issue is a constitutional grievance going back almost a century and a half. So long as the issue remains outstanding, the goal of reconciliation and constitutional harmony, recognized in s. 35 of the *Constitution Act, 1982*, and underlying s. 31 of the *Manitoba Act*, remains unachieved. The ongoing rift in the national fabric that s. 31 was adopted to cure remains unremedied. The unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import. (para 140)

The words led directly to the negotiations with MNC-affiliated Métis organizations that Prime Minister Trudeau has now undertaken.

If *Blais*, *Powley*, and *Manitoba Metis Federation* were relatively narrow, *Daniels* ([2016] 1 SCR 99) widened the horizon. In response to a request from the Congress of Aboriginal Peoples, the Supreme Court issued a declaratory

judgment that Métis and non-status Indians were “Indians” within the sense of Section 91(24) of the *Constitution (British North America) Act, 1867*. The Court did not order a remedy, saying only that its decision would end the “jurisdictional tug of war” between the federal and provincial governments over who had constitutional responsibility for Métis and non-status Indians. Yet the Court may have made negotiations more complicated by departing from its own recent precedents. In *Blais*, it had held that Métis were not Indians for purposes of the NRTA. Also, in *Cunningham* ([2011] 2 SCR 670), it upheld the right of an Alberta Métis community to refuse membership to status Indians: “The exclusion corresponds to the historic and social distinction between the Métis and Indians and respects the role of the Métis in defining themselves as a people” (headnote). It now ruled, however, that Métis were Indians within the meaning of Section 91(24). All previous decisions had distinguished Métis from Indians and further stressed that not all mixed-race people were Métis; now these distinctions were blurred, if not swept away.

Whatever the implications may be for legal doctrine, the practical result has been to make negotiations politically more difficult. Prime Minister Trudeau’s campaign promise was directed at the MMF in particular and the historic Métis in general, but that may seem too narrow in the light of *Daniels*. However, dealing with all self-identified Métis and non-status Indians simultaneously will be difficult because they are represented by various organizations with different objectives. The only practicable way forward, if the government is to keep its campaign promise, may be to negotiate first with the historic Métis, then later with other mixed-race groups, committing itself to an open-ended course of constitutional negotiations in which the ceiling of one settlement tends to become the floor of the next, while those who settled first may want to reopen their agreement in light of gains won by those who deal later.

Implications

Below is a discussion of three topics that are likely to be part of any negotiations. All are bedeviled with major difficulties arising from Métis history and demography as well as Canadian constitutional law. The discussion points out principles that should undergird any agreement.

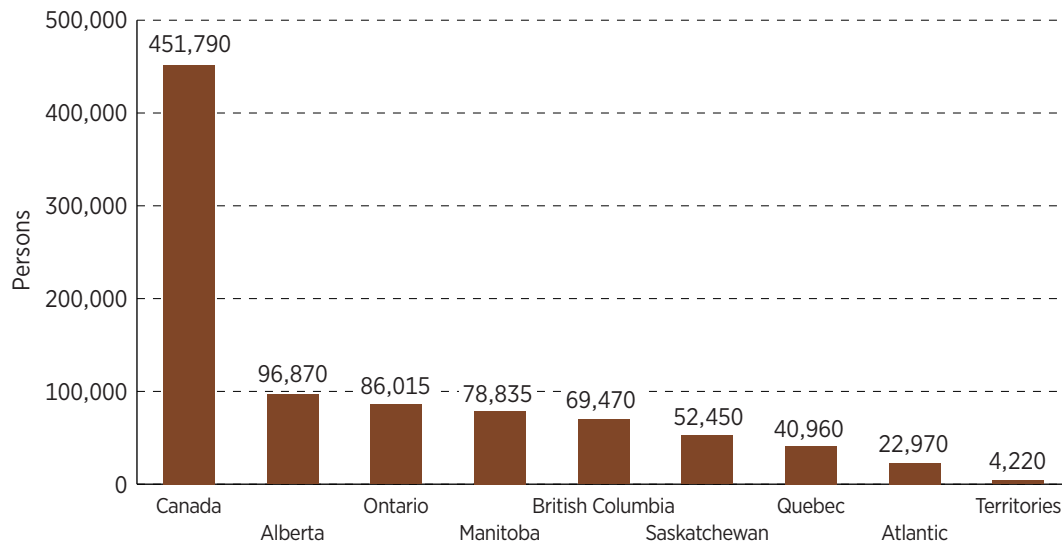
1 Government

The Métis National Council (MNC) consistently uses the vocabulary of government to describe itself and its activities (Adams, 2013: 464–465). Like its provincial affiliates, it calls itself the “Métis Nation,” and it aspires to “self-government” and to have its own “constitution” rather than to be regulated under the *Corporations Act*. It terms membership “citizenship,” and it maintains a “Métis Nation Protocol” with the government of Canada, originally signed with the previous government.

