

SAKITAWAK IPCA

The Inherent Rights of the Métis in Northwest Saskatchewan and how it relates to First Nation and Métis Consultation Policy Framework 2010 Province of Saskatchewan

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I. INTRODUCTION

The Métis community of Île-à-la-Crosse, also known as Sakitawak, through A la Baie Métis Local 21 has entered into an agreement with the Department of the Environment and Climate Change Canada (ECCC) through which the community of Île-à-la-Crosse will undertake a project entitled "The Sakitawak Conservation Area: Multi-Interest Protection and Conservation in Trapping Block N-14".

While the Agreement is with the A la Baie Métis Local which is the s. 35 Métis rights representative of the Métis village of Île-à-la-Crosse, it is the community/village as a whole which is engaged in the project. In 2015, the Local, the Municipal government, the Fishermen's Association and the Trappers Association entered into an MOU and formed ICS4 for the purpose of better representing the interests of their community/village.

The project began in the Fall of 2019. The purpose of the project is to enable the Métis of Île-à-la-Crosse "to protect habitats of vulnerable species including the woodland caribou, moose, migratory birds and various fish species, promote sustainable development practices, and advance Indigenous way of life, knowledge systems and stewardship activities" through the potential establishment of one or more Indigenous Peoples Conservation Area (IPCA).

The Project Agreement also stipulates that consultations with the province of Saskatchewan must take place on the development of IPCAs and for the identification of mechanisms for formal protection. This is because the federal government in 1930, through the Natural Resources Transfer Agreement, turned over almost all Crown lands within the province from federal government ownership to provincial government ownership. While some access to natural resources were reserved for Treaty Indians, such as hunting and fishing rights, no such rights were preserved for the Métis (*Blais*, SCC 2003). Therefore, there is no getting around involving the provincial government when it comes to gaining access to Crown lands for the purposes of this project.

Nevertheless, as will be seen further on, the Métis of Île-à-la-Crosse and North West Saskatchewan generally possess s.35 Aboriginal hunting, fishing, trapping, and gathering rights established through the courts. As we will also see, the Métis of Île-à-la-Crosse are also challenging the federal government scrip system and claiming unextinguished rights (Aboriginal title) to the ownership of the lands and resources in North West Saskatchewan.

With the election of the Trudeau Liberal government in October 2015 the federal government embarked on a path of reconciliation and as a part of its reconciliation efforts with the Métis Nation. This included setting up an s. 35 rights reconciliation processes with other Métis rights holding groups. No such process has yet been established for MNBC. While an exploratory discussion table for the North West Saskatchewan Métis Council (NWSMC) to resolve the 1994 land claim was agreed to by Minister Bennett in January 2017, this table was never established, leading to a new land claim action filed in the Federal Court of Canada in October 2019 by A la Baie Métis Local 21 and other plaintiffs from North West Saskatchewan, along with Locals and individuals from northeast Alberta.

Taking all of this into account, this Sakitawak IPCA will take a wholistic approach, considering laws, policies, and practices as they are currently being applied, as well as community assertions.

A. *Re: Asserting s.35 right by the Sakitawak Métis Community*

I. Introduction

To understand the duty to consult as it applies to the Métis community of Île-à-la-Crosse / Sakitawak, which is part of a larger regional rights-bearing Métis community, it is important to understand the law and policies as they relate to this right.

The foundation for this developing right is the result of the 1982 patriation of the Canadian Constitution to Canada from Great Britain. Section 35 provides the follows:

- a) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- b) In this Act, "aboriginal peoples of Canada" include the Indian, Inuit and Métis peoples of Canada.
- c) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist byway of land claims agreements or may be so acquired.
- d) 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.

In 1906 a Treaty and Scrip Commission negotiated Treaty 10 at Île-à-la-Crosse with the Cree and Dene of area and took scrip applications from Métis at Île-à-la-Crosse and La Loche. A second Commissioner returned in 1907 to take applications from those Métis who missed the 1906 sittings.

Based on the decision of the Commissioner where the applicant was deemed to be Métis and entitled to scrip, a certificate of entitlement was provided to the applicant. It is these certificates which were acquired from them by the white speculators who travelled with the Scrip Commissioner. The scrip coupons themselves when issued by Ottawa were not delivered to the Métis applicants but were delivered directly to the speculators (third parties).

There was a total of 306 scrip applications taken at Île-à-la-Crosse (172 money scrip and 134 land scrip), 189 scrip applications (99 money scrip and 90 land scrip) taken at La Loche Mission and Portage La Loche, and 3 land scrip applications taken at La Loche River (Bulls House) in 1906. The remaining Métis missed in 1906 were dealt with in 1907.

