



Understanding the Métis Nation of Alberta’s Role and Authorization in Relation to Dealing with Section 35 Métis Rights and Crown Consultation in Alberta¹

The following submission has been prepared by the Métis Nation of Alberta (“MNA”) in order to outline to the Government of Alberta (“GoA”) why the MNA, which includes its Locals, Regions and Provincial Council, is the appropriate representative body to deal with in relation to addressing with the Crown’s duty to consult, and, where appropriate, accommodate, Métis rights protected within the meaning of the s. 35 of the *Constitution Act, 1982*.

1. Organizations Can Be Authorized to Advance Section 35 Aboriginal Rights and Address the Duties flowing from those Rights (i.e., Crown Consultation)

The Supreme Court of Canada has confirmed that Aboriginal groups who possess s. 35 rights can authorize an entity (i.e., an individual or organization) to represent them for the purpose of asserting their collectively-held s. 35 rights. Specifically, the Supreme Court of Canada held,

... But an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights: see, e.g., *Komoyue Heritage Society v. British Columbia (Attorney General)*, 2006 BCSC 1517, 55 Admin. L.R. (4th) 236.²

As ‘Aboriginal groups’ that possess s. 35 rights, this legal proposition applies equally to Métis communities that meet the legal test in *R. v. Powley*, [2003] 2 S.C.R. 207. For example, both governments and the courts have recognized that corporate entities established by Métis communities can be appropriate parties for the Crown to negotiate and entering into harvesting agreements with as well as for advancing collective Métis claims in relation to non-fulfillment of Crown promises in a manner the upheld the honour of the Crown or other related duties.³

It is important to note that this ‘authorization’ does not mean that a s. 35 right is transferred to the organization or that its becomes the s. 35 rights-holder. It simply means that the entity in question has the authority to advance the collective’s interests in relation to the s. 35 right, including engaging in litigation, negotiations, agreements or settlements with respect to the right.

¹ This document has been prepared by the MNA’s legal counsel—Jason Madden and Zachary Davis of the law firm Pape Salter Teillet LLP—as a part of the MNA’s ongoing engagement with the GoA in relation to developing a Métis consultation policy for non-Settlement Métis. It should not be used or reproduced, in whole or in part, without the MNA’s written permission.

² *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 at para. 30.

³ For example, see *R. v. Laurin*, [2007] O.J. No. 2344 (Ont. Prov. Ct.) with respect to a court upholding a harvesting agreement negotiated between the Government of Ontario and the Métis Nation of Ontario Secretariat Inc. or *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, wherein the Supreme Court of Canada granted an incorporated Métis organization “standing” in relation to advancing a “collective Métis claim.”



By logical extension, the same entity that can be ‘authorized’ for the purpose of asserting a s. 35 right can also be authorized to deal with Crown consultation and accommodation obligations, which flow from the honour of the Crown and an asserted or established s. 35 right. Both the courts and governments have recognized this type of ‘authorization’ the following situations:

- corporate entities can advance Crown consultation claims on behalf of Aboriginal communities generally and Métis communities specifically,⁴ and
- the federal and provincial governments have negotiated and entered into agreements with corporate structures as appropriate entities for the purposes of Crown-Métis consultation processes.⁵

2. The Métis Nation of Alberta is Authorized to Advance Section 35 Métis Rights and Address the Crown Obligations Owing to those Rights

Background on the Métis Nation of Alberta as a Métis Self-Government Structure

Contrary to Parliament’s “exclusive Legislative Authority” and constitutional responsibility for the Métis people—as “Indians” within s. 91(24) of the *Constitution Act, 1867*⁶—the collectively-held rights, interests and traditional governance structures of the Métis were historically ignored and disrespected by the federal government as it advanced Canada’s expansion into the Métis Nation’s Homeland (*i.e.*, the ‘Old Northwest’ or the historic Northwest) post 1867.

