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Old and Difficult Grievances: Examining the Relationship Between the Métis and the Crown

Jean Teillet*

I. INTRODUCTION

In 1982, Canada took the unique and unprecedented step of giving constitutional protection to the Aboriginal and treaty rights of the “aboriginal peoples of Canada” in section 35.

- 35(1) The Aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- 35(2) For the purposes of this Act, the “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

Section 35 of the *Constitution Act, 1982* is unprecedented in two ways. First, it gives constitutional protection to Aboriginal and treaty rights. Second, it includes a mixed-blood people, the Métis, within the definition of the “aboriginal peoples of Canada”. There is no other country in the world that has taken either step.

It has been noted by the Supreme Court of Canada that the inclusion of section 35 in the *Constitution Act, 1982* was the culmination of a long and arduous struggle by all the Aboriginal peoples of Canada.¹ Indeed, the three national Aboriginal organizations of the day, the National Indian Brotherhood, the Native Council of Canada and the Inuit Tapirisat, worked together to achieve the entrenchment of Aboriginal and

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¹ *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at 1105, [1990] S.C.J. No. 49 [hereinafter “*Sparrow*”].

treaty rights in the Constitution.² At the same time, several non-Aboriginal bodies were also calling for constitutional reform that included protection for Aboriginal peoples. By the fall of 1980, there was public support for the idea of entrenching Aboriginal rights in the Constitution. The Canadian Bar Association, the Pepin-Robarts Task Force on Canadian Unity, a Joint Senate-House of Commons Committee on the Constitution, and several church groups all called for the constitutional protection of Aboriginal rights.³

The political debates in both the House of Commons and in the Senate calling for constitutional protection for Aboriginal peoples and their rights are illuminating. There was a consensus that the Aboriginal peoples of Canada had “old and difficult grievances” that required reconciliation.⁴ The debates reflect a unanimous recognition that government had ancient legal obligations to Aboriginal peoples and that the relationship with the Crown and the practices of the past needed to change.

The move to give the rights of Aboriginal peoples constitutional protection was clearly intended to be a substantive change in the relationship between Aboriginal peoples and the Crown. The constitutional debates reflect this and show that section 35 was to be “a turning point in the status of native peoples in this country”, “a renewal of our commitment to the native peoples”, an “historic recommendation of equality of constitutional standing of the Aboriginal peoples with other communities in Canada” and “a political watershed in the lives of the Aboriginal people in Canada”. Finally, that including section 35 in the Constitution would mean that, “no government or individual will again

² Note that these three groups represented the Indians, Inuit and Métis peoples of Canada in the constitutional negotiations of the late 1970s and early 1980s. The national bodies that represent these three distinct Aboriginal peoples in 2004 are the Assembly of First Nations, the Métis National Council, and the Inuit Tapiriit Kanatami. The former Native Council of Canada is now known as the Congress of Aboriginal Peoples, which claims to represent a mixture of off-reserve, status, and non-status Aboriginal individuals. This claim is disputed by the Assembly of First Nation, which claims to represent all Indians whether on or off reserve, and by the Métis National Council which claims to represent all members of the Métis Nation.

³ Hogg, *Canada Act 1982 Annotated* (1982), at 1-3, 69 and 81-83; Purich, *The Metis* (1988), at 167-169; Romanow, “Aboriginal Rights in the Constitutional Process” in Boldt and Long (eds.), *Quest for Justice* (1985), at 73-74.

⁴ *Hansard* of the House of Commons and Senate of Canada 1980-1982, re inclusion of s. 35, statement by Senator Austin in Senate Debates, at 3317.

be able to put aside or disregard the rights of Canada's original peoples" because Parliament has taken the "opportunity of redressing their claims in the Constitution and to provide a legal basis for it".⁵

That was 1982. It is now more than 20 years since that monumental constitutional change was made. Since 1982, the Supreme Court of Canada has brought down more than 35 judgments with respect to the Aboriginal and treaty rights of Indians. With respect to the Métis, the first judgment of the Supreme Court of Canada, *R. v. Powley*, was handed down in 2003.⁶ At this point, with a substantial body of Aboriginal constitutional law now in place, and a new Supreme Court of Canada decision that applies that body of law to the Métis, it is worth asking whether section 35 is providing a resolution to the old and difficult grievances.

II. WHAT ARE THE OLD AND DIFFICULT GRIEVANCES?

The old and difficult grievances all stem from the problematic relationship between Aboriginal peoples and the Crown. What was the relationship just prior to 1982? It was unbalanced, to say the least. The Crown held the power, the lands, the resources, the courts, the law enforcement and the money. By 1982, Aboriginal peoples held, for the most part, only the equities.

The inclusion of section 35 in the *Constitution Act, 1982* was intended to even out the power relationship. But perhaps with the hindsight of 20 years we can see that, in 1982, little thought appears to have been given as to exactly how section 35 would restrain the powers of the Crown. Even less thought appears to have been given as to how the Crown would react to this encroachment and that it might act to protect its authority and jurisdiction.

In argument before the Supreme Court of Canada from 1984 to 2004, federal and provincial Crowns have consistently resisted the conclusion that constitutional space for Aboriginal peoples means any re-

⁵ *Hansard, id.*, Senate Debates, at 1921-1922 and 3318; and see H.C. Debates, at 3889, 4044-4045, 7448, 7519-7521, 9403, 13276 and 13280.

⁶ *R. v. Powley*, 2003 SCC 43, [2003] S.C.J. No. 43 [hereinafter "*Powley*"].

straint on Crown jurisdiction or authority.⁷ For 20 years, the Crown has argued any one or more of the following: that section 35 is merely of a preambular character; that section 35 undermines the balance of federalism; that section 35 prevents government from governing; that the courts ought not to inquire into provincial decision making; that the Crown cannot discharge its burden; that the Crown's duty is not engaged; that the province is not in a position to ...; that the duty stops short of ...; that their obligations are political; not legal; not enforceable; not fiduciary; not constitutional — no, not us, or at the very least not yet.⁸

With respect to the Métis, the litany of denial is slightly different. For Métis, the Crown's complaint is that it does not know who the Métis are; that the Métis are merely individuals with some Aboriginal ancestry; that their rights are derivative or dependant on Indian rights; that while Indians may have Aboriginal rights, Métis have none; that while Indians may have Aboriginal title, Métis have none; that Métis organizations are not legally capable of representing them; that they are not collectives; that the government has no obligations to Métis; that they are a provincial responsibility (from the federal government); that they are a federal responsibility (from the provincial governments); that there may be Métis in that province, but not in this province; that wherever and whoever those people might be they are not rights holders; they are not really Aboriginal or at least not Aboriginal enough; and anyway they all disappeared when Louis Riel was hanged in 1885. The Métis are, according to the Crown, non-existent or non-ascertainable as a people, and certainly not anyone or any entity that engages the recognition or any obligations of any of the governments in Canada.

From this litany we can see at least two fundamental issues with respect to the Métis that the Crown relies on in order to continue its course of denial. Both create roadblocks to the meaningful implementation of section 35. The first issue is this — does the Crown have constitutional

⁷ In particular, see Crown arguments as set out in *Guerin v. Canada*, [1984] 2 S.C.R. 335 [hereinafter "*Guerin*"]; *Sparrow*, *supra*, note 1; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, [1997] S.C.J. No. 108; *Powley*, *supra*, note 6.

⁸ A variation of this paragraph was argued orally by Louise Mandell before the Supreme Court of Canada on March 26th 2004 in *Haida Nation v. British Columbia (Minister of Forests)*, [2002] 2 C.N.L.R. 121, [2002] B.C.J. No. 378 (C.A.) [hereinafter "*Haida Nation*"].

and/or fiduciary obligations to the Métis? If so, how is it required to implement those obligations?

The second issue is this — when do the Crown obligations to the Métis arise? The Crown has consistently argued that any fiduciary obligations it might have do not arise until there is a court-determined, site specific Aboriginal right. With respect to the Métis, the Crown denies any fiduciary relationship or obligations under any circumstances.

This paper will examine both of these issues in light of another issue — how and when is the Crown to implement a constitutional or fiduciary relationship with the Métis — an Aboriginal people it has rarely acknowledged and no longer knows.