While the MNC is an umbrella organization, its affiliates do indeed exercise some public functions. Its provincial affiliates run publicly funded educational, housing, and economic development programs targeted at members. This is not unique to the Métis; following the principle of subsidiarity, many democratic governments in other countries channel programs through religious and ethnic organizations that are closer to the people they serve. However, the scope of service delivery by Métis “governments” is limited by residential patterns. **Figures 2 and 3** show Métis population distribution across Canada according to the 2011 *National Household Survey*. Self-designated Métis live everywhere in Canada, though there are relatively more to be found in the western provinces. Moreover, even within provinces, they are not concentrated in any single area, as shown by Métis populations in major Canadian cities (**figures 4, 5**).

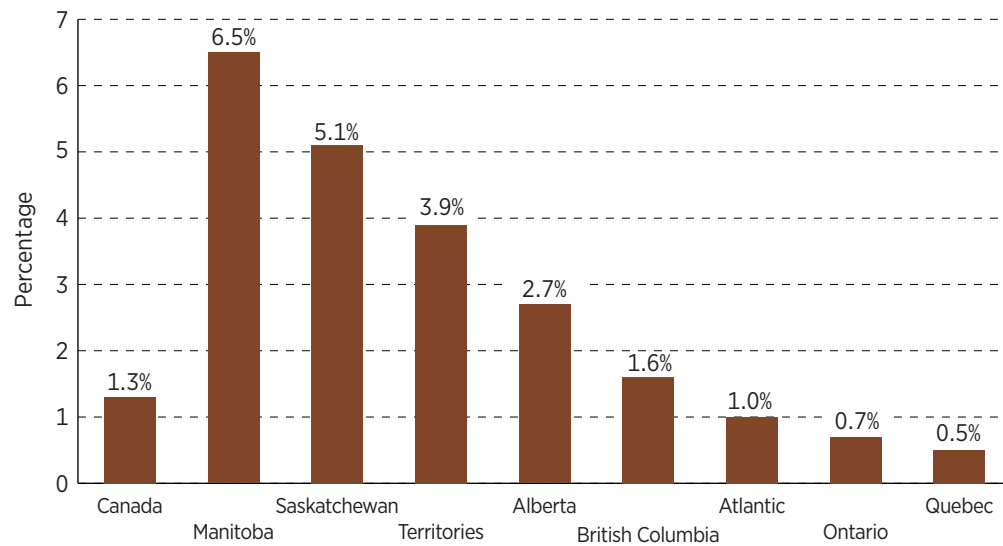
First Nations in Canada and Indian tribes in the United States can have forms of self-government because of residential concentration on their reserves and reservations. The exercise of this self-government includes a degree of coercive law enforcement, sometimes through their own courts (United States only) and police forces (both Canada and United States). But their coercive power ends with the boundaries of the territorial enclave. First Nations and Indian tribal people living off reserve carry certain treaty and legislated rights with them but are not subject to the governments that hold sway on reserve. Indigenous governments may offer voluntary services to members residing off reserve, but when they do so they act non-coercively.

