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The Métis and Thirty Years of Section 35: How Constitutional Protection for Métis Rights Has Led to the Loss of the Rule of Law

Jean Teillet

The Métis perspective on section 35 begins with the story of how Métis were included in section 35. On October 2, 1980, Prime Minister Pierre Trudeau published a “Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada”. The Resolution contained a reference to Aboriginal rights only in a general clause that proposed to preserve “rights” not contained in the Canadian Charter of Rights and Freedoms, “including those that may pertain to native people”. Aboriginal peoples had not been consulted about the new Constitution and they became concerned that a transfer of constitutional powers from Britain to Canada might result in a further diminishment of their Aboriginal and treaty rights. Following the publication of the Resolution there were many Aboriginal demonstrations, including the Constitution Express, an action that included many Métis leaders. By January of 1981 the first draft of what was later to become section 35 was added to the Constitution, which was originally drafted as follows:

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The aboriginal and treaty rights of the aboriginal peoples of Canada as they have been or may be defined by the Courts are hereby recognized and affirmed and can only be modified by amendment.⁴

According to Ian Waddell, the phrases “as they have been or may be defined by the Courts” and “and can only be modified by amendment” were later removed for redundancy. This was the form of the clause that went before the Joint Senate House of Commons Committee Hearings in January 1981. Just before Jean Chrétien, then Minister of Indian Affairs, went into the hearing for his presentation, Métis leader Harry Daniels accosted him, telling him to remember the Métis, that they were one of the Aboriginal peoples of Canada. It was at this point that Svend Robinson penned the basis of what was later to become section 35(2): “Aboriginal peoples include Indian, Inuit and Métis.”

As subsequently passed by the House of Commons in February 1981, the new Constitution then included women’s equality rights and Aboriginal rights. By November both clauses had been removed, an action that provoked Aboriginal leaders to protest vigorously, resulted in the resignation of Justice Berger from the bench, and created a flurry of media and public protest.⁵

In response to the vociferous protest and as part of the ongoing political bargaining, both clauses were reinserted into the new Constitution, with the revised section 35 reading now as follows:

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

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

Section 37 stated that a constitutional conference would be convened within one year of April 17, 1982, and that one of the mandated agenda items would be the “identification and definition of the rights of those peoples to be included in the Constitution”. The provision promised that representatives of the Aboriginal peoples would be invited to participate in the discussions.⁶ A later amendment to section 37 stated that at least

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⁴ Waddell, “Building a Box”, supra, note 1, at 18.
⁵ For the story of Justice Berger’s resignation from the bench, see Thomas Berger, One Man’s Justice: A Life In The Law (Vancouver: Douglas & McIntyre, 2002), at 146-64. For the story of the removal of the women’s equality clause, see <http://www.cbc.ca/history/EPISCONTENTS E1EP17CH2PA4LE.html>. For Aboriginal protest against the removal of their protection clause, see <http://indigenousfoundations.arts.ubc.ca/home/community-politics/constitution-express.html>.
⁶ Section 37 of the Constitution Act, 1982, since repealed pursuant to s. 54.
two additional constitutional conferences would be convened, the first within three years after April 17, 1982, and the second within five years of that date. At these two additional conferences the agenda was to include “constitutional matters that directly affect the aboriginal peoples of Canada”. Again, the Prime Minister was to invite “representatives of those peoples to participate in the discussions on those matters”.

As the date of the first constitutional conference drew near, questions began to arise with respect to representation. Throughout the debates leading up to the inclusion of section 35 in the Constitution, the Métis had been represented by Harry Daniels, a respected Métis leader from Saskatchewan and the President of the Native Council of Canada. The Native Council of Canada (“NCC”) was established in 1971 by Prairie Métis and non-status Indians. The NCC was, from its inception, a pan-Aboriginal association with multiple aims. The central aim of the non-status Indian members was to regain their status as “Indians” within the meaning of the Indian Act. When it came time to select representatives to attend the first constitutional conference, the NCC proposed two non-status Indians as the representatives, with a mandate to press for changes to the Indian Act that would result in the reinstatement of those who had lost their status. In the absence of Métis representation at the constitutional conferences, Métis concerns would not be heard.

