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# Thoughts on Métis Economic Development

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## Abstract

The thought experiment in this paper was conducted in order to come up with some rational limits on settling any possible outstanding obligation to the Métis and to think about how such a settlement might be used in the context of Métis economic development. It was from thinking about Métis economic development that the notion of capitalizing an economic development trust fund arose that could address the need for access to capital. Perhaps, if political conditions ever provided an impetus, elements of the paper could someday inform a serious discussion between Canada and a ratified representative body of the Métis and Half-breeds about laying to rest any outstanding grievances.

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# Thoughts on Métis Economic Development

## Introduction

The impetus for this paper was a lengthy musing over the "access to capital" problem faced by Aboriginal people in their efforts to establish business development or economic development. There is an abundance of literature in the Aboriginal economic development academic world which suggests that access to capital is a main impediment for Aboriginal economic development.[1] I wanted to look at the problem as it is experienced by Métis people. I began to imagine the possibility of a final settlement between Canada and the Métis, which could provide access to capital for the Métis from the capital value of the settlement. It was a way to imagine a pool of capital into which the Métis could dip to facilitate economic development.

A key assumption for this paper is that Canada would treat with the Métis in a substantially similar fashion that it has with the Indians and the Inuit. An analysis of a sample of existing final settlements with Indians and Inuit yields a per capita capital transfer amount and a per capita land quantum. An average of these amounts is then established. These average per capita amounts of money and land are then used to develop a potential value of a settlement with the Métis. Several other assumptions are used to arrive at a range of values for a settlement with the Métis. But the idea is rather simple: "Let's think about how a settlement with the Métis might look, given the lands and monies profile of existing settlements." Having established such a profile, one can then work out a rational constraint for the value of a potential settlement with the Métis.

I suggest that a way to settle with the Métis is to set aside a rationally constrained amount in a trust fund, from which Métis rights-bearing communities (as understood under the 2003 Supreme Court of Canada (SCC) decision, R. v. *Powley*) could draw for the purposes of participating in, or creating, economic development opportunities. By having a trust fund available to *Powley* communities, the benefits from the economic development opportunities would be long-term in two senses: 1) the financial impact to Canada could be spread out over many years; and, 2) the number of *Powley* communities would grow over time. By limiting the negotiation of Impact Benefit Agreements (IBAs) to project proponents and *Powley* communities, the economic benefits accrued from these economic opportunity "sharing mechanisms" would be directed to those Métis communities that have survived from the earliest days when they first emerged.

The reader may wish to become informed of the debate over a Métis claim, but these debates are not the primary focus of this paper. For the purposes of this theoretical exploration of possibilities, I have assumed that Canada has an outstanding obligation to the Métis/Half-breeds of Manitoba. The debates regarding the existence, or non-existence, of any outstanding obligations to the Métis are interesting. But for the purposes of this paper, the debates can be left

[1] To get a sense of the scale of the issue of access to capital and the many efforts to address it, the reader should note the most recent Federal Framework for Aboriginal Economic Development announced by INAC (http://www.ainc-inac.gc.ca/ecd/ffaed-eng.asp) and the existence of Aboriginal financial institutions (http://www.nacca.net/eng-splash.html). For an excellent survey of the issue, see Chapter 5, Volume 2 of the Report of The Royal Commission on Aboriginal Peoples, pp 906-931. (http://www2.parl.gc.ca/Content/LOP/ResearchPublications/prb9924-e.htm). The issue has been examined extensively in the policy research literature on Aboriginal economic development.

behind. I assume that Canada would treat any legitimate outstanding claim of the Métis in a way similar to how Canada has treated other Aboriginal peoples – in other words, that a negotiated settlement with the Métis would be approached in a fashion similar to how Canada has approached final agreements with Indians and the Inuit.

My intention is not to diminish the importance or complexity of the processes that would need to happen, or the lengthy negotiations necessary to get to the point in the Métis relationship with Canada that a final agreement might be negotiated. Nonetheless, a resurrection of the traditional place of the Métis within the Canadian economy could be revitalized by negotiating a relationship with the federal government that respects the historic contribution of the Métis to the economic growth of Canada. My intention is to examine the economic aspects of such an evolution in the Métis-Canada relationship. If a final agreement could be formulated in such a way as to provide capital transfers from Canada to the Métis, what could it look like? And how might it be structured in order to provide economic benefit to both parties to such an agreement?

## An Outstanding Métis Claim

I have given the existence of an outstanding claim against Canada by the Métis the status of an assumption in this thought experiment. Yet I would still like to give a bit of background on the assumption. I am not arguing for the veracity of the assumption; my intention is rather to give an overview of the possibility and to assume such a claim exists. Canada may wish to settle with the Métis population discussed independently of any court decisions declaring that it mishandled previous obligations.