Figure 2: Absolute number of Métis, Canada and selected provinces, 2011



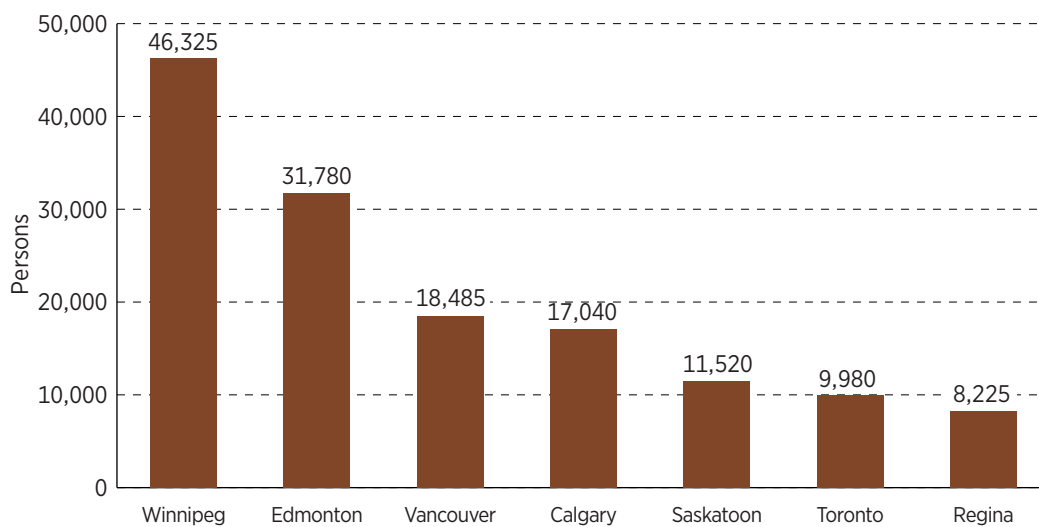
Sources: Thomas, 2015: chart 2, p. 21 (reproduced with permission); Statistics Canada, 2011a.

Figure 3: Métis, share of total population, Canada and selected provinces, 2011



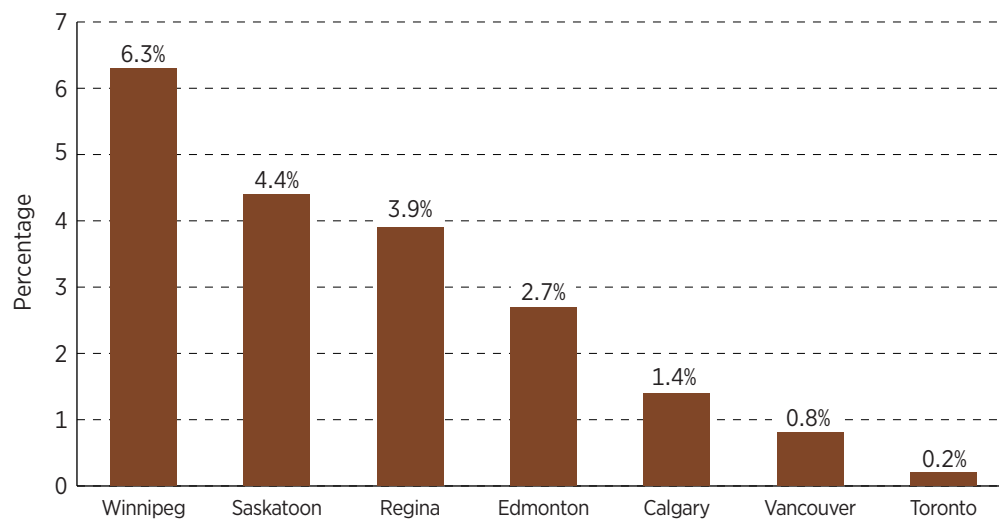
Sources: Thomas, 2015: chart 2, p. 21 (reproduced with permission); Statistics Canada, 2011a.

Figure 4: Absolute number of Métis, selected Census Metropolitan Areas, 2011



Sources: Thomas, 2015: chart 3, p. 22 (reproduced with permission); Statistics Canada, 2011a.

Figure 5: Métis, share of total population, selected Census Metropolitan Areas, 2011



Sources: Thomas, 2015: chart 3, p. 22 (reproduced with permission); Statistics Canada, 2011a.

Non-territorial government is not entirely impossible. Under the principle of subsidiarity, government can help ethnic and religious minorities to provide more effective services for themselves without forcing anyone to assume an unwanted identity. For example, much education in Canada is delivered by Roman Catholic and minority language schools that are publicly funded with their own elected school boards. Legislation allows Catholic and Francophone parents to aggregate their efforts to achieve the education they desire for their children. They can designate the school boards to which they wish their property taxes to be paid and elect members of those school boards. Their schools can receive governmental support like ordinary public schools. Métis leaders have not demanded separate schools, but the Canadian educational model might be adapted to organize other services that Métis people do desire.

