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## “Connection to Land”

**NORTH WEST LAND CLAIM &  
OTHER RELATED MNS LAND  
CLAIMS**

February 28, 2020

Thomas Isaac

# Agenda

1. Métis Connection to Land
2. Métis & Section 35, *Constitution Act*, 1982
3. North West Saskatchewan Métis Land Claim
4. 2019 Land Claim
5. Land Claims Policy
6. Current Status & Next Steps





# MÉTIS CONNECTION TO LAND

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# 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.” (MNS website)
- “As in the past, harvesting from Mother Earth remains an integral tradition of [the citizens of MNS] that [they] inherited from [their] ancestors.” (MNS website)



# Basis of Land Claims

- Métis Scrip System
  - Designed to attempt to extinguish any Métis rights to the land
- Treaty 3 Adhesion
  - Only Numbered Treaty where the Métis collectively signed an adhesion
- Federal Pasture Lands Policies
  - Métis communities in Manitoba and Saskatchewan were removed in the 1930s
- S. 31, *Manitoba Act, 1870*
  - *Manitoba Métis Federation Inc. v. Canada (Attorney General)*
- S. 35, *Constitution Act, 1982*





# **MÉTIS & SECTION 35, *CONSTITUTION ACT,* 1982**

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# 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. Van der Peet* Test

1. Courts must take into account the perspective of Aboriginal peoples themselves
2. Courts must identify precisely the nature of the claim being made in determining whether an Aboriginal claimant has demonstrated the existence of an Aboriginal right
3. In order to be integral, a practice, custom or tradition must be of central significance to the Aboriginal society in question
4. The practices, customs and traditions which constitute Aboriginal rights are those which have continuity with **the practices, customs and traditions that existed prior to contact**
5. Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims
6. Claims to Aboriginal rights must be adjudicated on a specific rather than general basis
7. For a practice, custom or tradition to constitute an Aboriginal right it must be of independent significance to the Aboriginal culture in which it exists
8. The integral to distinctive culture test requires that a practice, custom or tradition be distinctive; it does not require that that practice, custom or tradition be distinct
9. The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom or tradition is only integral because of that influence
10. Courts must take into account both the relationship of Aboriginal peoples to the land and the distinctive societies and cultures of Aboriginal peoples.



# *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





# **NORTH WEST SASKATCHEWAN MÉTIS LAND CLAIM**

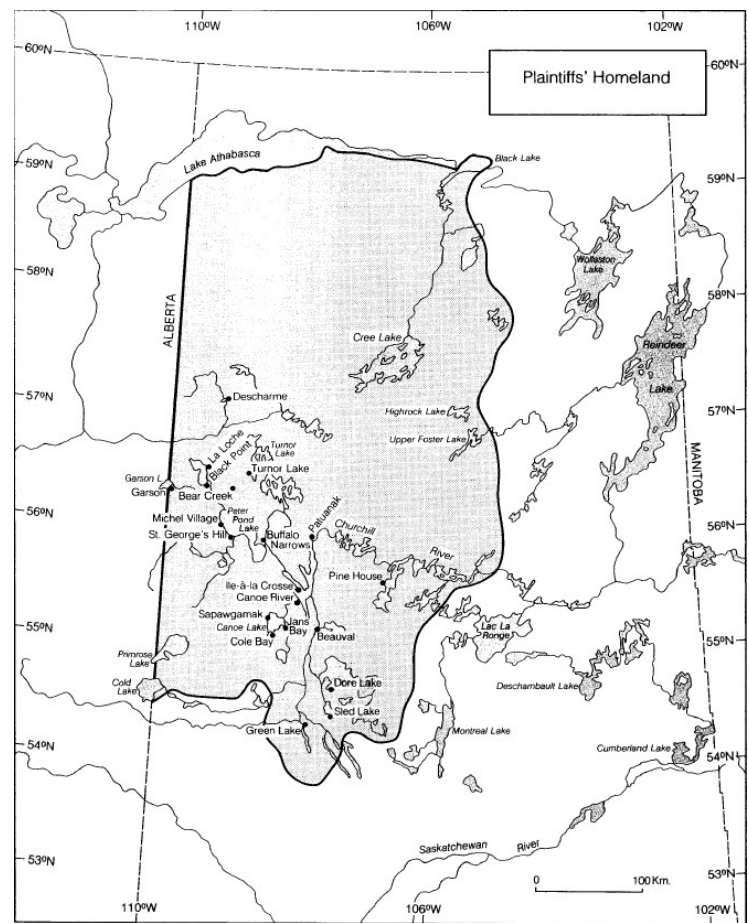
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# 1994 Action

- In 1994, Plaintiffs filed a land claim in the Saskatchewan Court of Queen's Bench on behalf of the Métis in Saskatchewan.
- Plaintiffs included MNS, the Métis National Council, the Métis Society of Saskatchewan Inc. (the predecessor to the MNS Secretariat Inc.), and Métis local presidents.
- Land claim concerned the Métis homeland in northern Saskatchewan.
- Plaintiffs argue that:
  - Canada acted in breach of its fiduciary obligation to the Métis by imposing a scrip system that was never designed to convey benefits on the Métis;
  - Canada knew that the scrip system was designed to and would destroy the base of land and resources to which the Métis were entitled and needed; and
  - Aboriginal title and rights to their homeland were never extinguished.
- Plaintiffs sought, among other things, a declaration recognizing their Aboriginal title and rights to the possession, occupation, use and benefit of their homeland.