In 1992, under the guidance of Senator Louis Morin of Turnor Lake, Buffalo Narrows Local 62 under the leadership of Philip Chartier began defending Métis in the region when charged for hunting or fishing to feed their families based on their right to do so in accordance to s.35 of the *Constitution Act 1982*. The first case was Toby "Snowman" Montgrand from Turnor Lake, originally from La Loche. Local 62 member, Clem Chartier was asked to provide the legal defence for this case and the ones to follow which he did on a pro bono basis.

After the April 19, 1993, trial of Mr. Montgrand in Buffalo Narrows the Elders, leaders, and community members of North West Saskatchewan present for the trial met at the BN Friendship Centre and a decision was made to pursue a land claim action which would address all Aboriginal rights at one time, rather than doing them one case at a time. This was accepted by the then MNS Executive who were also present. At the July 1993 MNS annual assembly held at Batoche, a resolution was passed to proceed with land claim litigation using North West Saskatchewan as a test case. In March 1994 a Statement of Claim was filed in Court of Queen's Bench in Saskatoon. That action was subsequently stayed in 2005/06 and remains so to this date.

In 1992 the Local opened the Snowman Legal Defence Fund, which was later renamed the Métis Rights Defence Fund (MRDF). The Local was the main contributor to the Fund, but some donations were also received from other sources, including individuals, MNS Affiliates and some Locals from throughout the Province.

The Métis Legal Education and Research Foundation (MLREF) after it was established in 2001, took over providing the legal services which since the original 1993 Snowman trial provided pro bono (free) legal services for a number of trials throughout the province, not just in North West Saskatchewan including the 2007 *R. v. Belhumeur* case which established s. 35 harvesting rights for the Métis in the Qu' Appelle Valley and environs including the City of Regina. The Fund continued to cover basic trial expenses, including witness travel and other costs.

2. Duty to consult and accommodate: Case Law.

It is established law as determined by the Supreme Court of Canada that the duty to consult, based on s.35 of the *Constitution Act, 1982*, is owed to the Aboriginal peoples: Indians (First Nations), Inuit and Métis. This duty is owed by all federal, provincial, and municipal governments when the rights and interests of Aboriginal peoples may be affected.

In the case of First Nations in North West Saskatchewan this duty is grounded in Treaties 8 and 10 and the Natural Resources Transfer Agreement 1930 which was entrenched in the *Constitution Act 1930* which form the basis or foundation for their well-established rights which governments and industry cannot ignore.

For the Métis, in this case, the Métis community of Sakitawak, the duty to consult and accommodate is grounded in:

A. An **"established"** s.35 right to hunt, fish, trap and gather in North West Saskatchewan as established by the provincial court in *R. v. Morin and Daigneault* in 1996 and upheld on appeal by the Court of Queen's Bench in 1997. The court ruled that the scrip applied for by the Métis at Île-à-la-Crosse and La Loche in 1906 & 1907 did not extinguish the fishing right at issue in that case. The same applies to other harvesting activities, such as hunting, trapping and gathering for food. The issue of Métis commercial Aboriginal rights, for example Métis commercial fishing rights, remains unresolved.

The court decided that whatever the effect scrip had on land rights (Aboriginal title) which did not need to be decided in that case, it did not extinguish the s.35 harvesting rights. The issue of Aboriginal title to the land remains an outstanding issue to be decided by the courts.

While the case dealt with two Métis individuals, Bruce Morin and Dennis Daigneault from Tumor Lake, the decision applies to the whole of North West Saskatchewan as the s.35 fishing right at stake belongs to the Métis collective: the community, not the individual. Since the *Morin and Daigneault* decision Métis in North West Saskatchewan have been able to exercise their s.35 right to hunt, trap, gather and fish for food without a license.

The provincial court in the 2005 *R. v. Laviolette* case sitting in Meadow Lake extended the historic North West Saskatchewan rights-bearing Métis community south to include Green Lake and Meadow Lake which are in the Treaty 6 area. In reaching this decision Judge Kalenith held that there was an historic regional rights-bearing Métis community which was anchored by the settlements of Île-à-la-Crosse and Green Lake, Saskatchewan and Lac la Biche, Alberta, a triangle which included the settlements in and around the triangle, including Meadow Lake.