III. THE CROWN'S RELATIONSHIP WITH THE MÉTIS

The common law of Aboriginal rights developed in the context of the colonial experience in North America and has always been part of our constitutional law. The doctrine of Aboriginal rights is Canadian common law and it defines the constitutional relationship between the Crown and Aboriginal peoples.⁹ McLachlin J. explained this relationship in her decision in *Van der Peet*,

These arrangements [in the *Royal Proclamation*] bear testimony to the acceptance by the colonizers of the principle that the aboriginal peoples who occupied what is now Canada were regarded as possessing the Aboriginal right to live off their lands and the resources found in their forests and streams to the extent they had traditionally done so. The fundamental understanding — the *grundnorm* of settlement in Canada — was that the Aboriginal people could only be deprived of the sustenance they traditionally drew from the land and adjacent waters by solemn treaty with the Crown, on terms that would ensure to them and their successors a replacement for the livelihood that their lands, forests and streams had since ancestral times provided them...¹⁰

Unfortunately, the division of legislative powers and property set out in the *Constitution Act, 1867* was not sufficient to ensure that gov-

⁹ Slattery, "Understanding Aboriginal Rights" (1983) 66 Can. Bar Rev. 727, at 732 and 736-37.

¹⁰ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 272, [1996] S.C.J. No. 77, per McLachlin J. (as she then was) dissenting on other grounds [hereinafter "*Van der Peet*"].

ernments kept faith with the *grundnorm* on which the settlement of the country was based. It is for this reason that when the *Constitution Act, 1982* was enacted there was a political consensus to include section 35.

In 1984 and in 1990, the Supreme Court of Canada, in *Guerin* and *Sparrow*, set out the fundamental framework for analysis of section 35. The court held that the approach to be taken with respect to interpreting the meaning of section 35(1) is derived from general principles of constitutional interpretation, principles relating to Aboriginal rights, and the purposes behind the constitutional provision itself. They said that section 35 was to be construed in a purposive way.

The Court understood that the relationship between Aboriginal peoples and the Crown had to be addressed. It was not enough to address the specific events that gave rise to the Court action. The Court held that Aboriginal peoples and the Crown were in a fiduciary relationship and in light of that relationship, ways and means had to be found to protect Aboriginal peoples within the Canadian legislative, regulatory and policy regimes. The choice of fiduciary law was explained in *Guerin*,

[Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.¹¹

In *Guerin*, the Crown argued that if there was a trust, it was, at best, a political trust, enforceable only in Parliament and not a true trust, enforceable in the courts.¹² The Court expressly disagreed and held that even though the Crown's obligations could not be defined as a trust that did not mean that the Crown owed no enforceable duty to the Indians. As the Court explained six years later in *Sparrow*, the constitutional relationship between Aboriginal peoples and the Crown required a broad application of fiduciary law,

The *sui generis* nature of Indian title, and the historic powers and responsibilities assumed by the Crown constitute the source of such a

¹¹ *Guerin*, *supra*, note 7, at 28, *per* Dickson J. (as he then was) quoting with approval from Weinrib, *The Fiduciary Obligation* (1975) 25 U.T.L.J. 1, at 7; *Wewaykum Indian Band v. Canada*, 2002 SCC 79, at para. 80, [2002] S.C.J. No. 79 [hereinafter "*Wewaykum*"].

¹² *Guerin*, *supra*, note 7, at 9 and 21, *per* Dickson J.

fiduciary obligation ... the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship. Section 35(1) is a solemn commitment that must be given meaningful content. Yet, we find that the words “recognition and affirmation” incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. In other words, federal power must be reconciled with federal duty ... Such scrutiny is in keeping with the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada.¹³

The purpose of all of the Supreme Court findings with respect to the relationship between Aboriginal peoples and the Crown has been to facilitate reconciliation. Reconciliation requires three things — a working relationship, restraint on the exercise of governmental powers, and the creation of constitutional space that allows Aboriginal peoples to exercise and enjoy their rights and title. But section 35 did not give Aboriginal peoples the authority to protect their rights and interests themselves, nor did it alter the distribution of legislative powers. It did not give absolute status to Aboriginal and treaty rights. Instead, the *Constitution Act, 1982* simply “recognized and affirmed” Aboriginal rights in section 35. It is the Supreme Court of Canada that has read recognition and affirmation as incorporating constitutional restraints on the Crown’s exercise of its legislative and administrative powers.

The constitutional recognition afforded by [section 35] therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation ... it does hold the Crown to a substantive promise.¹⁴

The restraint, the “strong check on legislative power”, has been articulated in terms of broad principles — fiduciary relationship, justification and consultation. These are not the legal mechanisms for defining the existence of the Aboriginal right. Rather, they are the legal mechanisms for defining and enforcing the constitutional restraints on governments.

¹³ *Sparrow*, *supra*, note 1, at 1108; *Wewaykum*, *supra*, note 11, at paras. 74-79.

¹⁴ *Sparrow*, *supra*, note 1, at 1010.

From the vantage point of 2004, it seems that the inclusion of section 35 in the *Constitution Act, 1982* may not be having the effect intended by its creators. It does not seem to be a renewal of our commitment to the native peoples, nor has it been an historic recommendation of equality of constitutional standing of the Aboriginal peoples with other communities in Canada.

Basic scientific theory holds that to every action there is always opposed an equal reaction.¹⁵ If this theory applies to government, then we should not be surprised that section 35 seems to have had the effect of entrenching the Crown in an equal and opposite position of denial thereby creating an adversarial state of siege as between Aboriginal peoples and the Crown. This is particularly true of its relationship with the Métis. A relationship that can best be discerned by its absence.

The Crown often argues that it does not know who the Métis are. Yet both federal and provincial governments have taken few steps, if any, to find a contemporary answer to this complaint. Such willful ignorance should be unacceptable in a fiduciary. While, the Supreme Court of Canada has held that not all actions of the Crown trigger its fiduciary obligations, it has recently affirmed that the principle “applies to the relationship between the Crown and Aboriginal peoples”.¹⁶ On this basis it seems logical to presume that a fiduciary has at least one positive obligation in the absence of a triggering event — the obligation to identify the people with whom it has a relationship. If the Crown, as a fiduciary, fails to carry out this most basic activity surely it cannot then use its ignorance as an excuse to deny its obligations or to defeat rights. Indeed the Supreme Court said precisely this in *Powley*:

The appellant advances a subsidiary argument for justification based on the alleged difficulty of identifying who is Métis ... The development of a more systematic method of identifying Métis rights-holders for the purpose of enforcing hunting regulations is an urgent priority. That said, the difficulty of identifying members of the Métis community must not be exaggerated as a basis for defeating their rights under the Constitution of Canada.¹⁷

¹⁵ Isaac Newton, *Principia Mathematica* (1687).

¹⁶ *Wewaykum*, *supra*, note 11, at para. 83.

¹⁷ *Powley*, *supra*, note 6, at para. 49.

This contemporary claim of ignorance with respect to the identity of the Métis is convenient and new. In the past the government has quite adequately identified the Métis. Indeed, numerous counts of the Métis were carried out in the late 19th and early 20th centuries. That is how scrip was distributed to thousands of Métis on the Prairies. Treaty commissioners made it a usual practice to count the Indians and the Métis. Hudson Bay Company records and census takers also identified Métis. The real problem is that government neglected to keep its records up to date. It appears to have made its decision to stop acknowledging the Métis in the belief that two events extinguished the very existence of the Métis people — the distribution of scrip and the hanging of Louis Riel. While scrip may have had some legal effect on the Aboriginal title of the Métis, and the hanging of one man, Riel, certainly acted as a strong deterrent to political action, neither of these actions had the legal or physical effect of eradicating an entire people.¹⁸ The Métis people are still here, as an Aboriginal people.

The Supreme Court of Canada in *Sparrow* held that the Crown's fiduciary relationship is with the Aboriginal peoples of Canada.¹⁹ It was open to the Court, in view of the fact that *Sparrow* was about the fishing rights of Indians, to limit the fiduciary relationship to Indians and not use the more inclusive term Aboriginal peoples. Further, the Court stated that it was the term "recognize and affirm" from section 35 that imported the fiduciary relationship. In view of this, and when combined with the Court's admonition in *Powley*, it would seem likely that the fiduciary relationship, which applies to the "aboriginal peoples of Canada", includes the Métis.