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## Recognition of Indigenous Rights & Self-Determination (RIRSD) Process

- In 2017, MNS began negotiating with Canada under the RIRSD process
  - RIRSD process is a discussion between MNS and Canada to advance the recognition of Indigenous rights and self-determination
- Pursuant to the Framework Agreement, “it is intended that all land claims made by the Métis to land in Saskatchewan will be addressed in processes and discussions contemplated by this Framework Agreement”, i.e. RIRSD process
  - North West Métis Land Claim, Fort Qu’appelle, etc.
- In August 2019, MNS and Canada established a side table dedicated to the resolution of all Métis land claims in Saskatchewan
  - This is the first Métis land claims side table in all of Canada



# MNS Governance Structure

- MNS is the proper party to be negotiating the resolution of all Métis land claims in Saskatchewan on behalf of the Métis in Saskatchewan
- MNS Constitution is the main legislation with respect to governance of MNS
- Pursuant to the MNS Constitution:
  - MNS is the governing body of Métis in Saskatchewan
  - MNS is the collective/organization responsible for protecting s. 35 rights of Métis in Saskatchewan
  - Métis Nation Legislative Assembly (MNLA) is the governing authority of MNS
  - MNLA has a great degree of paramountcy with respect to other governance structures of MNS





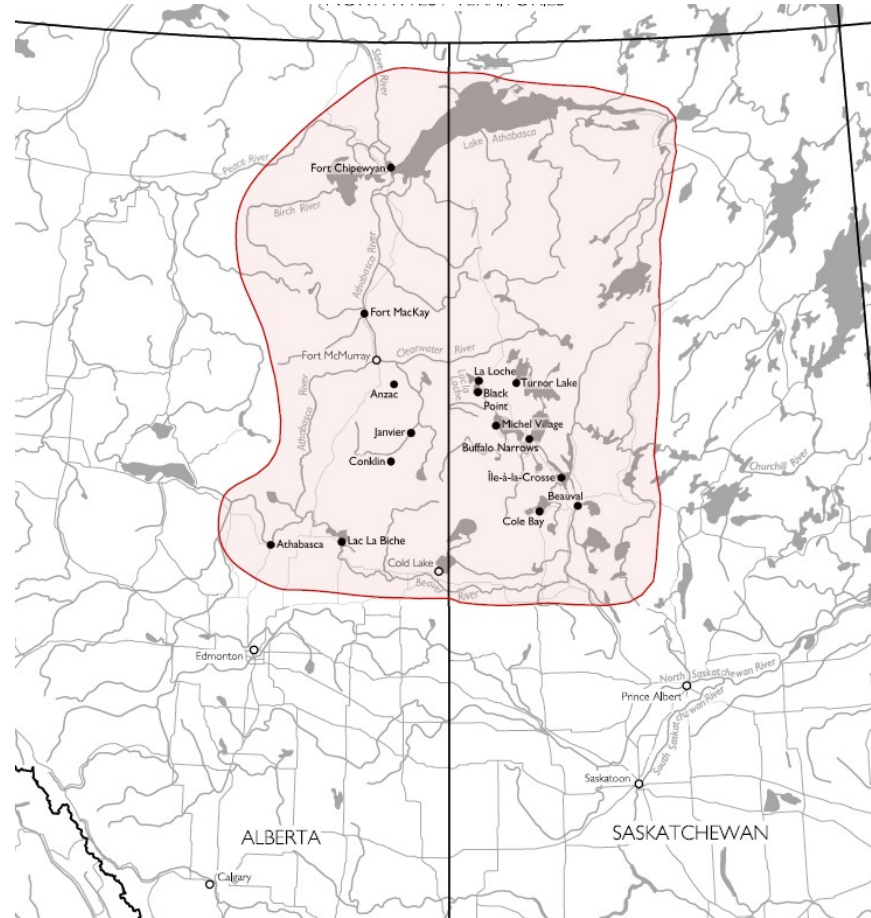
# **2019 LAND CLAIM**

# 2019 Action

- On October 16, 2019, Plaintiffs filed a land claim in the Federal Court on behalf of Métis in Alberta and Saskatchewan.
- Plaintiffs are personally named Métis individuals, communities, and Locals in Alberta and Saskatchewan.
- Land claim concerns land in northern Alberta and northern Saskatchewan.
  - Saskatchewan portion of the 2019 Action overlaps substantially, or entirely, with the North West Saskatchewan Land Claim.
- Plaintiffs sought, among other things, a declaration recognizing their Aboriginal title and rights to the ownership, possession, occupation, use and benefit of the claimed land.