Despite this neglect and the judicially-recognized “legal lacuna”⁷ the federal government’s indifference created, the Métis Nation’s citizens and communities within what is now known as Alberta have politically organized themselves since the early 20th century through the MNA and its predecessor organizations. From the Métis perspective, the MNA—whose antecedents pre-date the creation of the province of Alberta—is an expression of the Métis Nation’s inherent right to self-government and self-determination within Alberta. Moreover, throughout its long history, other governments have recognized the MNA’s representative role and engaged with it when Métis rights and interests are implicated (*i.e.*, the MNA-Alberta Framework Agreement, constitutional reform processes, *etc.*).

⁴ *Labrador Métis v. Newfoundland*, 2007 NLCA 75; *Enge v. Mandeville et al*, 2013 NWTSC 33;

⁵ For example see Government of Canada-Métis Nation of Ontario Consultation Agreement available at <http://news.gc.ca/web/article-en.do?nid=1014139> or Government of Manitoba-Manitoba Métis Federation “Turning the Page” Agreement with Manitoba Hydro that is available at [www.cccmanitoba.ca/resource/hearings/33/MH%20-012\(2\)11%2026~Manitoba%20Metis%20Federation%20Manitoba%20Hydro%20Kwaysh-kin-na-mihk%20la%20paazh%20Agreement.pdf](http://www.cccmanitoba.ca/resource/hearings/33/MH%20-012(2)11%2026~Manitoba%20Metis%20Federation%20Manitoba%20Hydro%20Kwaysh-kin-na-mihk%20la%20paazh%20Agreement.pdf)

⁶ *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12.

⁷ *Alberta (Minister of Aboriginal Affairs) v. Cunningham*, [2011] 2 S.C.R, 670 at para. 8.



In addition, in order to have a structure that was ‘legally recognized’ by other levels of government, the MNA—like other Métis Nation governments from Ontario westward—established an ‘association’ under provincial law⁸ (*i.e.*, the Métis Nation of Alberta Association, which was previously called the Métis Association of Alberta) to act as its legal and administrative arm until full Métis self-government recognition can be achieved.

It is important to note that this type approach does not mean that the MNA ‘incorporated’ its self-government structures or the Métis Nation under provincial law. Similar to other Aboriginal peoples (*i.e.*, the Inuit) who have used corporate structures as transitional vehicles to achieving the full recognition of their self-government through modern day treaties with the Crown, so too are the Métis. This pragmatic approach to advancing Métis self-government in Alberta cannot be used against the MNA by other governments, when no other option is available to it.

The Métis Nation of Alberta’s Members are Section 35 Rights-Holders

In order to become a member of the MNA (also known as a citizen), an individual must meet the criteria for citizenship as determined by the Métis Nation. This requires that all applicants provide objectively verifiable proof to the MNA registry that they:

- (1) self-identify as a Métis,
- (2) are distinct from other Aboriginal peoples,
- (3) have historic Métis Nation ancestry,⁹ and
- (4) are accepted by the Métis Nation by completing the MNA’s registration process.¹⁰

In addition to identifying Métis Nation citizens, the MNA registry identifies individuals who are members of regional rights-bearing Métis communities located throughout Alberta. Consistent with the Supreme Court of Canada’s decision in *R. v. Powley*, [2003] 2 S.C.R. 207, these individuals have objectively verifiable documentation within their MNA registry files that they:

- (1) self-identify as a Métis,
- (2) are distinct from other Aboriginal peoples,
- (3) ancestrally connect to one or multiple regional rights-bearing Métis communities in Alberta, and,
- (4) are accepted by these Métis communities by completing the MNA’s registration process.

⁸ *Societies Act*, RSA 2000, Chapter S-14.

⁹ Proving historic Métis Nation ancestry requires providing “evidence of an ancestor who received a land grant or a scrip grant under the *Manitoba Act* or *Dominion Lands Act*, or who was recognized as a Métis in other government, church or community records.” Bylaws of the MNA, (updated 18 Dec 2015) at arts. 3.1 and 6.2(a).