Can the Crown legitimately claim ignorance about the difficulties of identifying the Métis? The historical record shows that the Crown has, in the past, identified Métis when it saw fit. The record also shows that

¹⁸ For more on scrip see: Sprague and Frye, *Genealogy of the First Métis Nation* (1981); see also *R. v. Morin and Daigneault*, [1996] 3 C.N.L.R. 157, [1996] S.J. No. 262 (Prov. Ct.), affd [1998] 1 C.N.L.R. 182, [1997] S.J. No. 529 (Sask. Q.B.), in which the court considered the question of the effect of scrip on Métis harvesting rights. In that case the court held that scrip was silent on hunting and fishing, did not meet the clear and plain extinguishment test, and therefore did not extinguish Métis hunting and fishing rights. For more on the defects in the trial of Louis Riel see: Bumsted, *Louis Riel v. Canada: The Making of a Rebel* (2001); and see also Olesky, *Louis Riel and the Crown Letters* (February, 1998) *Canadian Lawyer*.

¹⁹ *Sparrow*, *supra*, note 1, at 1108.

much of the current difficulty with identification of the Métis is a direct result of Crown law and policy. Having noted that the Crown itself may be to blame for the identification uncertainty, we are still left with questions. What are the identification difficulties? What does “Métis” mean? Who is included? Can the Crown continue to use this excuse to deny Métis recognition?

IV. THE COMPLEX REALITY OF MÉTIS IDENTIFICATION

In law, prior to 1982 there were different names for all of the Aboriginal peoples of Canada. At the beginning of the 21st century we use the terms First Nations, Inuit and Métis. Throughout most of the 19th and 20th centuries these same people were known as Indians, Eskimos and Half-breeds. None of these terms accurately reflect the cultural societies of the peoples they purport to describe. For example, “Indian” is a legal term that includes many distinct cultures – Mohawk, Cree, Tlingit, etc.

Since 1982, Indians have been gradually adopting the term “First Nations” and at the same time reclaiming their own language names. For example, the Tlicho were formerly known in English as the Dogribs. The Inuit were previously known as “Eskimos” but are also “Indians” within the meaning of section 91(24) of the *Constitution Act, 1867*.²⁰

The term “Métis” now replaces the term “half-breeds”. Under the previous English-language designation, “half-breeds” were recognized by the British imperial government and by the government of Canada. Generally speaking, “half-breeds” were seen by government as individuals with some claim to Aboriginal rights and title, but were not recognized as an Aboriginal people. Using the term “half-breed” implies that one is an individual who has “mixed-blood” or is “half-Indian”. The very term “half-breed” or “mixed-blood” has much less political significance than terms such as “the Métis” or “the Métis Nation” because such

²⁰ Reference re *British North America Act, 1867* (U.K.), s. 91, [1939] S.C.R. 104.

individuals are considered to be distantly connected to Indian nations and any rights they have would derive from that connection.²¹

There is a distinction between the legal terms used to describe Aboriginal peoples and the terms they self-ascribe. The legal terms reflect the universal practice of outside naming, or recognition by others, of the existence of a people who are different. The term “Métis” is unique in that it is a legal term and self-ascribed in the west-central parts of Canada.²² This is unlike the use of the term “Indian”, which is a legal term and not self-ascribed. The term “half-breed” reflects the concept of outside naming by English speaking historians, lawyers and settlers. The Cree also practiced outside naming by calling the Métis *apeyogosan* — meaning half-people. The Cree also coined another term for the Métis — *otpayemsuak* — meaning “the independent ones”. To the Cree, the Métis were *otpayemsuak* because their communities were distinct from both the non-Indian and Indian communities and because most Métis considered the treaty and reserve system to equate to a loss of their highly valued independence.

Although the term “Métis” and “Métis Nation” were self-ascribed in the early 19th century, the Métis have also had many names attributed to them by outsiders — half-breed, chicot, freemen, bois-brulé, michif, the flower beading people, the independent ones, the road allowance people and the forgotten people – to name just a few.

To outsiders, “Métis” is generally unhelpful as a defined term. There are several reasons for the confusion the term engenders. First, confusion results because the term is often erroneously applied to two distinct groups of people. It is used to refer to all individuals who have mixed Aboriginal and non-Aboriginal ancestry. These same individuals are sometimes called non-status Indians, a term that reflects the fact that they are not registered under the *Indian Act*. Métis also is the self-ascribed name of a distinct Aboriginal people — the historic Métis Nation located in central, western Canada.²³

²¹ Sanders, *Aboriginal Peoples and the Constitution* (1981) 3 Alta. Law Rev. 410, at 420. See previous use of the term “half-breeds” in the *Manitoba Act, 1870*, S.C. 1870, c. 3, R.S.C. 1985, Appendix II, No. 8, and in the *Dominion Lands Act*, S.C. 1870, c. 31, s. 125(e).

²² The term “Métis” was a legal term in Canada prior to its use in section 35. It is used in the French version of the *Manitoba Act, 1870*.

²³ For more on the history of the Métis Nation see: *Report of the Royal Commission on Aboriginal Peoples*, vol. 4, c. 5 (1996) [hereinafter “RCAP Report”]; Dickason, *Canada’s*

The second source of the confusion arises from the fact that in the late 1960s and the early 1970s, the Canadian public became more sensitive to the language of naming. It is at this time that the term “half-breed” began to be understood as a pejorative term and subsequently fell into disrepute and disuse. It was also at this time that the term Métis began to be used to include all persons of mixed Aboriginal and non-Aboriginal ancestry.

A third source of confusion about Métis identity arises from the relationship between Indians and Métis and the changing definition of “Indian” in the *Indian Act*.²⁴ In 1985, largely in response to the political efforts of non-status Indians and Métis, the government introduced Bill C-31. This amendment to the *Indian Act* reinstated many thousands of Indians who had been struck off the *Indian Act* registry. Prior to regaining their status as Indians, many had been calling themselves Métis. Indeed, many have both Indian and Métis ancestry. Bill C-31 had a considerable effect on the identity politics of Indians and Métis in Canada. Many of those who were reinstated will not be legally able to pass their Indian status on to their children and so, while for at least for the first generation, Bill C-31 substantially increased the numbers of Indians and decreased the numbers of Métis, their children or grandchildren will likely revert to pre-1985 status.

Another contributing factor is that the federal government accepts jurisdiction for Indians on reserve, but all governments in Canada deny jurisdiction for off-reserve Indians and Métis.²⁵ This has contributed to the tendency to lump these two separate peoples together. This jurisdic-

First Nations: A History of Founding Peoples from Earliest Times (1994), at 306-318; Siggins, *Riel: A Life of Revolution* (1994); Sprague, *Canada and the Métis, 1869-1885* (1988); Purich, *The Métis* (1988); Sealey and Lussier, *The Métis: Canada's Forgotten People* (1975).

²⁴ *Indian Act*, R.S.C. 1985, c. I-5.

²⁵ Hogg, *Constitutional Law of Canada* (1997), at 27-24. Also see Chartier, “Indians: An Analysis of the Term They Used in s. 91(24) of the British North America Act, 1867” (1978-1979) 43 S.L.R. 39; Morse and Giokas, “Do Métis Fall Within Section 91(24) of the Constitution Act, 1867?” in *Aboriginal Self-Government: Legal and Constitutional Issues* (1995); McMahon and Martin, “The Métis and 91(24): Is Inclusion the Issue?” in *Aboriginal Self-Government: Legal and Constitutional Issues* (1995).

For *contra* see Flanagan, “The Case Against Métis Aboriginal Rights” (1983) 9 Can. Pub. Pol’y 314; Schwartz, “First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada” (1986).

tional denial was looked on with disfavor in *R. v. Grumbo*, where Wakeling J.A., in his dissenting judgment had this to say:

I view it as unfortunate that there appears to be a considerable amount of tactical manoeuvring involved in the positions taken by the federal and provincial authorities with respect to issues of this nature ...

... This province probably felt obliged to maintain the position it had consistently taken that the Métis are a federal responsibility ... This position the Province has adopted leads to the judicial temptation to conclude it cannot blow hot and cold ... I refrain from such temptation only because I have decided the position taken by the Province is, in all likelihood, one thrust upon it by the historical inability of governments to agree on the extent of the responsibility owed to the Métis and which level of government has that responsibility. It is a political rather than a legal foundation which they stand upon ...