It was reported in 2015 that the Métis registries in three provinces contained approximately the following numbers of individuals: Manitoba, 26,000; British Columbia, 11,000; and Alberta, 30,000 (Thomas, 2015: 29). This is about 27% of the self-identified Métis population in these provinces, leaving much room for the registries to grow if registration becomes a gateway to obtaining more numerous and more valuable services. Some non-status Indians might also seek registration, especially after the *Daniels* decision.

Membership is not an issue of public policy for private organizations, but it becomes a public issue as an organization becomes a delivery vehicle for public services. The Indian Register, first established by the 1951 *Indian Act*, has been a frequent source of dispute, litigation, and legislative amendment (Flanagan, 2017). It is one thing to have an Indian Register as an isolated exception, but another to start proliferating registries according to shades of ancestry. The federal government is already subsidizing existing Métis registries without playing the role of rule enforcer (INAC, 2015), but at a certain point it will not be able to avoid taking on enforcement responsibilities. In sum, service delivery can be justified under the principle of subsidiarity, but it may create contentious issues of official ethnic identification.

2 Land

The MNC and its affiliates claim to have unrecognized land rights, and the 2015 Liberal platform promised to settle Manitoba land claims as well as resolve unspecified Métis land claims elsewhere. However, these claims to land are legally dubious if they are taken to mean title (ownership) in the full sense.

Powley recognized that historic Métis communities have a continuing right to hunt for food under certain circumstances but no court decision has affirmed a Métis Aboriginal title to land. The Supreme Court in the *Manitoba Metis Federation* ruling criticized the federal government's distribution of Métis

children's lands in the 1870s for having been slow and prone to error, but it did not find that the Métis had any continuing ownership of land. Indeed, it denied that the federal government had a fiduciary responsibility for Métis lands, which would have logically followed from valid Métis pre-Confederation ownership. The decision also approved the constitutionality of the Manitoba children's grant—individual grants in fee simple, with no restriction on alienability. Finally, it did not say that the Métis were entitled to land in the present as compensation for the defects of the Métis children's land grant; nor have any court decisions overturned the validity of the various scrip distributions in the North-West, all of which were legislatively justified at the time as being connected with “the extinguishment of the Indian title” (Flanagan, 1990).

It is difficult to see how the historic Métis use of land could be considered as proof of Aboriginal title as described in Supreme Court decisions, most recently *Tsilhqot'in* ([2014] 2 SCR 257), which held that Aboriginal occupancy must be sufficient, continuous, and exclusive (para. 25). The Métis ranged widely across western Canada and the northern United States, hunting buffalo and manning boat brigades and cart trains. They did not hesitate to use armed force against Indians as they travelled, but they did not lay claim to particular hunting grounds or residential territories. Their winter camps were sometimes used for a few consecutive years but were not permanent settlements. When they did settle in permanent communities at Red River, Batoche, St. Albert, and elsewhere, they staked out individual farms, which they converted into Dominion land patents after 1870 (Ens and Sawchuk, 2016).

After the *Manitoba Act* set a precedent for compensation from the federal government “toward the extinguishment of the Indian title,” the Métis demanded scrip that could be used to purchase individual plots of land. Some of their clerical advisers, such as Father N.-J. Ritchot, would have preferred the government to give collective land grants with inalienable title so that the Métis could establish group settlements, yet the Métis themselves had little interest in such schemes. Unless future Canadian courts find that the Métis did possess Aboriginal title, a principled application of the rule of law does not demand the award of ownership of land in the present for infringement of ownership that never existed in the past.

Another complicating factor is that public lands now belong to the provinces. The federal government owns Indian reserves, military bases, national parks, and miscellaneous pieces of real estate sitting under federal office buildings, but not public lands in general. When the Dominion government distributed land and scrip to the Métis, it could act unilaterally because it owned the public lands of Manitoba and the North-West Territories, but such a unilateral approach is no longer possible after the Natural Resource Transfer Agreements (NRTA) of 1930.

A contemporary way of creating a Métis land base might be for the federal government to transfer money to Métis organizations for the purchase of land from willing sellers, either public or private. This is the approach used in the Treaty Land Entitlement initiative in Saskatchewan, designed to make up for shortfalls in the original allocation of lands to Indian reserves. Some Saskatchewan First Nations have used the money to buy urban land and make it a non-contiguous part of their reserves, which in several cases has proved to be a successful strategy for economic development (Flanagan and Harding, 2017).