¹⁰ Bylaws of the MNA, (updated 18 Dec 2015) at arts. 3.1 and 6.2(a).



To date, the MNA registry has identified over 180 “Métis root ancestors” who were the forbearers of the regional rights-bearing Métis communities that exist throughout the province today. These Métis root ancestors were repeatedly identified as Métis (*i.e.*, Halfbreeds) in historic records (*i.e.*, Northwest Territory scrip applications, Census records, Hudson Bay Company records, observations from the RCMP, European visitors, *etc.*) and were living within various settlements and areas, as a part of larger regional Métis communities, throughout Alberta well before the Crown asserted sovereignty or effected control in a given region.

It is also important to highlight that the MNA’s registry has undergone two significant changes since it was considered by the courts in *R. v. Hirsekorn*, 2010 ABPC 385:

- the MNA has cancelled all pre-2003 memberships, which may have been issued to individuals who did not have completed registry files meeting the membership requirements described above,¹¹
- as described above, the MNA registry also identifies Métis root ancestors that can genealogically connect to regional rights-bearing Métis community within Alberta.

As of July 2016, over 35,000 individuals have registered as members of the MNA, which unquestionably represents the critical mass of Alberta Métis. Moreover, if all children of existing MNA members were registered, it is estimated that the MNA registry would have over 100,000 members in it. Significantly, the MNA registry also includes descendants from all of the identified Métis root ancestors (*i.e.*, historic Métis family groupings) that constituted historic Métis communities prior to effective Crown control in various regions of Alberta.

The MNA also notes that the federal government (which is the level of government with “exclusive Legislative Authority” and constitutional responsibility with respect to the Métis as “Indians” within s. 91(24) of the *Constitution Act, 1867*¹²) provides the MNA funding to identify and register s. 35 Métis rights-holders within Alberta. Over the last decade, the MNA has received over \$10 million from the federal government to establish and maintain this objectively verifiable system for the purpose of identifying s. 35 Métis rights holders within Alberta. No other group within Alberta receives this type of federal support or funding. It is the MNA’s position that while other provincial processes may identify Métis for the purpose of ameliorative programs that did not and do not modify, address or extinguish s. 35 Métis rights, the identification of who are the Métis for the purposes of s. 35 rights must lie at the “core” of s. 91(24) of the *Constitution Act, 1867*. Accordingly, the system developed by the MNA—with financial support of the federal government pursuant to its s. 91(24) jurisdiction—should be relied upon for the identification of s. 35 Métis rights-holders in Alberta (in the same way Alberta relies on the *Indian Act* registry system to identify First Nation rights-holders).

¹¹ As of 2014, all MNA members have met the new registration rules put in place by the MNA in 2003, which align with the Supreme Court of Canada’s decision in *Powley*.

¹² *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12.



The MNA's Authorization from its Members vis-à-vis Section 35 Rights

The MNA's role as an 'organization' authorized to advance collectively-held section 35 Métis rights, interests and claims in Alberta is irrefutable. It comes from each individual MNA member voluntarily and willingly applying to the MNA's centralized registry for membership. Specifically, through this registration process, each member agrees to the MNA Bylaws that expressly mandate the MNA to pursue the following on their behalf:

- 1.2 To stand as the political representative of all Métis in Alberta and to promote self-determination and self-government for Métis in Alberta and Canada;
- 1.3 To promote, pursue and defend aboriginal, legal, constitutional, and other rights of Métis in Alberta and Canada;
- 1.4 Re-establish land and resource bases;¹³

Through this registration process, individuals accept the MNA's Bylaws as contractual terms that define their relationship with the MNA.¹⁴ Notably, the Alberta Court of Appeal has recognized the voluntary and consensual authorization the MNA receives from its members based on its Bylaws:

[t]he [MNAA] is a voluntary society incorporated under the *Societies Act*. Its powers come largely from consent and implied contract. No one is forced to join the respondent Métis Nation Association of Alberta. ... That Association is set up and sustained by agreement [through the MNA Bylaws] among its members...¹⁵