In his paper, "Métis Land Rights in Canada," Joseph Magnet gives an interesting opinion on the legal existence of an outstanding Métis claim relating to the implementation and administration of Secs. 31 and 32 of the *Manitoba Act.* Magnet concludes that:

> Primary disagreement today revolves around whether the Canadian and Manitoban government acted in good faith in carrying out the terms of the *Manitoba Act*, whether Prime Minister John A. Macdonald purposely deceived the Métis leaders as to Canada's intentions with respect to a Canada-Métis Agreement, to what extent there were frauds and deceptions in the administration of the Métis land grants, and whether, if such frauds occurred, they serve to nullify any extinguishment of Métis rights that may have taken place.[2]

The *Manitoba Act* addresses, for the sake of expedience, the Half-breeds' possible Aboriginal title claims in section 31 and settler rights in Section 32. By section 32, Canada agreed that it would grant to settlers, some [if not a vast majority] of whom were mixed heritage people, the lands where they either had been given title by the Hudson's Bay Company, or were in peaceful occupation. Section 32(3) dealt with those who occupied lands within the two-mile settlement on both sides of the Red and Assiniboine Rivers and guaranteed conversion of titles by occupancy into estates of freehold. Section 32(4) provided for a right of pre-emption for those who occupied lands outside the two-mile settlement belt where Indian Title had not been extinguished. Section 32(5) guaranteed essential rights in common to the hay lands that lay behind the two-mile settlement belt.

[2]Joseph E. Magnet, *Metis Land Rights in Canada*, (http://www.uottawa.ca/constitutional-law/metis.html, last accessed on September 2, 2008), 2.

Another indication of the possibility of an outstanding obligation to the Métis was the Métis Nation Accord, which was included in the Charlottetown Accord of 1992. It is clear that the federal government of the day was willing to enter into negotiations to address Métis grievances. The accord provides evidence of one instance in Canadian history in which the federal government, and several provincial governments, were ready to negotiate with the Métis. It may be the last instance, but the persistence of the Métis suggests that there could be more instances in the future.[3]

This cursory treatment of a longstanding debate is not intended to provide a conclusive demonstration of the existence of any outstanding obligation of Canada to the Métis. It intends merely to show that it is not a wild supposition to have as a premise in a thought-experiment that there is an outstanding obligation of some sort. Let us assume that a final agreement with the Métis is desired to bring closure to the notion of any outstanding obligation to them and move on to the next part of the thought experiment.

## Existing Final Agreements

The debates regarding the existence or non-existence of any outstanding obligations to the Métis are interesting, but for the purposes of this paper, the debates can be left behind. Following the line of argument advanced by Joseph Magnet and Louise Mandell, I will assume that Canada would treat any legitimate outstanding claim of the Métis in a similar way as Canada treats with its other Aboriginal peoples; i.e., that a negotiated settlement with the Métis would be approached in a fashion similar to how Canada has approached final agreements with the Indians and the Inuit. This notion is also supported by the instruction within the *Powley* decision that the hunting rights of the Métis within the environs of Sault Ste. Marie, Ontario, should be the same as the hunting rights of the Indians within the same geographic area.[4] Also, when the federal government decided to recognize that its policy on harvesting on federal lands by Aboriginal peoples included the Métis, recognition of equal treatment of all Aboriginal people is implied.

Turning now to the existing comprehensive agreements which Canada has with Indian and Inuit populations in Canada, the focus here is on comprehensive claims. "Final agreement" refers to the final stage of a comprehensive claim process, where there is a statutory basis for the terms of the agreement that details the capital transfer amounts between the parties, as well as any land transfers between the parties.

### *Summary of Financial Transfers for Existing Final Agreements*

The financial compensation in the final agreements we examined ranged between $24 thousand and $40 thousand per capita in present value 1989 dollars.[5] In the context of this paper, the

[3]The reader is invited to examine the text of the Accord: http://www.ainc-inac.gc.ca/ch/rcap/sg/cj5d_e.pdf - RCAP Report, 1996, Volume 4, Appendix 5D, 424-430.

[4]*R. v. Powley*, para. 50. "In the immediate future, the hunting rights of the Métis should track those of the Ojibway in terms of restrictions for conservation purposes and priority allocations where threatened species may be involved. In the longer term a combination of negotiations and judicial settlement will more clearly define the contours of the Métis right to hunt, a right that we recognise as part of the special aboriginal relationship to the land."

[5]The Present Value amount in 1989 dollars is calculated using the discount rate prevailing at the time each Agreement was signed.

present value is for 2006. A slight adjustment would be found if we expressed the values for 2009. But we did not rerun the calculations.