However, the parallel between the Treaty Land Entitlement initiative and Métis claims cannot be pushed too far. First Nations are legally organized communities with existing land reserves, to which new lands can be added after purchase. Except for the Métis settlements in Alberta, there are no such legally organized Métis communities that could purchase land. Money for land purchases would probably have to be given to provincial Métis associations. As organizations without shareholders, how effective would they be in managing land for commercial advantage? And who would be the beneficiaries of any revenues earned from lands purchased with public money transferred from the federal and provincial governments?

Another approach to creating a Métis land base would be to create analogues of the Alberta Métis settlements in other provinces, which might cooperate if the federal government provided compensation for the required provincial Crown land. But the eight Alberta Métis settlements have only about 5,000 residents in total. Tens of thousands of Métis now live in cities such as Winnipeg, Saskatoon, and Edmonton. How many want to move to remote new settlements to take up a life of farming and lumbering? Isaac has suggested, in the Manitoba context, that “more focus on financial or revenue streams as opposed to out-right land grants” might be appropriate (2015: E3). He is probably correct that any settlement will be mainly about money, no matter how it is enveloped in the rhetoric of land. The most likely avenue for such a settlement would be to revisit the nineteenth-century distributions of land and scrip.

Between 1870 and 1925, Canada made grants to over 24,000 Métis claimants, including 2,609,772 acres of land, either in the form of patents or land scrip; money scrip worth \$2,843,877 that could be used to purchase land; and a little over \$40,000 in cash (Coté, 1929: 19; table 2). These benefits must be evaluated in the context of the nineteenth century. Wages for manual labour were about \$1.00 to \$1.25 a day (Flanagan, 1991: 123). The initial sale price of Dominion Lands in western Canada was \$1.00 per acre. If that price for land seems ridiculously low, remember that this was unplowed prairie, with no access by rail or road. Varieties of grain and farm implements to make the land productive had not yet been developed. In fact, a dollar an acre was probably too high initially, as land sales were slow in the early years.

Table 2: Distribution of Land, Scrip, and Money to Métis, 1870–1925

Program	Claims	Acres	Scrip (\$)	Cash
Manitoba children land (240 acres)	6,034	1,448,160		
Manitoba children money scrip (\$240)	993		238,300	
Manitoba heads of family (\$160)	3,186		509,760	
NWT (land scrip)	4,840	1,161,612		
NWT (money scrip)	9,101		2,095,817	
Mackenzie River (cash)	172			41,280
	<u>24,326</u>	<u>2,609,772</u>	<u>2,843,877</u>	<u>41,280</u>

Source: Coté, 1929: 19.

By the standards of the day, land and scrip were potentially large benefits but not of much immediate use to the Métis, who had neither the technology nor the inclination to become large-scale farmers. Most did the rational thing under the circumstances: they sold their bounty to investors able to hold it for the long term. Canada's treatment of the Métis thus had different consequences from its treatment of Indians: the former received a temporary benefit as individuals, after which they were on their own; whereas the latter were put into a permanent status of dependence, which may have conferred some benefits but also many drawbacks.

Métis leaders have long maintained that they did not derive full benefit from the distribution of land and scrip. Typical allegations include the following:

- ❧ applications were rejected because claimants had taken treaty as Indians;
- ❧ land and scrip documents never reached the intended recipients, having been misappropriated along the way;
- ❧ sales were allowed, even encouraged, without proper legal safeguards;
- ❧ speculators took advantage of the unschooled Métis;
- ❧ as the price of Dominion Lands increased, money scrip denominated in dollars became correspondingly less valuable. (Flanagan, 1991)

The first complaint may well be true in some cases, although it is not clear that injustice was involved; officials tried to limit exit from treaty in order to prevent individuals from being left destitute. In *Manitoba Métis Federation*, the

Supreme Court spoke favourably of the last complaint respecting the 993 Métis children who received \$240 money scrip after the 1.4 million acres set aside in the Manitoba Act were exhausted. The price of Dominion Lands had gone up to \$2 an acre, so their scrip would only buy 120 acres, not the 240 acres that earlier claimants had received. The other allegations, however, will be hard to prove except in isolated cases, after so much passage of time.