Flowing from this express authorization, the MNA Bylaws mandate democratically-elected Métis governance structures at the local (*i.e.*, Local Councils), regional (*i.e.*, Regional Councils) and the provincial (*i.e.*, Provincial Council) levels to work—together—to represent all MNA members and the Métis Nation within Alberta. Collectively, these structures constitute the "Government of the Métis Nation," which are authorized to represent the MNA's members pursuant to the authorities and polices established by the MNA.¹⁶

¹³ Bylaws of the MNA, (updated 18 Dec 2015) at arts. 1.2 to 1.4.

¹⁴ *Halsbury's Laws of Canada - Charities, Associations and Not-For-Profit Organizations (2013 Reissue)*, VII. Members, 1. General; *Massie & Renwick v. Underwriters' Survey Bureau Ltd.* [1940] SCJ No 2; *Wawryniak v. Jagiellicz* [1988] OJ No 76, aff'd by [1988] OJ No 1514.

¹⁵ *Métis Nation of Alberta v. Boucher*, 2009 ABCA 5 at paras. 7 & 11.

¹⁶ Bylaws of the MNA, (updated 18 Dec 2015) at art. 12.1.



It is important to note that only the centralized registry can register MNA members as citizens of the Métis Nation or identify individuals as rights-holders for the purposes of s. 35 Métis rights. Individual Locals or Regions do not maintain their own objectively verifiable registration systems. They rely on the authorization granted by individual members to the MNA as a whole.

By virtue of being a part of the MNA's overall governance structure, Locals and Regions are authorized to represent MNA members based on their defined roles and mandates as set out in the MNA Bylaws and policies adopted by the MNA. While MNA Locals and Regions may be separately incorporated, they are bound by the contractual relationship set out in the MNA Bylaws. All policies, procedures, and standards adopted by Regions and Locals must, for example, be consistent with resolutions approved by the Provincial Council.¹⁷ MNA Locals and Regions must adhere to contractual relationship set out in the MNA Bylaws or their delegated authorizations to represent MNA members—as set out in the MNA Bylaws—are negated.

The MNA also highlights that its model of governance is very different than the one imposed on Bands (*i.e.*, First Nations) through the *Indian Act*. In the First Nation context, each Band has its own membership of status Indians as determined by the *Indian Act*. As such, a tribal council or treaty association can only be mandated to represent a Band's members, if the Band provides its authorization to the larger entity. The exact opposite is true in the Métis context. Every individual applies *directly* to a centralized registry and authorizes the MNA to represent their collective rights, interests and claims. By virtue of being a part of the MNA, Locals and Regions share in the authorization as set out in the MNA Bylaws and adopted policies.

The Métis Nation of Alberta's Authorization from its Members vis-à-vis Crown Consultation

As described above, the MNA is expressly authorized by its individual members to assert and advance their collectively-held s. 35 Métis rights. Since the Crown's duty to consult flows from these s. 35 Métis rights, the MNA, which includes its Locals, Regions and the Provincial Council, is also authorized to deal with this constitutional obligation owing to regional rights-bearing Métis communities throughout Alberta.

Building upon this authorization, in July 2009—after extensive consultations with the MNA's members, Locals, and Regions—the MNA's Annual General Assembly unanimously adopted a *Policy Guideline Regarding the Duty to Consult and Accommodate Métis Aboriginal Rights and Interests in Alberta* (the "Policy Guidelines"). These *Policy Guidelines* clearly articulate the complementary and mutually supportive roles that the MNA's different levels of governance authorities play in relation to the Crown's duty to consult:

¹⁷ Bylaws of the MNA, (updated 18 Dec 2015) at arts. 14.5 & 15.5.