It is of interest that the Federal government was made aware of this appeal and chose not to become involved. It too may have had the difficulty of denying responsibility for the Métis since it is their position the Métis were not included as an Indian in s. 91(24) and at the same time acknowledging the existence of certain rights of the Métis now recognized in s. 35 of the *Constitution Act, 1982*. These inconsistencies in the position of governments reinforce my view that the judicial process should give but scant attention to the positions they have adopted as they appear to be tainted by considerations beyond those which are properly relevant to a judicial determination.²⁶

Prior to the creation of reserves, both Indians and Métis shared territory, usually peacefully. Although their homes and camps were usually adjacent to but separate from those of the Indians, the Métis and Indians usually shared harvesting areas and maintained close family ties. After treaties were entered into, Indians gradually began to relocate to reserves, a process that was accelerated as laws requiring attendance at schools began to be enforced. After the creation of the reserves, some but not all Métis also moved onto the new Indian reserves, married into and became part of the Indian culture. However, many who moved onto the reserves maintained their identity as Métis despite being legally registered as “Indians”. Indeed this was the story revealed by Gwynneth

²⁶ *R. v. Grumbo*, [1998] 3 C.N.L.R. 172, at paras. 83-87, [1998] S.J. No. 331, revg [1996] 3 C.N.L.R. 122, [1996] S.J. No. 504 (Q.B.).

Jones, the Crown's historical expert during the *Powley* trial. The Métis who went to live on the Garden River reserve near Sault Ste Marie never merged with the Ojibway residents of the reserve.²⁷

In the 1890s, the Ontario government gave former Magistrate Borron a mandate to determine ways to decrease the numbers of persons on the treaty annuity lists. Following the new *Indian Act of 1876*, which declared for the first time that Indians were to be determined according to their father's heritage, Borron claimed that the Métis, who for the most part are the descendents of Indian women, had no legitimate claims to either land, annuities or treaty rights. In very frank language Mr. Borron stated that:

Had he [W.B. Robinson] intended to include, or ever anticipated — that French Canadians and French Half-breeds or other breeds of like fecundity and longevity — were to be recognized as Indians by the Department of Indian Affairs and permitted to draw Annuities which his Province would be called upon to pay a man of the Hon. W.B. Robinson's sagacity and shrewdness would surely have inserted a clause in the treaty to protect the Province from such an imposition.²⁸

As a result of Borron's report, the "breeds of like fecundity and longevity" were removed from the reserve and lost their status under the *Indian Act*. Many, including the Powleys' ancestors, simply returned to the nearby Métis community that persisted in the vicinity.

Métis rarely take on Indian status in order to become "Indians" culturally. Rather, they usually choose Indian status in order to take advantage of the benefits that are available to those recognized as Indians. Olaf Bjornaa gave a poignant illustration of this in *Powley*. At trial, Mr. Bjornaa was asked why he finally accepted Bill C-31 status when he said he'd identify as Métis until the day he died. Mr. Bjornaa told the court that he had been a commercial fisherman all his life. Recently he'd had an accident on his boat. As a result he couldn't fish any more and could no longer make a living from his fishing. While he retained his commercial fishing licences he was denied any social assistance. Since fishing licences can be inherited or used by other family members, he didn't want to give them up. But Mr. Bjornaa was raising his grandchild-

²⁷ *Powley*, 2003 SCC 43, at para. 35, [2003] S.C.J. No. 43.

²⁸ *Borron Reports* of 1891 and 1892 as cited in the *Report of Gwynneth Jones* (1998) prepared for the trial *R. v. Powley*. Ms. Jones was the Crown's historical expert.

dren and he now required over \$300 a month in medicine. Taking Bill C-31 was a pragmatic necessity. Mr. Bjornaa needed access to the health benefits available to status Indians but denied to Métis.²⁹

The issue of Métis identity is sensitive, has many layers and has always been complicated. Identity can also mean different things in different contexts. So with all of the above in mind we can ask the question — who are the Métis?³⁰ There appear to be at least three answers to this question: (1) Métis are individuals with mixed European and Aboriginal blood; or (2) Métis are an Aboriginal people; or (3) Métis are those who describe themselves as such in order to claim the protection of section 35 of the *Constitution Act, 1982*.

The first category is relatively self-explanatory. Anyone with any Aboriginal ancestry, no matter how remote, can self-identify as Métis and many programs and services are granted on the basis of self-identification. However, mere self-identification is not sufficient for the purposes of claiming constitutional rights. This is because the recognition and affirmation of Aboriginal rights under section 35 of the *Constitution Act, 1982* is reserved for the “aboriginal peoples of Canada”. The word “peoples” is used three times in section 35. It means that unless an individual can also prove membership in a Métis collective, she will not likely be able to claim section 35 protection for her rights. This line of reasoning can be seen in recent case law.³¹ It has now been affirmed by the Supreme Court of Canada in *Powley*:

The term “Métis” in s. 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears.³²

²⁹ *Powley* trial transcripts, volume 4, “Testimony of Olaf Bjornaa”.

³⁰ For more on this question see: Bell, “Who Are the Métis People in Section 35(2)?” (1991) *Alta. L. Rev.* 29.

³¹ *R. v. Howse*, [2000] B.C.J. No. 905 (Prov. Ct.), revd [2002] B.C.J. No. 379 (S.C.); leave to appeal to B.C.C.A. granted on March 12, 2003; *R. v. Daigle*, [2003] 3 C.N.L.R. 232, [2003] N.B.J. No. 65 (Prov. Ct.); *R. v. Castonguay*, [2003] 1 C.N.L.R. 177 (N.B. Prov. Ct.); *R. v. Chiasson*, [2002] 2 C.N.L.R. 220, [2001] A.N-B. No. 87 (Prov. Ct.); *R. v. Nunn*, unreported, April 17, 2003 (B.C. Prov. Ct.); *R. v. Hopper*, [2004] N.B.J. No. 107 (Prov. Ct.).

³² *Powley*, 2003 SCC 43, at para. 10, [2003] S.C.J. No. 43.

With respect to the second category, in *Powley*, the Supreme Court of Canada discussed the fact that there may be more than one Métis people in Canada:

The Métis of Canada share the common experience of having forged a new culture and a distinctive group identity from their Indian or Inuit and European roots. This enables us to speak in general terms of “the Métis”. However, particularly given the vast territory of what is now Canada, we should not be surprised to find that different groups of Métis exhibit their own distinctive traits and traditions. This diversity among groups of Métis may enable us to speak of Métis “peoples”, a possibility left open by the language of s. 35(2), which speaks of the “Indian, Inuit and Métis peoples of Canada”.³³

With respect to the third category, since the inclusion of the Métis as one of the “aboriginal peoples of Canada” in section 35, the term Métis is now a legal term, much like the term Indian. Some Aboriginal people, who do not culturally identify as Métis, are now claiming the constitutional protection of the legal term Métis. An example of this kind of claim can be found in the factum of the Intervener, the Labrador Métis Nation, at the Supreme Court of Canada in *Powley*, in which they stated that the “Labrador Métis” use the constitutional descriptor of “Métis” even though it was an Inuit culture.

Will the courts agree that the constitutional protection of the legal term “Métis” is available to those who are not culturally identified as Métis? The Supreme Court of Canada addressed this issue in *R. v. Blais*. In that case the question was whether Métis were “Indians” for the purposes of the *Natural Resources Transfer Agreements (NRTA)*. The Court said that the Métis are not included in the legal term “Indians”. The Court looked to the common language understanding of the term “Indian” at the time the *NRTA* was enacted — 1930. The Court said that it would not “overshoot” the actual purpose of the right and that the constitutional provision was not to be interpreted as if it was enacted in a vacuum:

³³ *Id.*, at para. 11.

... the terms “Indian” and “half-breed” were used to refer to separate and distinguishable groups of people in Manitoba from the mid-19th century through the period in which the NRTA was negotiated and enacted.³⁴

In view of this analysis, it seems likely that groups who culturally identify as “Indians” or “Inuit”, would not be “Métis” for the purposes of section 35 because they would not meet the plain language test set out by the Supreme Court of Canada in *Blais*.