**TABLE 1 Summary: Financial Compensation in Final Agreements [6]**

| Agreement | PVAmount ($1989) | Beneficiaries | Per Capita ($1989) |
|---|---|---|---|
| N.E. Quebec - Naskapis (1978) | $14,953,000 | 584 | $25,600 |
| West Arctic- Inuvialut (1984) | $114,578,000 | 2,860 | $40,100 |
| Yukon-First Nations (1990) | $242,673,000 | 7,433 | $32,600 |
| NWT-Nunavut (1993) | $580,000,000 | 23,000 | $25,217 |
| British Columbia - Nisga'a (1999) | $189,328,000 | 5,500 | $34,400 |
| Labrador-Inuit (2005) | $121,983,000 | 5,000 | $24,397 |
| Total | $1,263,515,000 | 44,377 | $28,473 |

As indicated in the Table 1, the average per capita capital transfer across all six Agreements considered is $28,473 in PV1989 dollars or $43,406 in 2009 dollars.

### *Land Amounts in Existing Final Agreements*

The quantum of land in final agreements with First Nations whose traditional territory is in provinces is at the lower end of the scale (see Table 2). Moreover, the title to the land is generally surface only. For example, the North Eastern Quebec-Naskapis Agreement provides for surface ownership only and the amount of land represents approximately .5 square kilometres per person. The British Columbia-Nisga'a Agreement is similar in terms of the amount of land provided at .4 square kilometres per person, but differs in that a small amount (about 3%) of the total includes subsurface ownership.

In sub-arctic territories, the quantum of land is significantly larger. The Labrador Inuit Agreement provides 3.2 square kilometres per person with ownership of surface rights (including partial entitlement to subsurface royalties). The Yukon Umbrella Agreement provides the next largest quantum of land at 5.6 square kilometres per person. In this case, the amount of land including subsurface ownership (3.5 square kilometres per person) exceeds the land with only surface ownership (2.1 square kilometres per person).

The greatest quantum of land is provided in agreements with the Inuit, whose traditional territory is in the Arctic. Title of such land generally includes more subsurface rights for First Nations

[6]DB Caldwell Research Associates Inc., "Land and Financial Compensation in Final Agreements" March 2006, prepared for the Office of the Federal Interlocutor.

than in other Final Agreements. The NWT-Nunavut Agreement provides 15.2 square kilometres per person, with about 90% surface-only ownership and 10% including both surface and subsurface ownership. The West Arctic-Inuvialuit Agreement provides about twice as much land at 31.7 square kilometres per person. The proportion of surface ownership only and combined surface and subsurface ownership, at 8.5% to 15%, is similar to the Nunavut Agreement.

It is noted in final agreements that settlement lands provided are based on the traditional areas of the First Nation involved. The Yukon Umbrella Agreement contains the clearest statement of the factors involved; in other words, a balanced allocation of land resource values requires that the land selected as settlement land should be representative of the nature of the land, the geography and the resource potential.

**TABLE 2: Summary of Land Quantums in Final Agreements**

| | **Population** | **Land** | **Land** | **Per Capita** | **Per Capita** | **Per Capita** |
|---|---|---|---|---|---|---|
| | | **Surface & Subsurface** | **Surface Only** | **Surface & Subsurface** | **Surface Only** | **Total** |
| | | **sq km** | **sq km** | **sq km** | **sq km** | **sq km** |
| | **A** | **B** | **C** | **B/A** | **C/A** | **(B+C)/A** |
| **Provinces** | | | | | | |
| B.C. - Nisga'a | 5500 | 62 | 1930 | 0.01 | 0.35 | 0.36 |
| NE Quebec - Naskapis | 584 | 0 | 326 | 0.00 | 0.56 | 0.56 |
| **Territories** | | | | | | |
| Labrador-Inuit | 5000 | 0 | 15799 | 0.00 | 3.16 | 3.16 |
| Yukon Umbrella | 7433 | 25900 | 15540 | 3.48 | 2.09 | 5.58 |
| **Arctic** | | | | | | |
| NWT-Nunavut | 23000 | 35829 | 314171 | 1.56 | 13.66 | 15.22 |
| West Arctic-Inuvialuit | 2860 | 12950 | 77700 | 4.53 | 27.17 | 31.70 |

Note: The Labrador Inuit Agreement includes partial royalties from subsurface rights

## Possible Scenarios for a Final Agreement with the Métis

An abundance of literature in the Aboriginal economic development academic world suggests that access to capital is a main impediment for Aboriginal economic development. Capital comes in many forms. I am not interested in notions of social capital and human capital, although they can be an interesting analytical tool in some circumstances. Here, I am interested in the notion

of making capital available to the Métis for economic development purposes by allowing for the use of a pool of capital on a case by case basis.

What might an agreement involving the Métis look like? The treatment of a territorial element in final agreements has evolved, given the development of institutional arrangements (such as the classification of property rights). In particular, modern institutional arrangements can allow one to exercise interest in lands (for example, usufruct, environmental protection, taxation) without resorting to the blunt instruments of land ownership (fee simple, collective land). For example, modern claims involve First Nations and Inuit in decision-making within the claim area – even over lands they do not own (in other words, settlement lands). Similarly, the *Powley* decision suggests that harvesting rights could be implemented through land access agreements – not ownership.