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8 The founding organizations of the NCC were the B.C. Association of Non-Status Indians, the Metis Association of Alberta, the Association of Metis and Non-Status Indians of Saskatchewan and the Manitoba Metis Federation. Representatives of these associations met in Victoria on November 16, 1970 and formed an Interim National Committee, with Jim Sinclair chosen as Chair and Tony Belcourt as Secretary. In April 1971 the group met again in Ottawa, where they adopted by-laws and elected the first Executive Committee. It was at this meeting that they took the name Native Council of Canada. Tony Belcourt was elected President at that meeting. The breakaway of the Métis from the NCC is discussed in Bryan Schwartz, First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft (Montreal: The Institute for Research on Public Policy, 1986), at 91-93. And see Antoine Lussier, “The Métis and the Non-Status Indians, 1967-1984” and “The Métis and the Indians 1960-1984” in Aspects of Canadian Métis History (Ottawa: Indian and Northern Affairs Canada, 1985) 1, at 1.
9 Non-status Indians refers to individuals who were not registered as “Indians” under the Indian Act. They may have had their own registration removed for various reasons including, for women, marriage to a man who was not an Indian. Many individuals identified as non-status Indians because their parents or grandparents had been de-registered. The story of the long efforts of the Canadian government to reduce those listed as Indians within the meaning of the Indian Act is related fully in the Report of the Royal Commission on Aboriginal Peoples (Ottawa: Canada Communication Group, 1996), Vol. 1, ch. 9 [hereinafter “RCAP Report”].
The Métis members of the NCC were understandably upset. Led by Clément Chartier, they walked out of the NCC, now convinced that a pan-Aboriginal organization would never adequately represent Métis interests. These leaders established the Métis National Council, an organization dedicated solely to the attainment of Métis goals. The Métis National Council then sought seats at the constitutional conference table and were promptly rejected. At this point the Métis retained a lawyer and filed an injunction demanding a seat at the table. In their injunction application they specifically referred to section 37, which stated that representatives of the peoples identified in section 35(2), the “Indian, Inuit and Métis peoples of Canada” were guaranteed representation. In an out-of-court settlement, the federal government agreed to give one seat to the NCC for the representation of non-status Indians and one seat to the Métis National Council for the representation of the Métis.\footnote{Brian Schwartz, *First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada, 1982-1984* (Kingston, ON: Institute of Intergovernmental Relations, Queen’s University, 1985), at 15-17. For a discussion of Alberta’s position during the First Ministers’ Conferences on Aboriginal Constitutional Matters, see R. Dalon, “An Alberta Perspective on Aboriginal Peoples and the Constitution” in M. Boldt & J.A. Long, eds., *The Quest For Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985), at 88-89.}

Ultimately, the resolution of the representation issue was of little assistance in resolving the difficult issues the constitutional conferences were intended to resolve. At the first conference in 1983, some Aboriginal leaders sought to amend the wording of section 35 by deleting the word “existing”. The concern of the Métis appears to relate to the “full box/empty box” debate. If “existing” meant treaty rights or rights that had already been recognized by the courts, then the Métis would have nothing out of the new Constitution. The attempt to remove the word “existing” was an attempt to ensure that rights could be recognized in the future.\footnote{This concern was subsequently resolved by the Supreme Court of Canada in *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075, at paras. 23-27 (S.C.C.) [hereinafter “Sparrow”], wherein the Court held that “existing” means unextinguished.} In response, the Premier of Alberta, Peter Lougheed, explained that he would not agree to delete “existing” from section 35:

> In November of 1981, we worked closely with the Alberta Métis leaders and others to develop an alternative wording, which would satisfy our respective concerns. The present recognition and affirmation
of existing aboriginal and treaty rights in Section 35 of the
Constitutional Act, 1982, is the result of that cooperation.\textsuperscript{13}

