TOWARD A MÉTIS POLICY

PREPARED BY

THE MÉTIS POLICY SUB-COMMITTEE
ABORIGINAL JUSTICE IMPLEMENTATION COMMISSION

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EXECUTIVE SUMMARY

Objectives

Further to the mandate of the Aboriginal Justice Implementation Commission, this paper has been prepared for the Aboriginal Justice Implementation Commission to contribute to the development of a Manitoba Métis policy. In doing so, the paper canvasses a range of considerations. These include the requisites of good policy making, the grounds for Manitoba to develop and implement a Métis Policy, and a review of specific obstacles and constraints facing both the provincial government and the Métis of Manitoba, together with recommendations for overcoming those constraints.

This paper is not intended to provide particular policy outcomes. The latter should stem from dialogue between the province and Manitoba Métis. However, the paper does provide a framework for the determination of specific policy outcomes, such as recommended by the Aboriginal Justice Inquiry and the Royal Commission on Aboriginal Peoples.

Limitations on Policy

A number of limitations facing the development of Métis policy face the province. These include the need to balance relations with the Métis with relations with other Aboriginal people in the province, including with First Nations, with persons of First Nation descent who may not identify with or be linked to historic Red River or Rupert's Land Métis communities, and with non-status Indian people. A particular concern of policy will be to take concrete and proactive measures with the Métis nation and its communities, while avoiding the penalization or further marginalization of other Aboriginal communities or groups.

A second major limitation concerns the deadlock over "jurisdictions" that has flavoured the political and legal dialogue between the federal and provincial governments, and with the Métis. The paper sets out a middle ground policy basis for addressing this matter, and points to options to break the deadlock in the course of developing provincial policy.

A third limitation concerns institutional capacities. New policy should enhance and further both Métis and provincial capacities rather than strain or undermine them. Accordingly, considerable attention is merited to those recommendations, both from the Aboriginal Justice Inquiry and the Royal Commission on Aboriginal Peoples (RCAP), concerning capacity building efforts. Of particular focus should be Métis community-level institutional capacities.

A final limitation canvassed speaks to the critical importance for government policy making not to proceed in either a vacuum, or in arbitrary directions. Recommendations of the Aboriginal Justice Inquiry and RCAP to design and implement policy through respectful partnerships has found considerable resonance in judicial decisions up to the Supreme Court. In addition, the courts have called for a reconciliation of Crown sovereignty and Aboriginal rights to be achieved through negotiation, not litigation or mere avoidance. Therefore the provincial process should incorporate Métis views and positions as an integral component of policy, and avoid being prescriptive.

Grounds for Policy

The paper reviews a wide range of grounds or reasons for Manitoba to establish a Métis policy in the near term, including:

- Constitutional morality;
- Constitutional uncertainty;
- Symbolic importance;
- Improving socio-economic conditions;
- The advancement of intergovernmental relations;
- Exercising policy opportunities in advance of court-driven change, and
- Contributing to positive and cooperative relations in the future, enhancing public awareness and education.

In brief, the Métis of Manitoba are a founding people of the province, and their formal recognition as such should be a matter of central government policy, together with the development of a respectful policy of engagement with clear goals for Métis governance and economic development.

Ways and Means

The paper explores a number of options by which the province, in partnership with Manitoba Métis, could proceed toward the establishment and elaboration of effective policy. These include arriving at a practical but proactive joint stance concerning federal denial of jurisdictional capacities under section 91(24) of the *Constitution Act, 1867* and other constraints on federal engagement.

Also important are the Manitoba Legislature's capacities, and limits, in legislating specifically in aid of shared goals for the Métis people. In addition, the paper addresses different approaches to sector-specific versus integrated and "all-in-one" approaches to policy formulation and implementation. Finally, the provincial policy legacy is reviewed, illustrating the fundamental absence of a principled policy-based objection to the government of Manitoba proceeding swiftly and in consultation to implement the applicable recommendations regarding Métis policy development as set out in the reports of the Aboriginal Justice Inquiry of 1991 and the Royal Commission on Aboriginal Peoples of 1996.

I. METIS POLICY SCOPE AND OBJECTIVES

I-1. Aboriginal Justice Implementation Commission Mandate

The Aboriginal Justice Implementation Commission (AJIC) was established by the government of Manitoba "to review the recommendations of the *Report of the Aboriginal Justice Inquiry (1991)* and to advise the government on recommended methods of implementing those recommendations for which the Province of Manitoba is responsible and accountable"[1].