The author has gone through the legal records of hundreds of sales of Métis children's grants in Manitoba and found them to be in order, while sale prices were comparable to prices of other real estate at the time (Flanagan, 1991: 103–133; Flanagan and Ens, 1994). Land scrip was considered real estate to be personally located by the recipient at a Dominion Lands office, but whether or not the right person showed up is difficult to establish today. Money scrip was in effect a kind of currency that could be traded with no legal formalities. No systematic records of sale prices exist, though notices in newspapers and correspondence of the day suggest prices of one-quarter to three-quarters of face value, depending on location and circumstance, with an average of about one-half (Flanagan, 1991: 147–149).

To adjudicate tens of thousands of individual complaints today is hardly feasible, given the long lapse of time and the nature of available records. And even if individual cases of injustice could be pinpointed, how would compensation be awarded? Four or five generations have passed since Métis lands and scrip were distributed. One recipient might have hundreds of contemporary heirs, another might have none. And how could one compute the contemporary value of scrip without knowing how much it was sold for and to what use it was put? For these and many similar reasons, the Métis “land claims” could not be revisited individually but would have to be negotiated on some sort of group basis.

A financial settlement might be reached by pragmatic bargaining, but what would be the underlying principle? Métis Aboriginal title has not been held to exist, so the Crown has no fiduciary responsibility. The administration of children's lands in Manitoba did not live up to “the honour of the Crown,” but no similar finding has been made for scrip in the North-West Territories. Empirical research shows that the Métis sold their lands and scrip for reasons that seemed good to them at the time, and they demanded scrip in forms that could be easily sold (Ens and Sawchuk, 2016: 189). Without further guidance from the courts, the principled justification for paying financial compensation related to these century-old programs is weak at best.

3 Consultation

In 2004, the Supreme Court of Canada created the “duty to consult” (Flanagan, 2015). The setting was British Columbia, where Aboriginal title had never been ceded by treaty. The ruling made sense in that context: it seems only fair to

consult a First Nation about exploitation of land and resources to which it may have a plausible claim of ownership. Shortly thereafter, the Court extended the duty to consult to Treaty 8 territory in Alberta, where the treaty allowed the signatory Nations to continue hunting on public land until the Crown desired the land for other purposes. Now the Court ruled that the Crown had a duty to consult before doing anything that might affect those hunting rights because, as treaty rights, they had been constitutionalized by the *Constitution Act, 1982*. The duty to consult quickly spread across Canada because many other treaties contain wording similar to Treaty 8. Although Aboriginal title had been ceded decades ago, First Nations now claimed a right to be consulted about any land or resource development in their “traditional territories,” although that phrase has no constitutional or legislative definition (Flanagan, 2015).

Section 35 of the *Constitution Act, 1982*, does not draw any distinction between Indians and Métis as rights-bearing Aboriginal peoples, so it has been suggested that consultation on the use of land and resource development should include the Métis, as has happened already in a few cases. The Métis Nation of Ontario has been consulted on a couple of mining projects in northwestern Ontario (Hasselback, 2017). Enbridge included the Alberta Métis settlements in its consultations on the probably-never-to-be-built Northern Gateway pipeline. In 2006/07, the courts of Newfoundland & Labrador affirmed the right of the Labrador Métis Nation to be consulted about construction of the Trans-Labrador Highway. However, the import of the decision is unclear because it left open the question of whether the litigants were claiming rights as Inuit or as a separate Métis community (Peach, 2013: 290–291; Adkins and Isaac, 2008).

That comparatively little consultation has taken place with Métis organizations about resource development reflects objective difficulties in organizing the Métis for consultation. The Supreme Court’s doctrine of consultation arose in the context of First Nations preferring claims to Aboriginal title or continuing hunting rights in specific areas. The Métis, apart from the Alberta settlements, are represented by provincial organizations whose members live all over the province, and they have no treaties or validated claims to Aboriginal title in specific areas. In the wake of *Powley* and of the Labrador Métis case, Métis regional communities might demand consultation for damage to Aboriginal hunting and fishing rights, but these communities are usually social rather than legal entities and it is unclear how they would be represented in consultations. Constitutional lawyer Thomas Isaac thinks consultation can be carried out through provincial Métis organizations (Hasselback, 2017), but this could involve people who live nowhere near the proposed project. This organizational problem will have to be resolved before Métis consultation can become a reality on any large scale.