In the cases of *R. v. Poitras*, *R. v. Myette* and *R. v. Boyer*, Judge Kalenith in his 2018 decisions in those cases referred to the regional rights-bearing Métis community in

North West Saskatchewan as the "historic Métis community of North West Saskatchewan (HMCONWS)" which has continued to exist to modern times. Mr. Myette was acquitted in December 2018 as the judge ruled that Rush Lake was within the area covered by the 2005 *Lavolette* decision, while Poitras and Boyer were convicted on the basis that the North West Saskatchewan Métis regional rights-bearing community did not extend south to Chitek Lake in the case of Boyer and 37 kilometers south of Meadow Lake in the case of Poitras.

The Court of Queen's Bench upheld those convictions on February 10, 2020. Notices of appeal have been filed on their behalf to the Saskatchewan Court of Appeal which will likely be heard later this year or early next year. Of note, the Court of Queen's Bench upheld the s.35 harvesting rights of the HMCONWS as an existing s.35 rights-bearing Métis regional community. And,

B. An **"asserted"** s. 35 right that the Aboriginal title and rights to the lands and resources of North West Saskatchewan have not been extinguished. According to the Supreme Court of Canada in *Haida Nation* this assertion may be sufficient to trigger the duty to consult. For Île-à-la-Crosse / Sakitawak and for North West Saskatchewan generally this assertion has been made in the courts. As noted above, a Statement of Claim was filed in the Court of Queen's Bench in 1994 because of the Snowman case and the guidance of Senators Louis Morin and Vital Morin. The claimed area said to be subject to unextinguished Métis Aboriginal title in this action includes all North West Saskatchewan between the south shore of Lake Athabasca to Green Lake. That action was stayed in 2005/06 and remains stayed to date.

In October 2019 a new Statement of Claim was filed in the Federal Court of Canada by the A la Baie Métis Local of Île-à-la-Crosse / Sakitawak, the Michel Village Local and several Métis individuals, including individuals from La Loche, Buffalo Narrows, Turnor Lake and Black Point. The Plaintiffs are asserting a strong prima facie case that the Métis Aboriginal title to the claim area was not extinguished by the scrip process and based on that existing Aboriginal title right that the court issue a declaration compelling the federal government to negotiate a land claim agreement with the Plaintiffs. This claim area is geographically smaller than the 1994 claim area. This claim is being actively pursued with a case management judge ensuring that the case proceeds in a timely manner.

The October 2019 Statement of Claim was amended and refiled on December 31, 2019. By these legal actions governments and industry have been informed of the "asserted" rights of the respective Plaintiffs, and in particular the A la Baie Métis Local. According to the Supreme Court of Canada, this form of assertion is sufficient to trigger the duty to consult.

For the Métis Village of Île-à-la-Crosse / Sakitawak, the duty to consult is owed to the Métis citizens of/in Sakitawak / Île-à-la-Crosse, not to the municipal government (LCA). Generally, there is a geographic sphere within which this duty must be applied which may take in the fur block or a larger area depending on the nature of the activity that is proposed by government and/or industry and the historical and traditional territory of the Métis in the claim area.

3. Duty to consult and accommodate: Saskatchewan Government Policy

The duty to consult in Saskatchewan is set out in the June 2010 "First Nation and Métis Consultation Policy Framework" adopted by the government of Saskatchewan. This 2010 policy replaces previous policies.

By this policy the provincial government is responsible for determining whether a duty to consult is triggered and if so, the level of consultation required. In the case of "asserted" rights the province is responsible for determining whether there is a credible basis for the right being asserted.

By this policy statement the provincial government commits to consult with and accommodate "rights-bearing Métis communities" in advance of making any decisions that may impact in an adverse manner their Aboriginal rights. **This has never been done regarding fish quota establishment for Sakitawak.**

The policy also makes it clear with respect to Aboriginal title that the provincial government does not accept assertions by Aboriginal peoples, including the Métis, that Aboriginal title still exists in the claimed area and that therefore such claims of adverse impact based on Aboriginal title are not subject to, nor covered by this policy.

The policy is also very clear that the consultation with respect to the Métis will be with the "rights-bearing Métis communities whose traditional territories coincide with the geographic area where the adverse impact would occur". The policy confirms that such rights are held by the collective and as such the consultations must be targeted to the elected leaders of the community and for this purpose the government recognizes the Presidents of Métis Locals "or their authorized designates".

In other words, the Local may delegate the Region, or the NWSMC or the MNS provincial body to negotiate on its behalf, but requires that the Local must provide a written, signed copy of the authorization/delegation to the provincial government before it is effective.