We can assume the number of Métis beneficiaries to be 300,000 for the purposes of calculations. The parameters of a possible Métis settlement can then be calculated in line with the existing agreements that were analyzed; that is, the size of the settlement with the Métis would be 300,000 multiplied by both the average per capita financial and land settlement amounts. This gives the general economic amounts of a settlement with the Métis, if one assumes that the manner in which Canada would negotiate would result in similar treatment of the Métis and Indians and Inuit, in relation to settling outstanding Aboriginal claims.

We can set the distribution of the total capital amount over our initial four elements (land in fee simple, land in reserve, IBAs and cash) in order to calculate a mixture which gives the maximum economic return over a particular number of years. For the sake of the thought experiment, we can establish a timeline of twenty-five years. Thus, we can calculate the elements of an economic package which would give a maximal return on investment at the end of twenty-five years. This mixture is based on the idea that the Métis would be treated in a Final Agreement the same way that Indians and Inuit have been treated.

## Illustrative Final Settlement

The Manitoba Act of 1870, which was passed by the Parliament of Canada, indicates that land should be granted to the Métis (literally, the Half-breeds). The question as to whether the provisions of the Act related to land grants were adequately carried out for the benefit of the Métis is currently before the courts. This section outlines some illustrative calculations that provide some perspective on the parameters that a settlement between Canada and the Métis might take. First, the Métis claims in Manitoba are considered and then the calculations are expanded to the rest of Canada.

The 1.4 million acres in question represent 5,665.7 square kilometres. Since there are currently 56,795 Métis in Manitoba, the amount of land in question can be represented as 0.1 square kilometres per person. The Métis claim concerns arable land. Consequently, an approximate value of the land claim can be obtained using information on the average value of farm land in Manitoba. The latest information available for Manitoba indicates that farm land (including pasture and unimproved land plus the value of farm houses, buildings and other structures) was

$554 per acre in 2004.[7] Consequently, a Manitoba Métis land claim can be estimated at approximately $775,600,000 or $13,656 per capita in 2005 dollars. This calculation is very general, in the sense that it is based on general assumptions: that is, while the math is specific, the assumptions used to generate the calculator are general. A more accurate calculation would need to take into account the fact that a portion of the land intended for the Métis was actually delivered to them. As a result, the overall estimate would need to be discounted by an estimated value of the land actually delivered. This discount is not calculated here, since the estimate is very general and the calculation of the land actually delivered to the intended people is beyond the scope of this paper, but the point is acknowledged.[8]

The parameters of a possible settlement with the Métis in Manitoba are predicated on the strength of the legal claim, which is not determined at present. Consequently, for the illustrative quantitative work, the strength of the claim is represented by factors used in the calculations as follows:

Strong claim (a Manitoba Métis case completely validated) = 1.0
Medium claim (a Manitoba Métis case two thirds validated) = 0.66
Weak claim (a Manitoba Métis case one third validated) = 0.33

Two settlement scenarios are considered.

### *Scenario A*

Scenario A illustrates a settlement consisting of land and financial compensation (see Table 1).

The land amount per capita in the strong claim case (the first column) is $13,656, which corresponds to the full 1.4 million acres in the Manitoba litigation. This is reduced to $9,013 in the medium strength case (the second column) and to $4,506 in the weak claim case (the third column).

Settlement agreements with Aboriginal peoples in other areas of Canada have generally included financial compensation as well as land. These payments are sometimes referred to as capital transfers. The weighted average value in two agreements between Canada, provinces and Aboriginal groups has been calculated to be $18,564 per person in 1989 dollars. In 2009 dollars this figure becomes $28,397. If a payment is found to be appropriate in the Manitoba Métis case, it is assumed to be of the same magnitude. As in the case of land, this figure can be adjusted for the strength of the claim: medium claim = $17,766; and weak claim = $8,883.

[7] Value of Farm Capital: Agriculture economic statistics, May 2005, Statistics Canada catalogue no. 21-013-XIE

[8] I want to thank Professor Tom Flanagan for pointing out that some lands did make it into Half-breeds' hands and so the present-day value of them needs to be taken into account in my calculations, but I do not think his work on the amount of land that made into the proper hands is methodologically sound and such a calculation is certainly beyond the scope of this paper. But it is a good point made by Prof. Flanagan.