Despite the complexities of Métis identification set out above, historically the Métis were part of the political, social and legal fabric of Canada since at least 1763. The recognition of the Métis and their inclusion in section 35 is not a new recognition. In fact, it is part of a long history of government recognition of the Métis. The Crown has consistently recognized that Métis were part of the Aboriginal landscape and dealt with them in recognition that they had Aboriginal rights. However, with a few exceptions, government dealt with Métis as individuals and refused to deal with the Métis as a collective.

Prior to the 1830s, the British imperial government treated the Métis like all other Aboriginal people in North America. For example, the Métis shared in the annual distribution of presents given by the Crown to Aboriginal allies. Originally instituted by the French and later continued by the British, the giving of presents was an important symbolic means of cementing the friendship and alliance of Aboriginal peoples and the Crown. Métis warriors fought along with other Aboriginal warriors as allies of the British Crown in the War of 1812.³⁵

After 1830, British policy in Canada, with respect to the Métis began to shift. The government, in its policies and law, began to separate Métis from Indians. This shift had only one motivation — government’s desire to decrease its financial obligations to Aboriginal people by reducing the sheer numbers of those who were considered to be Aboriginal. In 1846, the Bagot Commission recommended that:

Crown financial obligations were to be reduced ... and only persons listed as band members would be entitled to treaty payments ... [recommending that] the following classes of persons be ineligible to receive these payments; all persons of mixed Indian and non-Indian blood who had not

³⁴ *R. v. Blais*, 2003 SCC 44, at para. 34, [2003] S.C.J. No. 44.

³⁵ *Report of Dr. Victor Lytwyn* (1998) prepared for the trial in *Powley*.

been adopted by the band; all Indian women who married non-Indian men and their children ...³⁶

The policy was reiterated by the Pennefather Commission of 1858, which had a mandate to find effective methods of decreasing government financial obligations to Indians. It recommended that one of the most efficient ways to decrease these costs would be to cut the Métis off the treaty lists.³⁷

In Manitoba in 1869, Canada negotiated with the Métis as a collective. That negotiation resulted in the *Manitoba Act, 1870*, which set aside 1.4 million acres "... for the benefit of the families of the half-breed residents".³⁸ In 1875, in the *Addendum to Treaty Three by the Half Breeds of Rainy Lake/Rainy River*, the Métis adhered to the treaty as a collective. In the numbered treaties on the Prairies and in the Northwest Territories, government officials met with Métis and Indians at the same time to discuss the treaty, but then used different mechanisms for each. Indians received treaty. Métis received scrip, issued pursuant to the *Dominion Lands Act*.³⁹ In each of these circumstances the Métis sought to have their Aboriginal claims recognized. They were acknowledged as having Aboriginal claims, although for the most part, they were dealt with as individuals and treated differently than Indians.

This is why the recognition of the Métis in section 35(2) is not a new recognition. And because the recognition of the Métis is not new, their inclusion in section 35 cannot be interpreted as merely a political compromise. The inclusion of the Métis in section 35 is part of a contin-

³⁶ *RCAP Report, supra*, note 23, at vol. 1, at 268.

³⁷ *Id.*

³⁸ *The Manitoba Act, 1870*, S.C. 1870, c. 3, R.S.C. 1985, App. II, No. 8, s. 31; *RCAP Report, supra*, note 23, at vol. 4, c. 5, at 305-309, 403-407, 413-22; *Dumont v. Canada (Attorney General)*, [1990] 2 C.N.L.R. 19, [1990] S.C.J. No. 17, revg (*sub nom. Manitoba Métis Federation Inc. v. Attorney General of Canada*), [1988] 3 C.N.L.R. 39, [1988] M.J. No. 327 (C.A.), revg [1987] 2 C.N.L.R. 85, [1987] M.J. No. 108 (Q.B.). See also *Dumont v. Canada (Attorney General) (Man. C.A.)*, [1992] 2 C.N.L.R. 34, [1991] M.J. No. 621 (C.A.), revg [1991] 3 C.N.L.R. 22, [1990] M.J. No. 660 (Q.B.) [hereinafter "*Manitoba Métis Federation*"]. For an extensive discussion of the background, negotiations and implementation of the *Manitoba Act, 1870*, see Chartrand, *Manitoba Métis Settlement Scheme of 1870* (1991).

³⁹ *Dominion Lands Act*, S.C. 1879, c. 31, s. 125(e). For a discussion on the scrip distribution system, see *RCAP Report, supra*, note 23, at 407-408, 422-30. For discussions on Métis participation within treaties, see *RCAP Report, supra*, note 23, at 341-43. Also see map of Métis scrip commissions in *Historical Atlas of Saskatchewan* (1999), at 61-62.

uum begun much earlier, implemented as part of the doctrine of Aboriginal rights as articulated in the *Royal Proclamation*, and affirmed by government actions and in statutes, treaties and constitutional instruments.

What is new about section 35 is the solid commitment to deal with the Métis as an Aboriginal people from 1982 on. The government's failure to consistently treat the Métis as a people was the foundation of the old and difficult grievances that required reconciliation with the Métis. The very survival of the Métis into the 21st century is a testament to their collective strength and aspirations. It was in 1763 with the Pontiac Uprisings that the Métis first began to assert their Aboriginal rights. These assertions continued with the Battle of Seven Oaks in 1816, the Sayer trial in 1849, Mica Bay in 1849, Red River in 1870, the *Half-breed Addendum to Treaty #3* in 1875, at Saskatchewan (Duck Lake, Fish Creek and Batoche) in 1885, and again in the events leading up to 1982.⁴⁰

As settlement moved west, and the government concluded treaties with the Indians, the Métis faced the continuing challenge of maintaining their collectivity.

... Increasing immigration and development consumed their historical lands at a distressing rate. Increasingly restrictive hunting laws, with which they were required to comply despite their Aboriginal heritage, made it more and more difficult to follow traditional pursuits. While they were never well off, Indian people at least had their reserves and benefited from various social services provided by the government of Canada. Not so the Métis ... Game was scarce, prohibitively expensive fishing licences were required, and white settlement was spreading remorselessly. The majority of the Métis were reduced to squatting on the fringes of Indian reserves and white settlements and on road allowances. The 'independent ones,' who had been the diplomats and brokers of the entire northwest were now being referred to as the 'road allowance people'.⁴¹

This excerpt from the *RCAP Report* specifically discusses the Alberta Métis. Yet, Alberta is the only province that has maintained some

⁴⁰ For Pontiac Uprisings see *Testimony of Dr. Lytwyn*, Powley Trial Transcripts, vol. 3, at 3-151; For Mica Bay see *Testimony of Dr. Ray*, Powley Trial Transcripts, vol. 2, at 124-288. For other Métis assertions see *RCAP Report*, *supra*, note 23, at vol. 4, c. 5.

⁴¹ *RCAP Report*, *supra*, note 23, at vol. 4, c. 5, at 227.

affirmative action with respect to the Métis. Governments by and large have refused to acknowledge the existence of the Métis as a people. The Métis were intentionally ignored or displaced and became known as the “forgotten people”. With no protected collective lands, the Métis culture was constantly threatened by wave after wave of settlers with an agricultural lifestyle. Yet, despite all of this, the Métis survived. They slipped from public awareness and as with all Aboriginal peoples in Canada, they lived for decades in relative obscurity. Canadians grew into their maturity as a country during this time but with respect to their memories of the Métis “down they forgot as up they grew”.⁴²

Some people think that the Metis Nation history ended on the Batoche battlefield or the Regina gallows. The bitterness of those experiences did cause the Metis to avoid the spotlight for many years, but they continued to practise and persevere Metis culture and to do everything possible to pass it on to future generations.⁴³

The story told by Olaf Bjornaa at trial — that he and his sister were turned away from the reserve school (because they were not Indians) and the non-Aboriginal school (because they were Indians), is indicative of the Métis place in Canadian society — “You’re almost a person in your own homeland.”⁴⁴

However, while the Métis may have been forgotten by the public and government, they did not disappear. The Métis quietly continued to persevere and in the 1960s, along with Indian and Inuit organizations, they began to re-emerge with new political organizations to speak for their rights.