With or without the word “existing”, First Nations and the Métis both sought to ensure that section 35 included Aboriginal self-government. The Métis National Council put it this way:

The purpose of our participation in this conference is to entrench in the constitution the right of the Métis people to a land base and self-government ... We believe we must have these rights entrenched in the Canadian constitution to fulfill our Métis destiny.\textsuperscript{14}

There was no way that the Premiers or Canada were prepared to agree to the express inclusion of self-government in section 35. Nor did they agree on much else that would give more substance to section 35. The two things they did agree on were added as amendments. A gender equality clause was added, and a new section was included to incorporate modern land claims agreements, an inclusion it should be noted that, despite Premier Lougheed’s refusal to delete the term “existing”, is entirely inconsistent with its meaning. Section 35(3) now included future rights that would come into existence by agreement. The first constitutional conference also established that there would be future conferences to deal with the fact that the definition of the rights in section 35 had not been accomplished. Subsections 35(3) and (4) and section 35.1 were added:\textsuperscript{15}

35(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

35(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.\textsuperscript{16}

35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class

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\textsuperscript{13} Melvin H. Smith, Q.C., Some Perspectives on the Origin and Meaning of Section 35 of the Constitution Act, 1982, Public Policy Sources, Vol. 41 (Vancouver & Toronto: Fraser Institute, 2000), at 11 [hereinafter “Smith”].

\textsuperscript{14} Id., at 10.

\textsuperscript{15} Smith, supra, note 13, at 12-13.

\textsuperscript{16} Subsections 35(3) and (4) were added by the Constitution Amendment Proclamation, 1983. See SI/84-102.
24 of section 91 of the “Constitution Act, 1867”, to section 25 of this Act or to this Part,

(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

Ultimately, the constitutional conferences, which were intended to put some flesh on the bones of section 35, left that work undone. Conferences were held in 1984, 1985 and 1987. No further agreements were reached and the focus of the last three conferences was mainly self-government.¹⁷

Meech Lake added nothing to the resolution of section 35. In fact, the entire process excluded Aboriginal participation and it was as a result of that exclusion that on June 23, 1990, Elijah Harper was able to take his defiant stand, supported by virtually all of the Aboriginal peoples in Canada. The image of Elijah Harper holding on to his eagle feather and quietly refraining from supporting the Meech Lake constitutional proposal in the Manitoba legislature is one of the enduring constitutional images in the Canadian consciousness. Despite the fact that Newfoundland also rejected the Meech Lake proposal, it is the image of Elijah Harper that sustains in the national mind’s eye.

In reaction to the Aboriginal rejection of Meech Lake, the Charlottetown round of constitutional conferences began very differently. Aboriginal peoples were conspicuously included in these discussions. For the Métis, the Charlottetown Accord was a momentous achievement. It contained a Métis Nation Accord¹⁸ which would have included Métis as “Indians” within the meaning of section 91(24) of the Constitution Act, 1867¹⁹ and also included a definition of Métis. It also promised negotiations towards self-government.²⁰ The rejection of the Charlottetown

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¹⁸ Proposed Métis Nation Accord, RCAP Report, supra, note 9, Vol. 4, App. 5D, at 376-82.
¹⁹ (U.K.), 30 & 31 Vict., c. 3.
²⁰ RCAP Report, supra, note 9, Vol. 4, at 380, Métis Nation Accord, s. 14: Upon a proclamation issued by the Governor General under the Great Seal of Canada of amendments to the Constitution of Canada, which include an amendment to the Constitution Act, 1982 recognizing the inherent right of self-government of the Aboriginal
Accord by the general public was a serious setback for the Métis. With its downfall went any support for resolution of Métis issues by the federal government. Métis, once again, were relegated to a role they had played prior to 1982 — the forgotten people.

Despite the failure of all the constitutional discussions in the conferences, Meech Lake and Charlottetown, the Métis sustained a belief that their inclusion in section 35 carried some meaning. After all, they were now a named people in the Constitution. Their Aboriginal and treaty rights were “recognized and affirmed”. Surely that meant something. It has taken 30 years for the true meaning of constitutional inclusion to become clear.