**TABLE 3: Scenario A**

| | | Strength of Claim | | |
|---|---|---|---|---|
| | | **Strong = 1.0** | **Medium = 0.66** | **Weak = 0.33** |
| Land (Per Capita) | | $13,656 | $9,013 | $4,506 |
| Financial Transfer (Per Capita) | | $26,918 | $17,766 | $8,883 |
| Impact Benefits (Per Capita) | | $0 | $0 | $0 |
| Total (Per Capita) | | $40,574 | $26,779 | $13,389 |
| | | | | |
| **Manitoba:** | **All Métis Population** | $2,304,400,330 | $1,520,904,218 | $760,452,109 |
| **Canada:** | **All Métis Population** | $12,172,200,000 | $8,033,652,000 | $4,016,826,000 |
| **Canada:** | **Métis in small cities & rural** | $7,059,876,000 | $4,659,518,160 | $2,329,759,080 |
| **Canada:** | **Métis in rural areas** | $3,529,938,000 | $2,329,759,080 | $1,164,879,540 |

Note: Figures presented are rounded to the nearest dollar

Based on the current Métis population in Manitoba, the value of land and financial compensation in a settlement could range between $760.5 million ($13,389 x pop. 56,795) and $2.3 billion, as illustrated in Table 3.

On the assumption that the Métis claim in Manitoba could be replicated for the rest of Canada (with approximate population of 300,000), a settlement with the Métis could range between $4.2 billion and $12.8 billion in 2009 dollars. If the Manitoba claim is held to apply to Métis in small cities and rural non-reserve areas, the settlement could range between $2.4 billion and $7.5 billion. If the settlement were restricted to Métis living only in rural non-reserve areas, the valuation could range from $1.3 billion to $3.8 billion.

### *Scenario B*

There is another possible scenario which employs the notion of a settlement area for the Métis in which land is not a part of the agreement package. The idea for Scenario B is to take land out of the capitalization mixture. Thus, the final Métis agreement could contain cash, a settlement area, and access to opportunity-based IBAs upon that settlement area. The cash could be put into a trust fund. It is suggested that the way forward would be to set aside a rationally constrained amount in a trust fund, equivalent to a negotiated amount in the range of settlement scenarios described above, from which Métis communities, as understood under the *Powley* decision, could draw for the purposes of economic development opportunities.

Scenario B illustrates a settlement consisting of financial compensation and impact benefits but no land (see Table 4 below). The financial transfer in Scenario B is identical to that of Scenario A. The key difference is that the land value would be added to the financial value and transferred into a trust fund which would be used for economic development of the Métis. The total values of the settlement for Métis in Manitoba and more broadly for other Métis in Canada are the same as in Scenario A.

**TABLE 4: Settlement Scenario B**

| | | Strength of Claim | | |
|---|---|---|---|---|
| | | **Strong = 1.0** | **Medium = 0.66** | **Weak = 0.33** |
| Land (Per Capita) | | $0 | $0 | $0 |
| Financial Transfer (Per Capita) | | $26,918 | $17,766 | $8,883 |
| Impact Benefits (Per Capita) | | $13,656 | $9,013 | $4,506 |
| Total (Per Capita) | | $40,574 | $26,779 | $13,389 |
| | | | | |
| **Manitoba:** | **All Métis Population** | $2,304,400,330 | $1,520,904,218 | $760,452,109 |
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| **Canada:** | **Métis in rural areas** | $3,529,938,000 | $2,329,759,080 | $1,164,879,540 |

Note: Figures presented are rounded to the nearest dollar

But why should the Métis go for a landless final agreement? Such a "landless" final settlement would be a good idea for several reasons: 1) Métis Aboriginal title cannot be proven using the existing test (though the Court may change the test in the future); 2) even if the Supreme Court of Canada changes the test, proving Métis Aboriginal title will take a long time; and, 3) the purpose of sec. 35 protection of Métis rights in the *Powley* decision does not contemplate Métis title.

The existing test for Aboriginal title is found in the Supreme Court of Canada decision in the *Delgamuukw* case, which was decided in late 1997. It addressed a First Nations claim in British Columbia. The Court decided that the relevant time for consideration in an Aboriginal title claim is pre-contact; that is, Aboriginal title is founded in the fact that Aboriginal people were on the land prior to contact with European people. One obvious aspect of the Métis is the post-contact fact of their being. The Métis do not come into being without contact between the two peoples. This idea was the basis for governments' denial, prior to the *Powley* decision, that the

Métis had any Aboriginal rights. They could not meet the *Van der Peet* test for Aboriginal rights, because they are a post-contact Aboriginal people. *Powley* changed the temporal dimension of the *Van der Peet* test in order "to reflect the distinctive history and post-contact ethnogenesis of the Métis, and the resulting differences between Indian claims and Métis claims." (*Powley*, para. 14). The Court did not change the test for Aboriginal title; it changed the test only for Aboriginal rights. It may change the test for title when a case on that matter appears before it, but it also may not in order to maintain a difference between Indian and Métis claims (a difference rooted in Aboriginal title). Obviously the Court was willing to change the test for Aboriginal rights in the context of the Métis, so it may be willing to change the test in order to allow for Métis Aboriginal title. However, at the time of writing, the issue had not been put before it, so it is still the case that the Métis cannot prove Aboriginal title under the existing test.