In *Sparrow*, the Chief Justice stated the reasons why it was necessary to protect Aboriginal rights in the Constitution. He quoted MacDonald J. when he stated that we “cannot recount with much pride the treatment accorded to the native people of this country”.⁴⁵ The same kind of historical reasons underlie the decision by the federal government and nine provinces to expressly include Métis and their Aboriginal and treaty

⁴² Cummings, “anyone lived in a little how town”, in Gary Geddes (ed.), *20th Century Poetry & Poetics* (1969), at 108.

⁴³ *Powley*, 2003 SCC 43, at paras. 24-27, [2003] S.C.J. No. 43, at para. 24-27; and see also *RCAP Report*, *supra*, note 23, vol. 4, c. 5, at 227.

⁴⁴ *R. v. Powley*, [1999] 1 C.N.L.R. 153, at para. 83, [1998] O.J. No. 5310 (Prov. Ct.).

⁴⁵ *Sparrow*, [1990] 1 S.C.R. 1075, at 1103, [1990] S.C.J. No. 49.

rights in the *Constitution Act, 1982*. O'Neill J. perhaps stated it best when he held that:

The purposes underlying the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982* relate to both prior occupation, and reconciliation. What, however, are the reasons underlying the protection that s. 35(1) gives, and what is the basis for the special protection that aboriginal peoples generally, and Métis people specifically, have within Canadian society? Surely, at the heart of s. 35(1), lies a recognition that aboriginal rights are a matter of fundamental justice protecting the survival of aboriginal people, as a people, on their lands. The Métis have aboriginal rights, as people, based on their prior use and occupation as a people. It is a matter of fairness and fundamental justice that the aboriginal rights of the Métis which flow from this prior use and occupation, be recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*.⁴⁶

The Ontario Crown, in *Powley* urged the court not to treat the Métis as a people but rather as individuals who are simply the descendents of Indians, with their rights and existence determined by their Indian ancestors, their Indian blood quantum and their Indian lifestyle. The court rejected this submission,

This theory in effect would deny to Métis their full status as distinctive rights-bearing peoples whose own integral practices are entitled to constitutional protection under s. 35(1).⁴⁷

In fact there would have been no reason to include the Métis in section 35 if they were to be treated as individuals who are part Indian. The recognition — that the Métis are a distinct people — is one of the most fundamental reasons that required the inclusion of the Métis in section 35. The failure of governments to recognize and affirm the Métis as a people is the old and difficult grievance of the Métis. Government's predominant pattern — treating Métis as individuals — is exactly what is needed and still needs to change.

⁴⁶ *R. v. Powley*, [2000] O.J. No. 99, at para. 16, [2002] O.J. No. 99 (S.C.J.).

⁴⁷ *Powley*, 2003 SCC 43, at para. 38, [2003] S.C.J. No. 43.

V. WHEN DOES THE CROWN HAVE TO ACT?⁴⁸

The relationship between the Crown and the Métis first came before the Supreme Court of Canada in *R. v. Powley*. It is in *Powley* that the Court affirmed that the Métis are an Aboriginal collective with their own distinctive practices, customs and traditions. It set out a test for identifying the section 35 harvesting rights of the Métis. The Court held that the purpose for including Métis in section 35 was to enhance “their survival as distinctive communities”⁴⁹ and to “protect practices that were historically important”.⁵⁰

The inclusion of the Métis in s. 35 represents Canada’s commitment to recognize and value the distinctive Métis cultures ... which the framers of the *Constitution Act, 1982* recognized can only survive if the Métis are protected along with other Aboriginal communities.⁵¹

The duty to protect is a positive duty on the Crown. After all, non-interference may be achieved by inaction, but protection cannot be implemented in the abstract or in the negative. Protection also cannot be achieved by the enactment of policies, regulations or laws that affect, but do not address Métis rights. As the Supreme Court of Canada noted in *Sparrow*, Aboriginal peoples are justifiably suspicious of “neutral” rules that in reality place insurmountable obstacles that bar the exercise of their rights.⁵²

The Crown argues that it has no constitutional or fiduciary obligations to Aboriginal peoples generally, and no obligations to Métis specifically, unless and until there is a court finding. By this, the Crown means a specific finding of a specific right for each and every separate Aboriginal people.

⁴⁸ The theories on Crown obligations with respect to consultation and accommodation that appear in this paper were developed with Arthur Pape and first appeared in the factum of the plaintiffs in *Taku River Tlingits First Nation v. Tulsequah Chief Mine Project*, [2002] B.C.J. No. 155, at 171-73 (C.A.), affg [2000] B.C.J. No. 1301 (S.C.) [hereinafter “*Taku River Tlingits*”] and also in the factum of the Intervener, First Nation Summit in *Haida Nation v. British Columbia (Minister of Forests)*, [2002] 2 C.N.L.R. 121, at para. 37, [2002] B.C.J. No. 378 (C.A.).

⁴⁹ *Powley*, 2003 SCC 43, at para. 13, [2003] S.C.J. No. 43.

⁵⁰ *Id.*

⁵¹ *Id.*, at para. 17.

⁵² *Sparrow*, [1990] 1 S.C.R. 1075, at 1110, [1990] S.C.J. No. 49.

In support of its argument, the Crown takes the position that the constitutional obligations of section 35 are limited to *Sparrow*-type situations. In that kind of case, a defence against a prosecution, the courts have defined one of the Crown's duties as a duty to justify their actions. But the Supreme Court of Canada has never said that the Crown's duty only arises after a court has proclaimed the existence of an Aboriginal right, nor has it said that court determinations are the only source of the Crown's duties to Aboriginal peoples. On the contrary, the Supreme Court has always proceeded on the basis that the duty existed before the Court's determination of the right and that the Crown has to justify its infringement as of the time of the offence, not as of the time of the court judgment.

The Supreme Court also said, in *Adams*, that it is unconstitutional for the Crown to adopt an unstructured discretionary regime that risks infringing Aboriginal rights in a substantial number of applications.⁵³ This is hardly the kind of statement that can only apply to after-the-fact justification. Rather, it speaks to the general obligations of the Crown and is a positive duty. It arises without the adjudication of specific rights.

The discussion of the Crown's duty to consult in *Delgamuukw* also reflects the view that Crown obligations arise prior to the adjudication of Aboriginal rights or title:

... the fiduciary relationship between the Crown and Aboriginal peoples may be satisfied by the involvement of Aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation ... The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to Aboriginal title. Of course, even in those rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal people whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require

⁵³ *R. v. Adams*, [1996] 3 S.C.R. 101, at para. 54, [1996] S.C.J. No. 87 [hereinafter "*Adams*"].

the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands.⁵⁴

Sparrow, *Adams* and *Delgamuukw* therefore, cannot be reconciled with the position that the Crown's obligations do not arise until particular section 35 rights are determined. Practically speaking, if the Crown has no obligations to Aboriginal people until specific rights are adjudicated, Aboriginal peoples have no constitutional protection. Under such an interpretation, Aboriginal peoples will be forced to flood the courts because that would be the only way to stop the Crown from charging Aboriginal people with harvesting violations, alienating Crown lands and resources, or authorizing impacts to land-related Aboriginal interests. This cannot be correct and no one can afford this enormous litigation agenda.

This position, that the Crown has no obligations prior to a court-determined right, contains two errors. First, it prioritizes justification and infringement over recognition and affirmation. Second, it assumes that constitutional and fiduciary duties only arise in the context of justification. This focus on justification instead of the affirmative purpose of section 35 is clearly misguided. The justification scheme cannot be used to determine the existence of Aboriginal rights. Justification reflects one fact only, that such rights are not absolute. In this way it is similar to section 1 of the Charter. Just as section 1 does not define the nature of governments' obligations under the Charter, the Crown's obligations pursuant to section 35 also cannot be defined through the lens of justification.

As noted in *Delgamuukw*, the Crown has, at minimum, an obligation to act "with the intention of substantially addressing the concerns of the Aboriginal people whose lands are at issue".⁵⁵ In *Taku River Tlingits*, the B.C. Court of Appeal found that the duties of the Crown were triggered by the assertions of the Aboriginal peoples and did not require a court finding. The court said that to find otherwise would have the effect of robbing section 35(1) of much of its constitutional significance:

⁵⁴ *Delgamuukw*, [1997] 3 S.C.R. 1010, at para. 186, [1997] S.C.J. No. 108.