The need to include the Métis in consultation could be both positive and negative for proponents of economic development. On the positive side of the ledger, the Métis, as children of the fur trade, have always been a commercial people. For example, the NWT Métis favoured building the Mackenzie Valley pipeline in the 1970s when First Nations were opposed (Ens and Sawchuk, 2016: 465–466). More recently, the Manitoba Metis Federation has supported a major power line in Manitoba opposed by the local First Nation (Paul, 2015). Contemporary programs of the provincial Métis organizations tend to feature job training, education, and economic development. Métis organizations would likely be a pro-development force in consultations, and more interested in opening up opportunities for their members than in blocking development.

On the negative side, consultation with First Nations has already contributed to blocking some major projects, such as the Mackenzie Valley pipeline, the Northern Gateway pipeline, and the Ring of Fire mining development in northern Ontario. Even where projects have gone ahead or are still under consideration, there has been a major increase in transaction costs for proponents—including the expenses of negotiation, litigation costs when negotiations fail, delays caused by slow processes of negotiation and litigation, and overall uncertainty (Flanagan, 2015; McConaghy, 2017: 187–189; Newman, 2016: 457–459). And it is not just a matter of delay: sometimes the economic window for a project closes altogether, as happened with the Mackenzie Valley pipeline and could happen with several other major projects now under review in Canada. Layering Métis consultation over First Nations consultation could make an already complicated situation even more difficult to manage. Court rulings have established that the Métis are a full-fledged Aboriginal people like Indians and thus have in principle the same right to be consulted if their Aboriginal rights are affected by development, but the mechanics of doing so are far from clear at this point.

Conclusions

- 1** Because ethnic identity is self-defined in Canada (except for Status Indians), there are no clear legal definitions of categories such as Métis and non-status Indian. This means that an attempt to negotiate with one sub-group will probably lead to a chain of negotiations with other sub-groups, making the outcome of negotiations difficult to foresee.
- 2** Ethnic mobility, that is, transferring personal self-identification from one group to another, has raised the measured standard of living of the Métis, as reported by Statistics Canada, thus undercutting the case for large expenditures of public funds unless they are targeted to those demonstrably in need.
- 3** Providing valuable benefits to large new groups of Indigenous people, no matter how defined, will create incentives for new claimants to come forward. This will not only lead to unforeseen costs but will make it necessary to create a Métis equivalent of the Indian Register.
- 4** A territorial basis for Métis government in the proper sense does not exist and is not likely to be created. However, Métis “governments” may be effective under the principle of subsidiarity in delivering certain social services to their people.
- 5** Court decisions to this point have not recognized either Métis Aboriginal title or federal fiduciary responsibility for the Métis. The Supreme Court criticized the implementation of the Manitoba Métis children’s land grant but did not condemn the design of nineteenth-century programs delivering land and scrip to the Métis. It remains judicially undecided whether these programs extinguished Métis Aboriginal rights, as the legislation seemed to suggest (“... toward the extinguishment of the Indian title ...”). Furthermore, adjudicating century-old individual claims is not practicable, while at the same time there is no principled basis for a collective land-claims settlement with the contemporary Métis.
- 6** Métis communities have on occasion been included in the “duty to consult” but residential patterns and the absence of territorial Métis government will make this difficult to accomplish in many cases.

Because the Métis population is poorly defined and liable to grow unpredictably as incentives encourage changes in personal self-identification, a wise federal government will be careful about assuming financial obligations. And it would be unfortunate if the Métis were steered toward the dependency that has been such a great handicap for many First Nations. With minimal government assistance up to this point, the Métis have survived in Canada and achieved a standard of living not far from that of other Canadians. It would be ironic and sad if dependency-inducing government assistance interfered with further progress, as it so often has with First Nations.

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Tom Flanagan is a Fraser Institute Senior Fellow; Professor Emeritus of Political Science and Distinguished Fellow at the School of Public Policy, University of Calgary; and a Senior Fellow of the Frontier Centre for Public Policy. He received his B.A. from Notre Dame and his M.A. and Ph.D. from Duke University. He taught political science at the University of Calgary from 1968 until retirement in 2013. He is the author of many books and articles on topics such as Louis Riel and Métis history, aboriginal rights and land claims, Canadian political parties, political campaigning, and applications of game theory to politics. Prof. Flanagan's books have won six prizes, including the Donner Canadian Prize for best book of the year in Canadian public policy. He was elected to the Royal Society of Canada in 1996. Prof. Flanagan has also been a frequent expert witness in litigation over aboriginal and treaty land claims.



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