The *Morin* case in Saskatchewan deals directly with Métis Aboriginal title in northern Saskatchewan. For several years the case has been at the information-gathering stage, but it has not even gone to trial yet. It may take many years for the Supreme Court of Canada to hear the case and decide whether or not the test for Aboriginal title should be changed in order to accommodate the reality of the Métis.

Other cases in Saskatchewan and Manitoba deal with the issue in a tangential manner. These cases may provide the opportunity for changing the test, since they deal with the issue of Métis Aboriginal title tangentially. Again, there is one case in Saskatchewan and the Manitoba Metis Federation (MMF) case in Manitoba. The MMF case was about twenty years in development before it went to trial. It is now at the appeal stage in Manitoba and, if appealed again to the Supreme Court of Canada, would take approximately twenty-five years from start to finish. First Nations title cases also progress very slowly, taking around ten years from start to finish. From a pragmatic point of view, therefore, it could be reasonably argued that the Métis in Manitoba and Canada would more wisely spend their resources negotiating rather than litigating.

Finally, the purpose of including the Métis in sec. 35 of the *Constitution Act, 1982* is to give constitutional protection of Métis rights. This purpose is clearly described in the *Powley* decision. Paragraph 17 of *Powley* states: "the inclusion of the Métis in s. 35 is not traceable to their pre-contact occupation of Canadian territory. The purpose of s. 35 as it relates to the Métis is therefore different from that which relates to the Indians or Inuit. The inclusion of the Métis in s. 35 represents Canada's commitment to recognise and value the distinctive Métis cultures, which grew up in areas not yet open to civilization." And, in paragraph 18: "Section 35 requires that we recognise and protect those customs and traditions that were historically important features of Métis communities prior to the time of effective European control, and that persist in the present day." Clearly, the purpose of the sec. 35 protection of Métis rights as described in the *Powley* decision does not contemplate Métis Aboriginal title. The constitutional protection is protection of activities *on* the land. Métis have Aboriginal rights which are rights to carry on customs and traditions *on* the land: for example, the right to hunt for food. But Aboriginal title is a right *to the land itself*. It is a right *in* the land. Rather than try to prove Aboriginal title, it is my contention that the Métis, for pragmatic reasons, should negotiate a final agreement that does not include land. A negotiated settlement could take into account the possibility of Métis Aboriginal title without litigating it and therefore "rolling the dice" in front of the Supreme Court of Canada.

The final aspect of my thought experiment involves the Crown's duty to consult, which applies as much to Métis communities as it does to First Nation and Inuit communities. I suggest that the finding of a legal duty to consult owed to *Powley* communities provides a good reason to establish the trust fund that would be created in my suggested final agreement with the Métis. Before proposing the contours of a suggested final settlement, I will briefly outline the legal duty to consult.

## The *Taku* and *Haida* Decisions

In the following section, I will provide some text selections from the *Taku* and *Haida* decisions, and several interpretations, with the intention of investigating the SCC decisions for language and narrative regarding the duty to consult, the honour of the Crown, and the scope and content of these notions. Also, I canvass the related concepts of the source of the duty to consult, when the duty arises or could arise on a policy basis in relation to Métis rights, whether asserted or proven.

The reason for examining these decisions is to suggest a type of eligibility criterion for Métis communities to access any funds that would be made available for economic development opportunities. An occasion upon which a community's Métis Aboriginal rights might be infringed, or more specifically, upon entering into a formal consultation process with the Crown that particular community would be given access to a fund in order to increase capacity for a meaningful consultation and accommodation. By using the Crown's legal duty to consult as the entrance point, Métis communities would become eligible for accessing an economic development fund on a case by case basis; but the cases would be related to actual opportunities rather than possible "make-work" projects.

According to the Supreme Court of Canada, Aboriginal consultation and accommodation is grounded in the honour of the Crown. In dealing with Aboriginal peoples, the Crown must act honourably. The duty is described at para. 16, *Haida* as not being "a mere incantation, but rather a core precept that finds its application in concrete practices."
Reconciliation is the goal of acting in accordance with this duty.

In *Delgamuukw*, the SCC confirmed and expanded on the duty to consult, indicating that the content of the duty varies with the circumstances. There exists a minimum duty to discuss important decisions where the infringement is less serious or relatively minor. A significantly deeper consultation is required in most cases, and full consent of the Aboriginal nation is required on very serious issues. "The foundation of the duty in the Crown's honour and the goal of reconciliation suggest the duty arises when the Crown has knowledge, real or constructed, of the potential existence of the Aboriginal right or title and contemplates conduct that may adversely affect it."[9] In *Haida*, the SCC describes the source of the duty to consult as being located in either real or constructive knowledge of Aboriginal and treaty rights that may be infringed by a decision of the Crown.