⁵⁵ *Id.*

In my opinion, nothing ... provides any support for the proposition that Aboriginal rights or title must be established in court proceedings before the Crown's duty or obligation to consult arises.⁵⁶

The B.C. Court of Appeal in *Haida Nation* stated the obligation even more forcefully.⁵⁷

So the trust-like relationship and its concomitant fiduciary duty permeates the whole relationship between the Crown, in both of its sovereignties, federal and provincial, on the one hand, and the aboriginal peoples on the other. One manifestation of the fiduciary duty of the Crown to the aboriginal peoples is that it grounds a general guiding principle for s. 35(1) of the *Constitution Act, 1982*.

It would be contrary to that guiding principle to interpret s. 35(1) ... as if it required that before an aboriginal right could be recognized and affirmed, it first had to be made the subject matter of legal proceedings; then proved to the satisfaction of a judge of competent jurisdiction; and finally made the subject of a declaratory or other order of the court. That is not what s. 35(1) says and it would be contrary to the guiding principles of s. 35(1), as set out in *R. v. Sparrow*, to give it that interpretation.

The Ontario Court of Appeal expressed a similar opinion in *Powley*. In that case Sharpe J. said,

I do not accept that uncertainty about identifying those entitled to assert Métis rights can be accepted as a justification for denying the right ... The basic position of the government seems to have been simply to deny that these rights exist, absent a decision from the courts to the contrary... The government cannot simply sit on its hands and then defend its inaction because the nature of the right or the identity of the bearers of the right is uncertain.⁵⁸

The Supreme Court has not yet brought down a judgment that considered whether the Crown's duties are triggered in the absence of a court finding, although *Sparrow*, *Adams* and *Delgamuukw* suggest there is such a duty.⁵⁹ The *Sparrow* justification approach cannot exhaust the

⁵⁶ *Taku River Tlingits*, *supra*, note 48, at 171-73 (B.C.C.A.).

⁵⁷ *Haida Nation*, *supra*, note 48, at para. 37.

⁵⁸ *R. v. Powley*, [2001] O.J. No. 607, at para. 166, [2001] O.J. No. 607 (C.A.).

⁵⁹ These issues were argued before the Supreme Court of Canada in *Taku River Tlingits* and in *Haida Nation* in March of 2004.

role of section 35 in the relationship between the Crown and the Aboriginal peoples of Canada.

The courts in *Taku River Tlingits* and in *Haida* held that the Crown's duties were triggered by threats to vulnerable Aboriginal interests rather than the adjudication of rights. The Powleys indeed argued just this trigger in their argument with respect to the necessary change to the contact test for Métis. Before the Supreme Court, the Powleys submitted that the relevant time to determine the rights of the Sault Ste Marie Métis community was the time just prior to 1850, when the Crown's obligations arose pursuant to the *Royal Proclamation*. The historical record showed that the Crown had authorized non-Aboriginal third party activities just prior to 1850 when control was shifting away from the Aboriginal peoples in possession. This was the time when, with respect to the Sault Ste Marie Métis community, the Crown's fiduciary obligations arose and when its obligations to implement the equitable principles in the *Royal Proclamation* crystallized.

This approach mirrors the practices of the Crown in making treaties to implement the equitable principles of the *Royal Proclamation*. Historically, treaty making involved no exhaustive analysis to determine the practices, customs or traditions of the Aboriginal people at contact, nor was there any attempt to determine eligibility based on length of occupation.⁶⁰ On the contrary, the Crown properly entered into treaty with the Indians who were in possession at the time. Each time the Crown implemented the equitable principles from the *Royal Proclamation* — beginning in the Upper Great Lakes with the *Robinson Treaties* and continuing west with the numbered treaties — it negotiated when it wanted to access lands and resources for settlement, mining or forestry development or in order to build transportation corridors.

It is suggested that this is the appropriate trigger for Crown obligations — when it seeks to authorize activities that stand to affect Aboriginal interests. Once that trigger has been activated, the Crown is under an obligation to effectively protect Aboriginal communities and the lands and resources on which they rely. This trigger and the resulting obligations would apply to all Aboriginal peoples — including the Métis.

⁶⁰ Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1992-93) 8 Queen's L.J. 232.

VI. HOW DOES THE CROWN HAVE TO ACT?

Once the trigger has been activated, the Crown is obligated to undertake all activities with a view to ensuring that it substantially addresses the concerns and interests of Aboriginal peoples. This necessitates consultation and accommodation. The Crown's duty is not satisfied unless it fulfils both.

The Supreme Court said, in *Delgamuukw*, that there is always a requirement to consult when Aboriginal rights may be infringed.⁶¹ Consultation is constitutionally mandated although it will usually be triggered by a pending exercise of statutory power. The decision in *Adams* goes further, requiring statutory regimes in respect of land and resources to provide rules for complying with the duty:

... In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights ...⁶²

Consultation has two parts. It is intended to fulfil government's obligation to inform Aboriginal peoples and to inform itself. This includes informing itself and the affected Aboriginal peoples about the significance of any actions government is about to undertake, the effects of such actions and how those effects might be mitigated. Because the ecological, cultural or economic impacts on Aboriginal peoples are not always obvious, Aboriginal people have a role to play in providing that information and analysis.⁶³ They can only do this effectively if government is genuinely seeking to inform itself.

⁶¹ *Delgamuukw*, *supra*, note 54, at para. 168.

⁶² *Adams*, *supra*, note 53, at para. 54.

⁶³ For discussions of practices and institutions that sustain a minority people and its culture, see *Mahe v. Alberta*, [1990] 1 S.C.R. 342, [1990] S.C.J. No. 19; *Lalonde v. Ontario (Health Services Restructuring Commission)* (2001), 56 O.R. (3d) 505, at paras. 180-81, [2001] O.J. No. 4767; *Doucet-Boudreau v. Nova Scotia (Min. of Education)*, 2003 SCC 62, [2003] S.C.J. No. 63, at paras. 26-29, 60 and 65.

Accommodation is intended to fulfil the Crown's obligation to exercise its authority so as to protect Aboriginal peoples. Effective accommodation measures will vary with the circumstances but the goal of accommodation is not to trade off or surrender Aboriginal interests and rights. Rather, the goal is to ensure Aboriginal interests and rights will survive and can be effectively exercised. At minimum, accommodation requires the Crown to refuse to authorize proposals that would either undermine or endanger Aboriginal interests, especially the interests needed to sustain them as an Aboriginal people.

If the Crown chooses to exercise its legal authority in the absence of substantive consultation with the Aboriginal collective or in the absence of an agreement on accommodation, any authorization that it grants will suffer from a fundamental legal defect. This would be so if the Crown has not fulfilled its duty to consult and accommodate according to the standards of loyalty and prudence to which fiduciaries are held.⁶⁴

Whether the Crown has fulfilled its duty to consult and accommodate will not depend on initiatives that are alleged to accommodate the Aboriginal interest, or whether the Crown has considered Aboriginal concerns, taken some mitigation steps, or acted rationally as opposed to arbitrarily. The duty is not procedural it is substantive. The fulfilment of the duty depends on whether the Crown substantially addressed the interests of the Aboriginal peoples.

VII. THE COMPLEXITIES OF CONSULTATION WITH THE MÉTIS

With respect to the Métis, it is suggested that the Crown has the same consultation obligations that it has to all other Aboriginal peoples. It must take steps to inform the Métis about its pending actions. And it must inform itself about how its actions might affect the Métis collective.

With respect to how the government is to fulfill its consultation obligations, three issues have arisen since *Powley* that show the complexities of consultation with the Métis. First, with whom is the government obligated to consult — who represents the Métis *qua* Métis? Second, is

⁶⁴ *K.L.B. v. British Columbia*, [2003] S.C.R. 51, at 40; *Regal (Hastings) Ltd. v. Gulliver*, [1942] 1 All E.R. 378, at 361 and 389; *Toronto Dominion Bank v. Uhren* (1960), 32 W.W.R. 61 (S.C.C.); *Lloyds Bank v. Bundy*, [1974] 3 All E.R. 757.

a Métis collective synonymous with a physical community? Third, is there an obligation on each Métis individual to provide provincial governments with evidence that meets the *Powley* test prior to exercising a Métis harvesting right?

As a general principle, the government's consultation obligation must be directed to the Aboriginal peoples, as a collective, because Aboriginal rights are collective rights. Consultation with individual members of the collective can only inform government about that individual's interests. It cannot fully inform government about the collective interests or aspirations of an Aboriginal people.