Thus began what has since become known as the full box/empty box debate, with the players on predictable sides. The Métis asserted that the box was full and government had an obligation to act to recognize and affirm those rights. Government assured the Métis that section 35 was empty of meaning until filled in by court-determined rights. This opinion was based on the early drafts of section 35, which had included an explicit statement that the rights protected by section 35 were only those that “have been or may be defined by the Courts”. Douglas Sanders related the following story about the federal government’s empty box theory:

Ian Binnie, then the leading figure in the federal Department of Justice, was asked what rights he thought were protected by section 35. The question was put at a Ministerial level meeting held in preparation for one of the First Ministers’ Conferences on aboriginal constitutional matters. Binnie gave one example, Indians had the right to surrender land. His statement was greeted with laughter, it was so absurd. The federal government had an “empty box” theory. A box of rights had been protected by section 35, but unfortunately the box was empty.\(^2\)

Thirteen years after the enactment of section 35, government’s opinion was the same for the Métis:

At the present time, the Ontario Government does not recognize Metis people as having any special access rights to natural resources.\(^2\)

peoples of Canada and the coming into force of s. 91A of the Constitution Act, 1867, clarifying that all of the Aboriginal peoples of Canada are included in section 91(24) ...


In all of the previous decade of constitutional discussions, none of the Aboriginal peoples of Canada had considered that their crowning achievement — recognition and affirmation of their rights in the Constitution — would have no legal effect. Everyone had expected that governments would act to change their laws, regulations and policies to begin this recognition and affirmation. It had not occurred to the Métis that a deafening silence of denial would be the only result of section 35.

With the failure of political action, all Aboriginal peoples, including the Métis, turned to the courts. And it has been in this forum that any subsequent resolution of Métis identity and rights has been undertaken.

Two Indian cases handed down by the Supreme Court of Canada inspired the Métis to begin a litigation strategy: Guerin v. Canada\textsuperscript{23} in 1985 and Sparrow\textsuperscript{24} in 1990. Although Guerin could have been argued with reference to section 35, it was not. In the early 1980s most were wary of section 35 and at the time Guerin was proceeding through the courts the constitutional conferences were still in play. In the end, no one argued Guerin as a section 35 case. Still, it was clear that the Supreme Court of Canada was prepared to look at the government’s role in dealing with reserve lands in a manner that indicated an elevated level of scrutiny from previous cases. With the finding that Aboriginal peoples were in a fiduciary relationship with the Crown, the Court fired a warning shot across the bow. If the government interpreted this decision narrowly, it was not seen that way by Aboriginal peoples. Guerin gave Aboriginal peoples some confidence — if government would not act in their interests, maybe the courts would do so. Sparrow further cemented the relationship between Aboriginal peoples and the courts. Sparrow also provided the road map for the Métis hunt for justice. The Métis saw that there was now a general framework for determining the existence of Aboriginal rights and that they could fit into that framework.

In the mid-1990s the Métis began their litigation journey. The first cases arose in Manitoba and Saskatchewan.\textsuperscript{25} These cases — a hunting case in northern Manitoba and a fishing case in Northwest Saskatchewan — affirmed four important things. First, they recognized that Métis existed as an Aboriginal people with collective Aboriginal rights in these areas. This was no small victory in light of the history of government-
Métis relations, where Métis were typically treated as individuals with uncertain claims to Aboriginal rights. Second, these courts affirmed that Métis hunting and fishing rights were protected within the meaning of section 35 and that they were to be treated equally to Indian rights. Again, these were important gains and clarification that section 35 did not contain a hierarchy of rights that placed Indian rights ahead of Inuit or Métis rights. Third, the courts concluded that the scrip process had not extinguished Métis harvesting rights. Whatever effect scrip may have had with respect to any Indian title claimed by the Métis, the scrip documents are silent about harvesting rights. Fourth, Métis harvesting rights co-existed with the treaty rights of Indians. The Métis won both these cases at trial and again on appeal to the Court of Queen’s Bench. The provincial governments declined to appeal further and in Manitoba, in particular, proceeded to act as if these courts had not recognized any Métis rights at all. The Saskatchewan provincial government drew an arbitrary line dividing northern and southern Saskatchewan and continued to charge Métis south of that line.