[9] Haida Nation *v*. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, 2004 SCC 73 paragraph 35.

The potential rights embedded in claims of Aboriginal or treaty rights are protected by s. 35 of the Constitution Act 1982. The honour of the Crown requires that these rights be determined, recognized and respected. To accomplish this recognition requires that the Crown participate in processes of negotiation. During the process of negotiation, the honour of the Crown may require it to consult and, upon occasion, accommodate Aboriginal interests.

There is a difficulty in ascertaining the potential existence of rights. However, the difficulty does not allow the Crown to ignore rights until they are proven. It is this relatively newer aspect of Aboriginal rights jurisprudence that seems to be telling governments to stop ignoring Aboriginal claims of rights. The Métis would appear to be able to benefit from such a warning, since there is only one proven Métis Aboriginal right at present.

According to *Haida*: "There is a distinction between knowledge sufficient to trigger a duty to consult and, if appropriate accommodate, and the content or scope of the duty in a particular case. Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances…."[10]

The content of the duty reflects the nature of the claim being asserted. The Chief Justice concluded that consultation and accommodation are an essential corollary to the honourable process of reconciliation that s. 35 demands. Content of the duty varies with circumstances. In general terms, the scope is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title and to the seriousness of the potentially adverse effect upon the right or title claimed. In discharging the duty to consult, regard may be given to the procedural safeguards of natural justice mandated by administrative law. However, every case must be approached individually; that is, assessment of the claim is an imperative step.

The SCC stated in *Haida* that, "It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts."[11] In other words, the Court appears to be warning the government that the jurisprudence has now developed to the point that aboriginal groups will have the ability to slow down projects, if they have not had their concerns addressed in a meaningful way. I would point to the Plantinex case in Northern Ontario and the Dene 'Tha case in the Mackenzie River basin as examples of projects delayed by Aboriginal people.

## Proposed Structure of a Final Settlement

In Scenario B above, the capital value of the land is shifted and made available to fund meaningful consultations and any economic opportunities that could be agreed to via IBAs. I now want to expand on that scenario and describe how a final agreement between the Métis and the federal government could be structured in order to promote economic development for the Métis. First though, a brief background on IBAs.

[10] Haida Nation *v*. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, 2004 SCC 73, paragraph 37.
[11] Haida Nation *v*. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, 2004 SCC 73, paragraph 51.

There is no precise definition for an IBA. Their scope and content can vary considerably. Generally, though, IBAs can be used to address specific social and economic impacts of development on Aboriginal people and to attempt to flow benefits directly to Aboriginal communities affected by a development project. Jean-Paul Lacasse gives a good overview:

> Generally speaking, the overall goal of an IBA is to maximize the social and economic benefits that will accrue to the Aboriginal community through the carrying out of the project while simultaneously minimizing adverse social, economic and environmental impacts on the community's way of life.[12]

IBAs should be beneficial to all, a goal which should temper unrealistic negotiating postures. Communities may opt for co-management of the project in the form of a joint venture. IBAs will vary from project to project depending on the nature of the project (mining, forestry, etc) or on local needs.

Matters considered appropriate for Inuit benefits in IBAs entered into under the Nunavut Land Claims Agreement included the following:[13]

- Inuit training
- Inuit preference hiring
- Employment rotation reflecting Inuit needs and preferences
- Scholarships
- Business opportunities including provision of seed capital and expert advice, notification of opportunities and preferential contracting practices
- Housing, accommodation and recreation
- Language of workplace
- Protection of archaeological sites
- Inuit access to facilities constructed for the project such as airfields and roads
- Particularly important Inuit environmental concerns
- Outpost camps

But why should the Métis ever negotiate such a deal and why should Canada ever bother negotiate? Canada should negotiate because it may be true that there is an outstanding claim owed the Métis. The honour of the Crown and the goal of reconciliation with the Métis are reasons enough for the federal government to negotiate. But let us be more pragmatic: as with any other final agreement with an Aboriginal people, Canada should negotiate with the Métis to have certainty on the ground upon which resource development projects will take place. Until such time, Canada will forever face the possibility that there is an outstanding claim. The Métis are not going away.

For their part, the Métis should negotiate because Canada could wait out the very long time it could take the Métis to prove their claim. Such a situation results in a vast waste of taxpayers' money (the Métis are taxpayers too) and does nothing toward achieving reconciliation.

[12] "Impacts and Benefits Agreements on Aboriginal Title Lands" by Jean-Paul Lacasse in Joseph Magnet and Dwight Dorey eds. *Legal Aspects of Aboriginal Business Development*, LexisNexis Butterworths, 2005. p 321.
[13] "Impacts and Benefits Agreements on Aboriginal Title Lands" by Jean-Paul Lacasse in Joseph Magnet and Dwight Dorey eds. *Legal Aspects of Aboriginal Business Development*, LexisNexis Butterworths, 2005, p 325.

