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**Collectively Asserting S. 35 Rights in Duty to Consult
and Accommodate**

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Agenda

1. The Métis and the Duty to Consult in Saskatchewan
2. Current Challenges
3. How can the MNS help?



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**The Métis and the
Duty to Consult in
Saskatchewan**



Métis Connection to Land

- Land permeates Métis customs, way of life, and group identity
- “As [Métis Nation – Saskatchewan (MNS)] evolved throughout the great expanse called Canada, [its] citizens hunted, fished, and gathered plants to ensure the survival of [their] families.”
- “As in the past, harvesting from Mother Earth remains an integral tradition of [the citizens of MNS] that [they] inherited from [their] ancestors.”



Métis as S. 35 Rights-Holders

- S. 35 recognizes and affirms existing Aboriginal rights
- S. 35 recognizes “Aboriginal peoples of Canada” to include Métis peoples in Canada
- *Powley* answered the question “Who is Métis for the purposes of s. 35?”
 - “The term ‘Métis’ in s. 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears.”



R. v. Van der Peet & *R. v. Powley*

- *Van der Peet* is the leading case for establishing Aboriginal rights
 - Set out 10 factors to be considered in identifying Aboriginal rights
 - “Where an Aboriginal community can demonstrate that a particular practice, custom or tradition is integral to its distinctive culture today, and that this practice, custom or tradition has continuity with the practices, customs and traditions of **pre-contact times**, that community will have demonstrated that the practice, custom or tradition is an Aboriginal right for the purposes of s. 35(1).”
- *Powley* is the leading case for establishing Métis rights
 - Set out a 10 part test for establishing a Métis right under s. 35
 - Foundation of the test comes from *Van der Peet*, but modified to exclude pre-contact evidence
 - “This modification is required to account for the unique post-contact emergence of Métis communities, and the post-contact foundation of their Aboriginal rights.”

R. v. Powley Test

1. Characterization of the right being claimed
2. Identification of the historic rights-bearing community
3. Identification of the contemporary rights-bearing community
4. Verification of the claimant's membership in the relevant contemporary community
5. **Identification of the relevant time frame**
 - a) “The test for Métis practices should focus on identifying those practices, customs and traditions that are integral to the Métis community's distinctive existence and relationship to the land. ... The focus should be on the period after a particular Métis community arose and before it came under the effective control of European laws and customs.”
6. Determination of whether the practice is integral to the claimants' distinctive culture
7. Establishment of continuity between the historic practice and the contemporary right asserted
8. Determination of whether or not the right was extinguished
9. If there is a right, determination of whether there is an infringement
10. Determination of whether the infringement is justified



Summary of Legal Principles

- Métis are unique and distinct rights-bearing Aboriginal peoples, whose rights are recognized and affirmed in Section 35.
- No hierarchy of Aboriginal rights within Section 35.
- Crown, as a whole, is accountable for its obligations to Métis as Section 35 rights-bearing Aboriginal peoples.
- Constitutional principle of the honour of the Crown is a guiding principle for the Crown in its relationship with Métis peoples.
- Crown has a duty to consult and, where appropriate, accommodate Métis peoples when the Crown contemplates conduct that might adversely affect potential or established Aboriginal rights.



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**Current
Challenges**



Challenges faced by Saskatchewan Métis in the past

- Issuance of Letters to Locals
 - Letters are often not fully-answered or not answered at all.
 - Letters represent missed opportunities for engagement.
- Local-by-Local Métis Engagement
 - Current approach creates divided voices.
 - Current approach offers limited leverage.
 - Current approach results in a “rushed” duty to consult.
- Low Impact “Consultation”
 - Current format provides for limited meetings.
 - Current format provides for limited funding.
 - Current format focuses on “box-ticking.”



Challenges faced by Saskatchewan Métis in the past cont.

- Non-Committal & Low Impact “Benefits”
 - Current format offers limited ability to enforce benefits.
 - Current format results in third-tier treatment behind other Section 35 rights-holders.
 - Current format represents a missed opportunity to secure benefits.

No Meaningful Benefits or Legacy



Current Challenges

- Delegation issues with the Province and Proponents
- The industry and government are more interested in working within the current divisive system
- It has been observed that the MNS approach scares a number of proponents and provincial government entities



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How Can the MNS Help?



What are the MNS's Objectives?

- To advance and defend Métis rights under Section 35;
- To strengthen Métis governance at all levels by growing governance capacity and expertise;
- To have the capacity, processes, and leverage to negotiate for benefits from activities in Saskatchewan; and
- To grow economic capacity and start building an economic legacy.



What is the MNS's Approach to Consultation?

- MNS as the designated representative of Locals in project consultations and negotiations, undertaken to satisfy the Crown's duty to consult.
 - This approach allows Métis to engage with the Crown, project proponents, and regulators as a single voice.
 - MNS acts as the vehicle by which the perspectives of each of Locals are presented in an unified and persuasive manner.
- The MNS approach ensures that each and every engagement is conducted in a manner that minimizes adverse impacts to Métis rights under Section 35 and that provides meaningful benefits to Métis, effectively advancing their interests.



How Can the MNS can Unlock Value from Projects?

1. A single and unified approach to:
 - a. identifying projects;
 - b. engaging and consulting on projects; and
 - c. negotiating benefits;
2. A robust “gatekeeper” function;
3. Expertise in leveraging Section 35 rights; and
4. Resources to enforce rights and expectations.

A “One Voice” approach embodies:

A shared desire to strengthen the Métis Nation and to provide meaningful opportunities for Citizens.



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