Meanwhile in Ontario, after having lived in the shadows for generations, the Métis slowly began to come out of hiding. In October 1993, Steve and Roddy Powley decided, for the first time, to bring their moose home in the daylight. A neighbour called Crime Stoppers and thus began the only section 35 Métis rights case that has gone to the Supreme Court of Canada. The case was successful at each level of court. But with each ruling, Métis assertions of their rights and opposition from the Ontario government escalated. When the Métis won a unanimous ruling from the Ontario Court of Appeal, then Premier Mike Harris announced vehemently from the steps of Queen’s Park legislature that the government would appeal to the Supreme Court of Canada. This was the same Premier who campaigned on a platform to rip up negotiated harvesting agreements with the Williams Treaty bands and whose government presided over the Ipperwash incident. For the Métis, it was obvious that despite pro forma statements by justice officials as to the independence of Crown counsel in determining the merits of an appeal, it was a political decision to appeal Powley to the Supreme Court of Canada.

26 Supra, note 22.
The decision of the Supreme Court of Canada, when it came in the Fall of 2003, was extremely gratifying to the Métis. The Court confirmed virtually every aspect of their claim. At least a skeleton definition of Métis was set out, one that was put forward and endorsed by the Métis National Council:

The term “Métis” in section 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.

A Métis community can be defined as a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life.28

The basic question as to whether Métis people existed in Ontario was put to rest. Finally, it was clarified that Métis rights co-existed with treaty rights and that Métis were to be treated on a par with Indians, at least so far as their harvesting rights were concerned.

The section 35 Métis box finally had something in it and the federal government, at the very least, began to take some small steps towards recognition. Realizing that they had no knowledge of where modern Métis communities were, the federal government commissioned several research papers. It is unfortunate that the Department of Justice interfered in the conclusions of these papers in a manner that undermined their independence and usefulness. Nevertheless, in 2004 the federal government did implement Interim Federal Guidelines for Métis Harvesting.29

The provinces responded with relentless negativity. Even in Ontario, a negotiated agreement was hard to come by. Still, in 2004 the Métis Nation of Ontario (a governing member of the Métis National Council) and the Province of Ontario entered into “Four Points of Agreement” with respect to Métis harvesting. The agreement included a commitment not to charge Métis who were harvesting pursuant to Métis-issued

28 Powley, supra, note 22, at paras. 10-12 (S.C.C.).
29 Reference to the existence of the Federal Guidelines can be found on the website of Aboriginal Affairs and Northern Development, at <http://www.aadnc-aandc.gc.ca/eng/1100100011945>. The Métis National Council was provided with a copy in 2004. However, the Guidelines are not readily available to the Métis generally. For example, a version was provided in 2011 to the Fort Smith Métis Council (not a member of the Métis National Council) in Parks Canada’s filed documents in Smith’s Landing First Nation v. Parks Canada Agency and Fort Smith Métis Council, Federal Court Doc. No. T-10-11. This case settled out of court.
harvesters cards. It also committed both sides to joint research in areas of the province where government questioned the existence of Métis and would initiate an independent review of the Métis registry. The province withdrew the many pending harvesting charges and then, on the very day they withdrew the last charge, proceeded to ignore the agreement and begin charging again. The Métis Nation of Ontario again resorted to the courts. This time it was not a section 35 case, but a simple question — was the Crown honour-bound by its commitments in the “Four Points of Agreement”. Justice Rogers in North Bay was unequivocal. The Crown did not have to enter into agreements, but if it did, it was honour-bound to implement them.