Accepting a landless settlement with Canada using Rupert's Land as the settlement area would benefit the Métis since the geographic area over which IBAs could be entered into would be much larger than any land settlement that would be part of a final settlement. In other words, the number of possible IBAs would be greater in a landless deal than a land settlement where the Crown might take a very narrow approach and decide to consult and accommodate only in the land areas specified in the final settlement. By not taking land in a settlement, the Métis may have a greater chance at preserving the historic cultural activities they want to preserve. Also, there is nothing stopping the Métis from using their settlement to purchase land on their own.

Both parties could benefit economically since a negotiated agreement could bring clarity to the concept of "Métis community" in relation to the Crown's duty to consult.

A settlement could specify the communities that are Métis on the settlement area; or what regions of the settlement area are Métis, and are owed a duty to consult when a Crown activity would adversely affect the rights spelled out under the final agreement. *Powley* could provide the negotiating framework for identification of such communities or regions. My suggestion is that Rupert's Land be the geographic boundaries of a final settlement area within which the Métis entities to which the Crown owes a duty to consult would be defined. The communities and regions that are recognised under the final settlement (a process which may take several years to complete, but accepting court decision provide an initial inventory), would be eligible to draw down monies from the trust fund established and financed as described above. The trust fund would be used to finance meaningful consultations and to provide capital to exploit any economic opportunities that may result and be captured in an IBA. Any resurrection of the traditional Métis economy could be revitalized by negotiating a relationship with the federal government that respects the historic contribution of the Métis to the economic growth of Canada. The path of using IBAs is by no means the only one available to achieve reconciliation; but by beginning to imagine paths to reconciliation, one is able to discern the broad outlines of how it can be approached in relation to the Métis. What would be required is the political will to entertain the notion that government's role is not to intervene in economic development opportunities by providing capital to participants, but its role should be to allow the participants to work out a "just share" of the projected capital flowing from the project. In this possible world, government facilitates the participation of aboriginal groups in order to discharge its duty to consult. In discharging this duty, government would allow for the emergence of Métis participation in economic development opportunities, not by direct intervention, but by facilitation.

By facilitating a Métis community's (or region's) participation in economic development opportunities, government may be able to facilitate economic participation by that community to such an extent that government monies intended to address "rights issues" and "self-government" processes would no longer be required. I think it may be true that self-financing governance structures are far more likely to hold sway in the Confederation. But that is another research topic for another time.

## Conclusion

This paper has argued that Canada and the Métis would both benefit maximally economically by limiting a settlement to IBAs entered into in the context of accommodation requirements for a

particular project in relation to a specific geographic area (Rupert's Land) and a cash transfer. This would provide the parties to the final agreement with the most positive impacts in relation to economic development.

My final recommendation was to bring together the concept of a Métis community as outlined in the *Powley* decision, the principles of the *Taku* and *Haida* decisions, and the potential for IBA as a form of accommodation, when and where warranted. It was suggested that the way forward is to set aside a "rationally constrained amount" in a trust fund from which Métis communities or regions, as understood under the *Powley* decision, could draw for the purposes of economic development opportunities. The rational constraint for a settlement with the Métis would be the average of the per-capita financial transfer amounts in the concluded final settlements, combined with the dollar-value equivalent of the land quantum per capita transfers in each final settlement. The result is a capital value for a final Métis settlement based on an assumed number of Métis persons and the assumption that Canada would settle with the Métis in approximately the same way it settled with the Indians and Inuit.

By having the trust fund available to *Powley* communities, the benefits from the economic development projects would be long-term in two senses: 1) the financial impact to Canada could be spread out over many years; and, 2) the number of "Powley" communities will be slowly added to over time. By constraining the negotiation of IBAs by government and project proponents with "Powley" communities or regions only, the economic benefits accrued from these "sharing mechanisms" would be directed to the actual Métis communities which have survived from the earliest days when they emerged.

The preceding, the reader will recall, was a thought experiment. Perhaps elements of it could someday inform a serious discussion between Canada and a ratified representative body of the Métis. It is apparent that the dollar value of settling with the Métis could be an onerous burden on Canada. But, the full value of the settlement may not be required immediately. The negotiations would take some time; the number of communities eligible for use of the proposed trust fund would increase over time; and there would be other time consuming elements within the process, all of which would provide a planning horizon for a final settlement. As one institution of several institutions that might emerge out of the negotiations, the idea of the trust fund proposed is not the only possible route to take within a settlement. The broadest idea in this paper is to be imaginative in the context of a final settlement with the Métis and treat them as equals among the Aboriginal peoples of Canada.

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