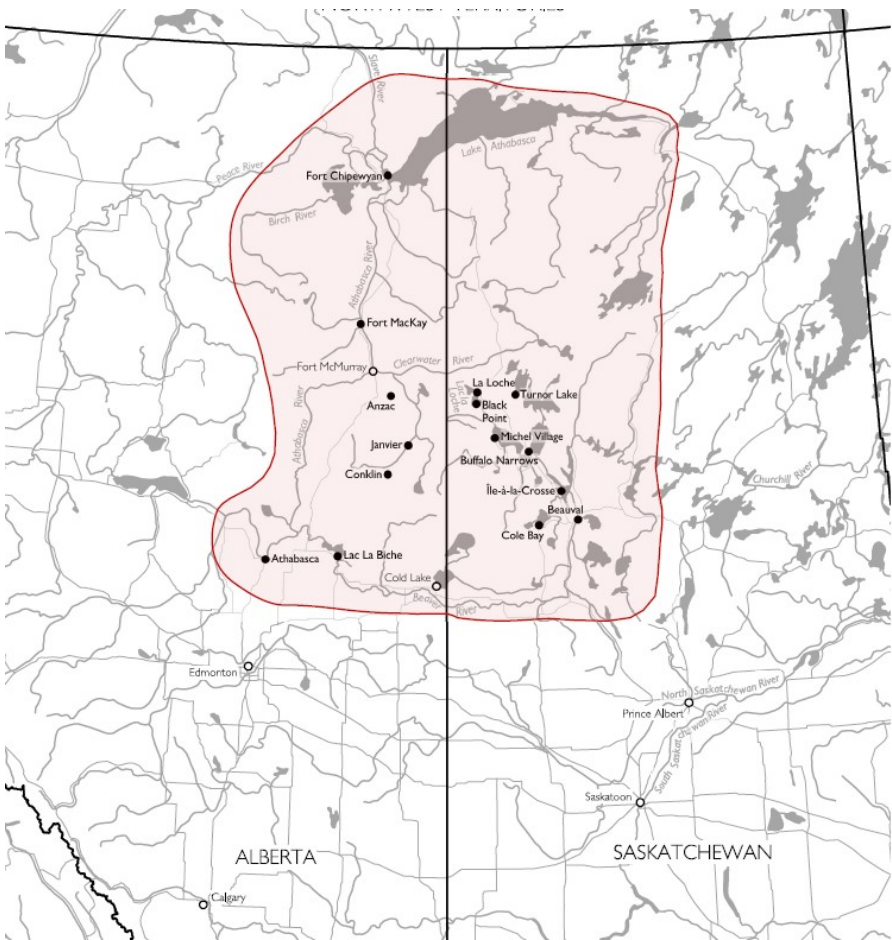
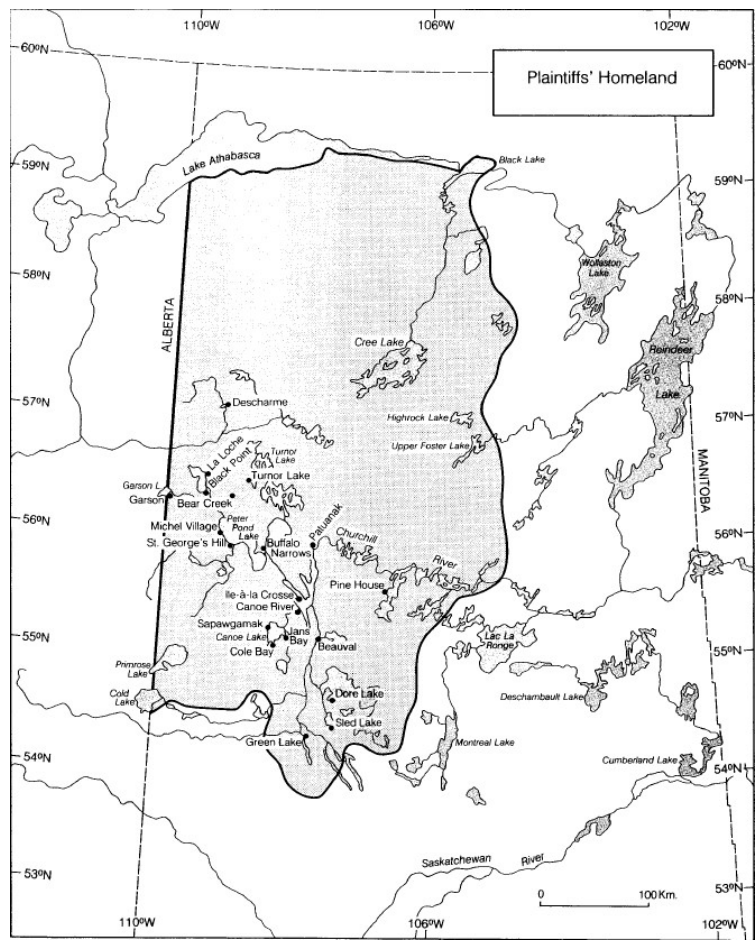