Meanwhile in Alberta, a similar story was being enacted. After negotiating an Interim Métis Harvesting Agreement that recognized a Métis right to harvest, the province began to lay charges. In *R. v. Kelley*, the Court of Queen’s Bench acquitted Mr. Kelley, stating that he had a right to rely on such agreements. However, the Court found that the Agreement itself lacked the force of law because it was not made pursuant to a law or regulation. This writer believes that the Court was wrong in this and that the better view is that the Agreement had as its source of law, section 35. The fact that the Agreement was not made a regulation or that the law itself was not amended, was of course not within the powers of the Métis. At the time, Ted Morton was running for Premier. His election campaign echoed the earlier Harris campaign in Ontario in that he promised to rip up the Métis Agreement if elected. Though he was not elected as Premier, he was appointed as Minister of Sustainable Resource Development, the ministry with jurisdiction over Métis harvesting. True to his promise, Minister Morton gave immediate notice that the Agreement would end. Despite a sustained effort on the part of the Métis Nation of Alberta, Alberta fastened onto the *Kelley* decision as an excuse, citing the fact that the Agreement was legally unenforceable. It conveniently and consistently neglected to mention that it was legally unenforceable only because Alberta did not give the Agreement the force of statute or regulatory law. Alberta then cancelled the Agreement.

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30 The Four Points of Agreement between MNO and Ontario can be found at <http://www.metisnation.org/harvesting/harvesting-policydocuments>.
The Métis were left with no option but to take to litigation hectare by hectare in Alberta, Saskatchewan and Manitoba. Charges in each province accumulated and were left to rot. In Manitoba, as of 2012, there are some 20 charges against Métis for harvesting. Despite a trial court judgment that affirmed Métis rights in *R. v. Goodon*, some of these charges are almost a decade old.

The battle in Manitoba is the most frustrating. To everyone else in Canada it seems obvious that if there are Métis anywhere, it must be in Manitoba, the home of Louis Riel. After consistently refusing to negotiate or to drop existing charges, in a recent case, *R. v. Beer*, the Métis learned from disclosure that Manitoba had enacted a Métis Harvesting Policy in January 2011. The policy was a closely held secret. No consultation process gave evidence of the policy and it was never published or provided to any Métis. Yet the policy purports to recognize harvesting cards issued by the Manitoba Métis Federation. This was news to the Métis. A disturbing aspect of this recently revealed policy purports to establish a “parallel world of unnamed bureaucrats” that will determine who is Métis.

In Saskatchewan, two cases have succeeded only in pushing the arbitrary boundary line a few miles further south. In an even more disturbing reality, the courts appear to be creating artificially bounded Métis communities that are defined only with respect to where the harvesting activity at issue in the case took place. For example, in *R. v. Bellhumeur*, the defendant resided in Regina but hunted in the Qu’appelle Valley. The Court held that the Métis community extended the 200 miles to include Regina — only because that is where the defendant lived. Meanwhile, Métis who live just a few miles east of the Qu’appelle Valley do not have any harvesting rights. In *R. v. Laviolette*, the Saskatchewan government argued that the defendant had no Métis rights because he lived in a common law relationship with a status Indian woman on an Indian reserve. In the government’s view, moving away from your small Métis community, even if only a move of 35 miles, resulted in an extinguishment of your harvesting rights.

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As a result of these cases, the Métis in the Prairie provinces no longer go to court to prove they have harvesting rights. They go to court for one reason only — to establish the harvesting boundaries surrounding an artificial and arbitrary Métis community — to prove a fiction as fact. Bear in mind that the Métis of the Northwest, particularly the descendants of the famous Métis buffalo hunters, were known far and wide as a highly mobile people who lived on the plains and travelled thousands of miles each year in pursuit of the migratory buffalo. Finding the boundaries of a physical settlement that can be called a Métis community is an exercise in futility. This is not to say that there were no Métis settlements. Red River (now Winnipeg), Fort Edmonton, Lac Ste. Anne, Batoche, St. Laurent, Rainy River and Sault Ste. Marie are just a few well-known Métis settlements. But for many Métis these settlements were not where they lived. If they were fur traders in the boreal forest they spent most of their time en route. If they were buffalo hunters they spent the bulk of their time on the plains. They built temporary wintering cabins in sheltered spots such as Cypress Hills, Wood Mountain and Turtle Mountain. Settlements were primarily for the acquisition of necessaries. But life for many Métis was one of mobility. It is in these circumstances that the current problem of Métis litigation arises. How does one geographically define a historical Métis community when the people were so mobile? The issue is compounded by the fact that even today the Métis continue to be more mobile than other Canadians.\(^\text{39}\)