The Métis Nation has an inherent right to self-government and has established governance structures to which it elects its leaders through regular elections on a democratic basis. In Alberta, the governing authorities of the Métis Nation are the Métis Nation of Alberta Provincial Council, the Regional Councils of each of six MNA Regions into which the Province of Alberta is divided, and the elected executive of recognized MNA Locals. ... The legitimate interlocutors for dealing with government and industry on all matters pertaining to Métis Aboriginal rights and interests on behalf of the Métis Nation in Alberta are the governing authorities of the Métis Nation of Alberta.¹⁸

The MNA also notes the parallels between its authorization and those recognized by the courts in relation to the authority to deal with the Crown's consultation duties owing to another Aboriginal community asserting s. 35 rights:

... In the present case, the LMN has established through its memorandum and articles of association, including the preamble to its articles, that it has the authority of its 6,000 members in 24 communities to take measures to protect Aboriginal rights. ... Anyone becoming a member of the LMN should be deemed to know they were authorizing the LMN to deal on their behalf to pursue the objects of the LMN, including those set out in the preamble to its articles of association. This is sufficient authorization to entitle the LMN to bring the suit to enforce the duty to consult in the present case.¹⁹

Based on the above, the MNA has clear authorization to deal with the Crown's duty to consult and accommodate, on behalf of the Métis s. 35 rights-holders it represents, as well as the rights-bearing Métis communities that are made up of those individual rights-holders.

The United Nations Declaration on the Rights of Indigenous Peoples

Finally, the MNA notes that the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP")—the principles of which the GoA has pledged to implement²⁰—requires States to consult and cooperate in good faith with the Indigenous peoples through their own representative institutions in order to obtain their free and informed consent prior to the adopting legislative or administrative measures or approving projects that may affect them or their lands or territories and other resources.²¹ Accordingly, if the GoA is to act in accordance with the principles of UNDRIP, it must consult and work with the MNA as the representative institution of over 35,000 Métis Nation citizens and rights-holders within Alberta.

¹⁸ Métis Nation of Alberta, *Policy Guideline Regarding the Duty to Consult and Accommodate Métis Aboriginal Rights and Interests in Alberta* (July 2009) at p. 3.

¹⁹ *Labrador Métis v. Newfoundland*, 2007 NLCA 75 at para. 47.

²⁰ Letter from R. Notley to Alberta Cabinet Ministers, (July 7, 2015).

²¹ *United Nations Declaration on the Rights of Indigenous Peoples*, arts. 19 & 32(2).



3. Conclusion

As a result of the foregoing, it is the MNA's position that it has the express and demonstrated authority to represent its members for the purposes of dealing with the Crown's consultation and accommodation obligations owing to regional rights-bearing Métis communities in Alberta. It is the *only* organization in Alberta expressly authorized to deal with these matters for the over 35,000 Metis that voluntarily mandate it for this purpose. It is also the *only* organization in Alberta that is funded by the level of government with unquestionable jurisdiction to identify who are the Métis for constitutional purposes, including the identification of s. 35 Métis rights-holders.

Flowing from this, it is the MNA's position that the GoA must work with and through the MNA, which includes its Locals, Regions and Provincial Council, to arrive at a mutually agreeable way forward on Crown consultation and accommodation with the Métis in Alberta. While the MNA acknowledges that the task of ensuring effective and meaningful Crown consultation and accommodation with Métis in Alberta is a challenging one, the following direction from the courts highlight the imperative for the MNA and GoA to work—together—on this issue that is fundamental to s. 35's promise and reconciliation:

It will, undoubtedly, be necessary for [Aboriginal groups], governments, and the courts to wrestle with the problem of who properly represents rights holders in particular cases, and how those representatives will engage with governments. I do not underestimate the challenges in resolving those issues, and recognize that the law in the area is in its infancy. I do not, however, see that these practical difficulties can be allowed to preclude recognition of Aboriginal rights that are otherwise proven.²²

The MNA looks forward to engaging with the GoA on this issue of importance to Alberta Métis.

²² *Tsilhqot'in Nation v. British Columbia*, 2012 BCCA 285 at para. 151.