# Map of 2019 Land Claim Area





# Comparison of 1994 & 2019 Land Claim Areas



# Implications for Métis Nation – Saskatchewan

- Plaintiffs commenced the 2019 Action as a representative proceeding.
  - Aboriginal rights under s. 35, *Constitution Act, 1982* are collective rights.
  - “MNS is mandated to represent the Métis of Saskatchewan”
- Counsel for the Plaintiffs in the 2019 Action previously acted for MNS in matters connected to the North West Saskatchewan Land Claim.
- MNS is already negotiating the North West Saskatchewan Land Claim with Canada under the RIRSD process





# **LAND CLAIMS POLICY**

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# Métis Land Claims Policy

- Main priority for MNS in its negotiations with Canada
  - “The Parties agree that the Shared Objectives of the Negotiation Process are to...jointly develop a relationship between Canada and the MNS consistent with the purposes of s. 35 by establishing processes wherein the rights and the [land] claims of the MNS, its Citizens and its respective communities in all regions of Saskatchewan may be recognized and respected.”
- MNS and Canada’s land claims side table is the first Métis land claims side table in all of Canada







# **CURRENT STATUS & NEXT STEPS**

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## Current Status & Next Steps

- MNS has filed a motion to intervene in the 2019 Action, to strike portions of the Plaintiffs' pleadings in the 2019 Action, and to remove the Plaintiffs' counsel from the 2019 Action.
- Efforts to resolve the North West Saskatchewan Land Claim will continue under the RIRSD process, specifically at the land claims side table.



# Thomas Isaac, B.A., M.A., LL.B., LL.M.

Thomas Isaac is a nationally recognized authority in the area of Aboriginal Law and serves as the Chair of the Aboriginal Law Group at Cassels. Tom has extensive cross-Canada experience advising industry, investors, and federal, provincial, territorial, and municipal governments/agencies on matters involving complex multi-jurisdictional Aboriginal-related disputes. Tom also has extensive experience representing industry and government clients before the Supreme Court of Canada, Federal Court of Canada, Ontario Court of Appeal, Ontario Divisional Court, BC Court of Appeal, BC Supreme Court, NWT Supreme Court, Yukon Supreme Court, Yukon Court of Appeal, Manitoba Court of Queen's Bench, PEI Supreme Court, PEI Court of Appeal, National Energy Board, Ontario Energy Board, and BC Environmental Appeal Board. In 2018, Tom was honoured as one of Canada's "Top 25 Most Influential" lawyers by *Canadian Lawyer* magazine.

Tom is a former Chief Treaty Negotiator for the Government of British Columbia and a former Assistant Deputy Minister responsible for establishing Nunavut for the Government of the Northwest Territories. He also served in a senior capacity with the Government of Saskatchewan dealing with Aboriginal issues.

Tom served as the Minister's Special Representative for the Minister of Indigenous and Northern Affairs regarding a Section 35 Metis Rights and Reconciliation Framework and a reconciliation approach for the Supreme Court of Canada's decision in *Manitoba Metis Federation v. Canada*. His report—*A Matter of National and Constitutional Import: Metis Section 35 Rights and the Manitoba Metis Federation Decision*—was released by Canada in July 2016.

Tom also served as the Minister's Special Representative for the Minister of Indigenous and Northern Affairs and the Premier of the Northwest Territories regarding the Akaitcho Dene and NWT Metis Nation negotiations in the Northwest Territories. His report—*A Path to Reconciliation*—was released by both governments in March 2017.

Tom is presently serving as the Minister's Special Representative for the Minister of Indigenous and Northern Affairs to conduct exploratory discussions on the Gottfriedson class action lawsuit against the Government of Canada relating to residential school day students.

Tom has published extensively in Aboriginal law, including 15 books, the most notable being *Aboriginal Law, 5<sup>th</sup> Ed.* His published works on Aboriginal law have been cited with approval by Canadian courts, including the Supreme Court of Canada and the Federal Court of Appeal.

Tom is a member of the law societies of Alberta, British Columbia, Nunavut, NWT, Ontario, Saskatchewan, and Yukon.





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