Taking aim at this problem is the central thesis in the latest Métis rights case, \textit{R. v. Hirsekorn}.\(^\text{40}\) The defendant shot a deer just outside the Cypress Hills in southern Alberta. At trial the judge convicted the defendant largely because he could not locate a Métis “community” in central and southern Alberta prior to effective control.\(^\text{41}\) He found against

\[^{39}\text{Mary Jane Norris, “Geographic Distribution and Mobility of Alberta Métis Population; Research Report based on 2006 Census”, 2010 for \textit{R. v. Hirsekorn}, [2010] A.J. No. 1389, 2010 ABPC 385 (Alta. Prov. Ct.), revd in part [2011] A.J. No. 1217, 2011 ABQB 682 (Alta. Q.B.) [hereinafter “Hirsekorn”]. The author concluded that once the five-year migration rates for Alberta are standardized (which factors in, among other things, a youthful population, moving for employment and family reasons) the Métis continue to be 11 per cent more mobile than the non-Aboriginal population in Alberta, while registered Indians are actually less mobile than the non-Aboriginal population. After the standardization of the data for the one-year mobility question, the Alberta Métis rates remain 24 per cent higher than the non-Aboriginal population.}\]

\[^{40}\text{Id.}\]

\[^{41}\text{In Indian rights claims, part of the test requires that the claimant prove the practice, custom or tradition was exercised at the time of contact with Euro-Canadians. For Métis the time test is “effective control”, which is the time when Métis customs, practices and traditions were changed by the influences and control of Euro-Canadians.}\]
the Métis on virtually all points, with some notable exceptions, which include his unequivocal recognition of Métis communities on the North Saskatchewan River. However, he dismissed the constitutional challenge on the grounds that the Métis had chosen to assert their rights in a very public way. The trial judge held that this precluded them from claiming that they were asserting a right to hunt for food. The trial judge also held that the very ability to raise a constitutional defence against a harvesting charge was an unacceptable collateral attack. He was overturned on both these points on appeal by the Court of Queen’s Bench.42

One of the trial judge’s central findings, which was upheld by the Court of Queen’s Bench, was that the Métis did not hunt in central and southern Alberta with sufficient regularity or in sufficient numbers to establish a harvesting right. This finding is nothing short of astonishing in light of the evidence. In fact, the evidence at trial is uncontradicted. Even the Crown’s expert agreed that the Métis hunted in central and southern Alberta prior to effective control. Having participated in many Aboriginal harvesting rights trials, this writer can attest to the fact that the evidence provided in Hirsekorn showing that Métis were in central and southern Alberta prior to effective control is more voluminous than at any other Aboriginal harvesting rights trial in the history of this country. There are detailed accounts by the Northwest Mounted Police of interviews with Métis in Cypress Hills on their arrival. The Blackfoot complained of the Métis hunting in their territory in southern Alberta and sent a petition to Canada detailing that complaint. There are descriptions of a Métis hunting camp in southern Alberta by the Boundary Commission. There are even photographs of a Métis camp of over 1,000 hunters located just 34 kilometres from where Mr. Hirsekorn shot his deer. All of this took place prior to effective control of southern Alberta.