The policy also acknowledges that the "courts have recognized that Métis Aboriginal rights to hunt, fish and trap for food exist in some parts of the Province, such as in Northern Saskatchewan" which is clearly a recognition of the s.35 rights of the HMCONWS and that the government has a "legal obligation to consult with rights-bearing Métis communities".

To be clear, the policy in no uncertain terms states that:

The Government will consult with Métis leadership in communities or regions where Métis Aboriginal rights have already been recognized, such as in Northern Saskatchewan.

While the policy states that Aboriginal title is not covered by the policy, it does acknowledge, based on the Supreme Court of Canada in *Haida Nation* wherein the court recognizes that governments may be required to consult with First Nations (and thus Métis communities), when governments have "knowledge ... of asserted rights, even if governments do not recognize the rights being asserted", that they nevertheless may be legally bound to deal with Aboriginal title and 2019 Statements of Claim, is strengthened, although it is already strong enough based on the established Métis Aboriginal rights to hunt, trap, and gather food as seen above.

4. Application of the law and policy to A la Baie Métis Local and thus to Sakitawak.

Based on the *First Nation and Métis Consultation Policy Framework June 2010* the Métis community of Île-à-la-Crosse / Sakitawak, as represented by the A la Baie Métis Local, is owed the s.35 duty to consult and accommodate. Before any government or industry proponent can undertake any activity which adversely impacts the Métis of Île-à-la-Crosse the government of Saskatchewan must determine to what degree the impact will adversely affect the community and then decide if the duty to consult is triggered and the level of consultation required.

In making its decision the government will also determine if the community has an "established" s. 35 Aboriginal right. As seen above the government accepts that the Métis of Île-à-la-Crosse possess a s. 35 Aboriginal right to hunt, trap, fish and gather for food, so this part of the requirements is met.

With the filings of the 1994 and 2019 Statements of Claim the province will also need to determine if there is a credible "asserted" Aboriginal title right vested in the community. However, in this case, there is no need for this determination to be made as s. 35 Aboriginal rights are already recognized by the courts, and hence by the provincial government in its duty to consult policy.

The asserted s. 35 Aboriginal title right in the claim area, which includes most of North West Saskatchewan, strengthens the requirement of government and industry to engage in real and meaningful consultation, which engages the Honour of the Crown and the federal government's fiduciary duty to deal with the rights of the Métis community. In this connection, as stated above, as A la Baie Métis Local is a Plaintiff in the 2019 Statement of Claim action (*Durocher et al v. Canada*), this also enhances the Local's position with respect to a potential s.35 rights reconciliation negotiation table with the federal government.

If the duty to consult is engaged (triggered) then the government and the industry proponent is legally bound to engage in a consultation process. The degree of which depends on the potential impact.

Once the province determines that the duty to consult is engaged by the 2010 policy it also makes available funding for the consultation. In most cases, the industry proponent also provides fiscal resources to the community being engaged. In this way the Local and/or Region could begin to build up its fiscal and administrative capacity to deal with both rights and programs and services needed by their communities.

Further, as First Nations with whom the Métis have co-existed for generations are also engaged in the consultation process it would be wise and practical for the Local to establish a working relationship with any First Nations Reserves/people who make use of the same territory. In this way, efforts could be undertaken to respect each other's co-existing s.35 rights, avoid conflicts and collaborate on exchanging information and perhaps adopting common positions and strategies.

When the duty to consult is triggered the community (in this case A la Baie Métis Local) must decide if it will undertake the consultation on its own behalf or delegate it to the Region, or to the provincial body (the MNS head office). If a delegation is made, it must be in writing and signed by a proper signing officer representing the Local and then registered with the government of Saskatchewan.

If this delegation has not been made, the Local is solely responsible for its own consultations with the provincial government and industry. On the other hand, if that delegation has been made, the Local can decide whether it wishes to continue under that delegated authority or decide whether it wishes to rescind that delegation and represent itself.

5. CONCLUSION

The HMCONWS has been found by the Court of Queen's Bench for Saskatchewan to be a current/contemporary section 35 rights-bearing regional Métis community. In particular the Métis in the village of Île-à-la-Crosse possess s.35 Métis Aboriginal harvesting rights, as do the other Métis villages whose Locals make up the North West Saskatchewan Métis Council.

Based on those established s.35 Métis Aboriginal rights, A La Baie Métis Local is owed the duty to consult and accommodate by the provincial government, whose 2010 Policy explicitly recognized those rights and the duty to consult based on those rights.