In this regard the AJIC is responsible for recommending priority areas for action in the short and longer term, and for the design of practical, cost-effective and attainable implementation strategies for priority action items. These recommendations are to be situated within the framework of principles set out in the AJI Report, within a justice system that is flexible and can be administered locally and which operates under the existing criminal laws of Manitoba and Canada. In discharging its mandate, the AJIC is to communicate and consult informally with Manitobans for the purpose of setting priorities and developing implementation strategies for proposed changes to the justice system.

The AJIC is also to report on the current status of implementation of the AJI Report recommendations and to assess and report on the jurisdiction of its work having regard to the Framework Agreement Initiative between Manitoba First Nations and Canada and the Report of the Royal Commission on Aboriginal Peoples.

The AJIC is to provide quarterly status reports to Ministers and to deliver its report by March 31, 2001 with final recommendations. Recommendations on specific issues are to be forwarded to Ministers as they are finalized.

[1] Aboriginal Justice Implementation Commission Terms of Reference, November, 1999.

I-2. Métis Policy Formulation: Introduction

A. Policy Development Generally

In general terms, a policy is the body of principles or values that guide a government in the management of public affairs. While government policies and programs must be lawful, especially in the era of the *Charter*[2], it is not necessary that they be based on legislation. Policies may be expressed in the form of statements, oral or written, and may find their origins in political values and positions, academic or other considered reports or studies of particular issues, socio-economic information, financial constraints, litigation pressures or the like.

There are many ways by which governments formulate and publicize policies for the conduct of public business. The most transparent method is to introduce in the Legislature a bill based on the political position or values of the government. It will then go for study and for public input *via* the legislative committee process. This procedure may or may not involve a prior process of public consultation or an attempt to build consensus beforehand.[3]

Another, less formal method is for the government or the responsible minister to make a policy statement in the Legislature (which may or may not be accompanied by a document describing the elements of the policy, its origins and anticipated benefits) or even to simply state the government's intention to proceed in a particular way with regard to certain matters or issues.[4] This is the approach that has been taken regarding the announcement by the Manitoba Government of it's intention to treat the Northern Flood Agreement as a modern treaty, for example.

Given the nature of the parliamentary process and the role played by the official opposition (no matter what party may currently be playing that role) making a statement

[2] In the recent Supreme Court decision *Lovelace v. Ontario* (December 7, 2000) the Court noted (at paragraph 56) that government ameliorative programs may also be reviewed under s. 15: "… the s. 15(1) scrutiny is not limited to distinctions set out only in legislation… we must have a broad understanding of how "law" in s. 15(1) is defined …since it is clear that s. 15(1) must be available to review ameliorative programs.

[3] There is no legal requirement in situations where a bill is introduced in the legislature for any prior public consultation: *Reference Re Canada Assistance Plan (BC*), [1991] 2 S.C.R. 525.

[4] These approaches are discussed in the context of a Manitoba Recognition Policy in the paper prepared for the AJIC by John Giokas entitled *Recognition, Reconciliation and Healing*, November 15, 2000.

in bill, documentary or verbal form is likely to lead to criticism. This adversarial aspect of parliamentary procedure is not necessarily conducive to building political consensus or broad public support. This is especially the case where the principles or values upon which the policy is based may not be well-known or widely shared – a matter of particular concern in the complex, evolving and contentious area of Aboriginal policy development.

Another approach is to seek to achieve public consensus - or at least a significant degree of public or interest group support for a measure - by tasking the public service to involve interest groups or broad elements of the public in the development or refinement of policy before it is announced or adopted by the government in any official way. In most cases, the ordinary conduct of government business allows public servants to establish these kinds of ongoing contacts with business, public interest advocacy groups, affected parties and the public in general and then to build upon them for policy development purposes.

This approach is less transparent than open debate in the Legislature, but may produce a greater degree of consensus than the more formal and public avenue provided by bills or statements in the Legislature. However, it may give rise to charges of secret or bureaucratic policy development or to accusations that powerful interest groups may have overly influenced policy development and sidestepped cabinet and the Legislature.[5]

Another way of formulating public policy is to leave the matter for examination by commissions of experts or of judicial inquiry. The former approach has been prominent in the Aboriginal justice area since the 1960s. Indeed, the AJI Report itself was one of a series of Aboriginal justice commission reports during the 1980s and early 1990s. With the evolution of Aboriginal law the focus has shifted from expert commissions to the courts, the result being that judges are increasingly being thrust into policy debates *via* their judgments.[6] Given the vague and uncertain nature of the constitutional and legal concepts upon which modern Aboriginal law has been erected and the need to reconcile the often sharply divergent viewpoints among interest groups and affected parties, there

[5] The advantages and disadvantages of this way of proceeding are described briefly in C.E.S. Franks, *The Parliament of Canada* (University of Toronto Press, 1987) at 209-12.