As with consultation implemented with Indians, consultation with Métis must begin with their elected representatives. This is, admittedly, a more complicated task for Métis than for Indians because Métis do not live in discrete physical communities equivalent to reserves. Métis people in any given region are rarely synonymous with a physical town, village or city. This is because the Crown did not relocate Métis into geographically distinct areas as it did when it relocated Indians onto reserves. The Métis continue to live, as most Aboriginal people lived prior to the creation of reserves, scattered throughout their traditional territory. Some live on reserves, some live adjacent to reserves, some live in the bush, some live in cities, towns or villages. Statistics show that the Métis have always been a highly mobile people and it is interesting to note that this characteristic has not changed. Indeed the latest census data shows that the Métis continue to move more than average Canadians.⁶⁵ Under these circumstances, consultation with Métis collectives is complicated but not an insurmountable task.

Can the Crown fulfil its consultation obligation with respect to the Métis by consulting with local municipal representatives? While it will obviously be important for the Crown to engage in consultations with municipal representatives, this would likely not fulfil the Crown's consultation obligation with respect to the Métis and their section 35 rights. Municipal representatives have no jurisdiction, authority or mandate to deal with the Métis *qua* Métis. They have limited jurisdiction pursuant

⁶⁵ Statistics Canada reports that according to the 2001 census, "23% of the population that identified themselves as Métis changed residences in the year prior to the census, compared with only 14% of the non-Aboriginal population". See the Statistics Canada web site at <<http://www12.statcan.ca/english/census01/products/analytic/companion/abor/groups2.cfm>>.

to their governing statute and within the geographic territory of their municipality. But municipal representatives have no mandate or authority to represent Métis with respect to the exercise of Métis rights or title. Municipal representatives are particularly inappropriate when one considers that elected municipal representative may not even be Métis and that the exercise of many Métis rights, such as hunting, fishing and trapping, take place well outside municipal boundaries.

Would the Crown's consultation obligation be fulfilled by consultation with Métis organizations? For Indians, the Crown instituted Chief and Council on reserves and gradually these bodies have replaced the traditional forms of governance and become recognized in law as the official representatives for all purposes including consultation. The Crown has never established similar political or legal bodies for the Métis. As a result, the self-created, ballot-box elected Métis organizations are the only entities in existence that have the structure and mandate to represent Métis *qua* Métis.⁶⁶

Governments are extremely reluctant and have refused to recognize the authority of these Métis created organizations for consultation purposes.⁶⁷ Governments question the Métis organizations' membership rules, question their authority and deny them recognition, resources and respect. In view of the fact that the Crown has neglected to maintain its own Métis records, has not adequately funded these organizations to enable them to develop verifiable records, and in the absence of any other viable entities, it is difficult to understand how the Crown can fulfill its constitutional and fiduciary consultation obligations without consulting Métis organizations.

The fact that Métis organizations are legally capable of representing the Métis for the purposes of their constitutional rights has been before the courts in Manitoba in the case of *Manitoba Métis Federation v.*

⁶⁶ These political organizations include the Métis National Council, the Métis Nation of Ontario, the Manitoba Métis Federation, the Métis Nation-Saskatchewan, *etc.*

⁶⁷ Testimony of Heather Leonoff, Q.C., at the Wuskwatim Hydro Projects public hearing before the Clean Environment Commission, Winnipeg, April 15, 2004, Transcripts, vol. 21, at 4976, wherein she testified that the Manitoba government had made a decision not to consult with the Manitoba Métis Federation at either the provincial or with the locals with respect to the effects of the projects on Métis because "a political group doesn't have Section 35 rights. Section 35 rights belong to communities. So it's communities of some sort that have rights, not a group like that. It has to be communities, the Metis people. Some Metis people have rights ... but not an organization."

Canada (previously known as *Dumont*).⁶⁸ The federal government moved to have the claim struck and a majority of the Manitoba Court of Appeal agreed. O'Sullivan J.A. dissented:

The problem confronting us is how can the rights of the Métis people as a people be asserted. Must they turn to international bodies or to the conscience of humanity to obtain redress for their grievances as a people, or is it possible for us at the request of their representatives, to recognize their people claims as justiciable?

In my opinion ... the rights of the Métis people must be capable of being asserted by somebody. If not by the present plaintiffs, then by whom?

The Supreme Court unanimously overturned the Manitoba Court of Appeal decision, which has the effect of reinforcing O'Sullivan J.A.'s finding that the Manitoba Métis Federation is an appropriate legal entity to represent Métis with respect to their Métis rights. It would seem logical that if the Manitoba Métis Federation can sue on behalf of the Métis with respect to their Métis rights, the Crown should also consult with them in respect of those same rights when it contemplates activities that stand to affect them.

In other developments post-*Powley*, evidentiary issues have arisen. The Supreme Court of Canada set out a test for ascertaining whether an individual can claim the protection of section 35 for Métis harvesting rights. Despite the Court's emphasis on the fact that Métis are a people with collective rights, and despite the Court's statements with respect to the urgent priority that must be afforded to standardizing Métis identification, provincial governments have made few moves in this regard and are refusing to recognize identification cards issued by Métis organizations. Instead, government is placing the burden of proof on each individual Métis who seeks to exercise her harvesting rights and in the absence of such proof is laying charges.

The quantity and cost of providing such voluminous evidence cannot be underestimated. Under such a demand and prior to exercising their harvesting rights, each individual Métis must provide a genealogy complete with supporting documentation. Each individual Métis must provide a full history of her Métis collective, complete with proof of the

⁶⁸ *Dumont v. Canada (Attorney General)*, [1988] M.J. No. 327, at 9, *per* O'Sullivan J. (in dissent) (C.A.).

date of the assertion of effective control by the colonial government. Each individual Métis must also provide proof that she is an active participant in the Métis community. Presumably such evidence could be adduced by evidence of participation in Métis social events, or in known Métis cultural activities such as jigging, playing the fiddle, beading or speaking Michif. Under these circumstances provincial natural resource officers become prosecutor, judge and jury. They determine whether there is a Métis collective, whether that collective has harvesting rights, the date of effective control, the sufficiency of genealogical evidence and whether the cultural connection to the Métis community is sufficient in terms of depth and length. This cannot be correct and if it is, the Métis cannot afford any more such “victories”.

Surely this cannot be what the Supreme Court of Canada contemplated in establishing the *Powley* test. Yet Crown prosecutors are demanding all of this evidence from each individual who claims Métis harvesting rights in the new world post-*Powley*. It is a rather stunning reversal of the strong statements of a unanimous Supreme Court of Canada. The prosecutorial lens, combined with the government’s own abysmal ignorance about the Métis is being used to do exactly what the court said should not happen. Governments are not working with Métis organizations as an “urgent priority” to consult with the Métis collectives or to accommodate them in a way that substantially seeks to identify Métis rights holders. Rather the “urgent priority” seems to be to charge individual Métis harvesters when they cannot discharge the impossible evidentiary burden the Crown has imposed under the guise of the *Powley* test. This is not a burden carried by any other Aboriginal peoples who seek to exercise their harvesting rights.

The Crown’s actions since *Powley* defeat what the Supreme Court of Canada said was the purpose of section 35 — to “protect practices that were historically important”⁶⁹ and in effect have eviscerated the Supreme Court of Canada’s judgment in *Powley*.

It is suggested that the better way to proceed would be for government to consult with Métis representatives and negotiate agreements that allow individual Métis to exercise their harvesting rights and provide the certainty that government needs. Until such agreements are in place, no prosecutions should be laid. The Crown should not take ad-

⁶⁹ *Powley*, 2003 SCC 43, at para. 13, [2003] S.C.J. No. 43.

vantage of the uncertainty and negotiation period by charging individual Métis for exercising the harvesting rights that have so recently been affirmed by the Supreme Court of Canada. Such restraint would be in keeping with the concept of holding the Crown to a high standard of honorable dealing with respect to the Métis.

VIII. CONCLUSION

As can be seen from the post-*Powley* events, the Crown is continuing its past practices and the very relationship that section 35 was supposed to change. The Crown focus remains on individual Métis rather than with the Métis collective. *Plus ça change plus c'est la meme chose*. It seems that the old and difficult grievances of the Métis remain to be reconciled.