No such evidence has ever before been amassed in another Aboriginal harvesting rights case. Certainly no other case has had a photograph of so many hunters so close to the kill site. Yet the courts appear to be deciding, not based on the Powley test, or even the Van der Peet test.43 Instead they appear to have decided that because there is no permanent or semi-permanent settlement, Métis must meet some higher standard of proof. They must have more than 1,000 hunters, they must have been there more often, they must do something above and beyond what the

42 Hirsekorn, supra, note 39, at paras. 49-53 and 82-83 (Q.B.).
previous Aboriginal case law states. This is the issue that will be argued before the Alberta Court of Appeal in the Fall of 2012 or Winter of 2013.

This history shows the relationship of the Métis to section 35 as of 2012. To date only the Métis Nation (geographically described as the Métis of the Northwest) has been recognized as being a Métis people within the meaning of section 35(2). Although there have been several cases brought in New Brunswick, each case has foundered for lack of any finding of a historic or continuing Métis community. In these cases, even experts called by the Métis claimants have declined to testify that there were any historic Métis communities in these areas. Until last year, there was some question as to whether there were Métis in Labrador, but the group there has recently decided that they are Inuit and not Métis. As a result, there appears to be only one Métis people in Canada — the Métis of the Northwest.

The above is a brief overview of the past 30 years of Métis law. Where has section 35 left us? First, the Métis are at the mercy of provincial political whim. Despite the urgings of the Supreme Court of Canada that these matters are best negotiated, the Alberta Métis negotiated agreement was interpreted as legally unenforceable and was eliminated when the political winds changed. If the courts find that there are section 35 rights, and Métis negotiate an agreement based on that finding, the subsequent negotiated agreements should not be so vulnerable to politics. In this, section 35 has ultimately been of little avail. Supreme Court of Canada urgings about negotiated settlements mean little if there is only one party at the table. Negotiations are a dance that requires a partner. What we have seen is that a section 35 declaration of Métis rights cannot bring the government to the table or sustain a negotiated agreement when the political winds shift direction.

Second, Métis are left with a disturbing lack of law. Why? The answer appears to be a lethal combination of section 35 and section 52. Section 52 states that any law that is inconsistent with the Constitution is of no force or effect to the extent of the inconsistency. This indeed is the declaration Aboriginal claimants seek from the courts in harvesting rights.
cases. For example, the Powleys were acquitted of hunting charges by virtue of their Métis rights within the meaning of section 35 and therefore that section of the Ontario *Game and Fish Act* was declared “of no force or effect” with respect to them. Because Aboriginal rights are collective rights, the finding of the Court in *Powley* also means that the relevant section of the *Game and Fish Act* does not apply to the Métis community of Sault Ste. Marie.

Following the Supreme Court of Canada’s decision in *Sparrow*, despite the fact that the case was sent back down for reconsideration, Ontario implemented a policy that recognized and affirmed fishing and hunting practices for Indians registered under the *Indian Act*.

Despite these cases and the many thousands of Aboriginal people who are affected, no provincial government has amended its laws or regulations to accommodate Métis rights. The federal government has also failed to take any actions that might be described as law. All governments have resorted to policy or guidelines. As the Ontario government has stated:

> The provincial legislation that MNR currently implements, fish and wildlife related and otherwise, does not purport to directly regulate Aboriginal or treaty rights protected by section 35. Indeed, there are various and significant issues with respect to provincial regulation of Aboriginal and treaty rights including federal-provincial division of powers issues and *Indian Act and Charter of Rights and Freedoms* concerns.

This position is curious to say the least. The fact is that these policies do “directly regulate” Aboriginal and treaty rights because they have supplanted laws and regulations.

Métis have been consulted on none of these policies or guidelines. Many of them are not published anywhere and some we know of only by accident. The *Beer* situation is a case in point. It cannot be right that all

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47 *Sparrow*, supra, note 12, at para. 89.
Métis in a province find out about the existence of policies only by way of disclosure in a regulatory case. Clearly, transparency of law and accountability are no longer available to the Métis. To say the least, this is not the rule of law that all other Canadians live by. The unfortunate and unexpected result of section 35 therefore appears to be an utter loss of the rule of law for Métis.