[6] The *Lovelace Case*, *supra* note 2, is a prime example. There, the Supreme Court was called upon to assess the policy of the Ontario government to direct casino proceeds to Indian Bands as opposed to sharing them more widely among all Aboriginal communities in the province. In the result, the Court upheld the targeted nature of the Ontario

may be sound reasons for allowing the courts to flesh out and define more precisely the basis of future Aboriginal policies through their rulings.

Allowing the courts to wrestle with Aboriginal policy matters removes contentious and socially divisive issues from the political or bureaucratic arena, at least temporarily. It also allows governments to attempt to influence policy development indirectly through legal arguments without necessarily having to make their positions public in the political arena. However, the locus of control shifts from politics to the judiciary – from elected officials or public servants who answer to elected officials to judges who answer to their understanding of the law and to their own consciences. This approach may backfire because judges may not adopt the government's arguments and may in any event rely on techniques of legal reasoning that do not necessarily lend themselves to good policy-making. The result is often to catch the government off-guard and unable to properly implement the court's decision.[7]

Given the foregoing, the task of developing an explicitly Métis policy for the province of Manitoba will require the government to decide at the outset how it wishes to see that policy developed. This, in turn, will mean assessing in the first instance how much of that policy already exists in inchoate form in existing provincial policy and program approaches to Aboriginal peoples within Manitoba, commission recommendations, judicial decisions and prevailing public attitudes and fiscal realities.

In the second instance, and assuming that existing policies and programs furnish the basis for a minimal policy position, developing an explicitly Métis policy will require the government to decide how much farther it will go to build on, extend or completely alter the policies and practices that may already exist. This will mean assessing the willingness of the public and the ability of provincial institutions to digest any new policy with a view to educating and building consensus as well as to enhancing institutional capacity to carry out the proposed policy.

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approach for reasons that can only fairly be described as judicial policy.

[7] This is demonstrated most recently by the Supreme Court decision in *R. v. Marshall* [1999] 3 S.C.R. 456 where the Court's finding that the treaty signatory First Nations were entitled to a moderate livelihood from natural resource harvesting caught the federal government completely without a policy or program basis upon which to respond adequately.

B. Calls For A Manitoba Métis Policy

The *Report of the Royal Commission on Aboriginal Peoples* (RCAP) was explicit in its call for a sea change in Canadian policies for dealing with Aboriginal peoples, including the Métis. The sheer breadth of the proposed policy changes is signalled in the first recommendation in the RCAP Summary of Recommendations that "federal, provincial and territorial governments … commit themselves to building a new relationship based on the principles of mutual recognition, mutual respect, sharing and mutual responsibility" and that these principles find expression in a new Royal Proclamation and in legislation.[8] Many other recommendations call equally explicitly for new national, regional and local Aboriginal policies.

By way of contrast, the AJI Report does not explicitly call for the development of an overall Métis policy by the province of Manitoba. Instead it focuses on more discrete issues, turning its attention to Métis issues in a limited number of instances where implicated by the broader AJI mandate to assess the Manitoba justice system. Nonetheless the AJI did envisage that the province, in conjunction with the federal government, would develop a more coherent approach to dealing with Métis issues. In calling for recognition of the special constitutional position of the Métis as being under federal jurisdiction and for the delineation of the Métis community boundaries for "program delivery, local government and administration of justice purposes"[9], for example, it seems unarguable that the AJI was calling for entirely new federal and provincial policies for the Métis.

In the modern Canadian constitutional landscape, "program delivery, local government and administration of justice purposes" are a shared federal and provincial responsibility in the area of Aboriginal peoples and communities that can only be discharged when each level of government has clear policy guidelines that permit the allocation of resources and which allow for the avoidance of duplication.

C. Limitations on Métis Policy Development in Manitoba

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[8] Report of the Royal Commission on Aboriginal Peoples, Vol. 5, *Renewal: A Twenty Year Commitment* (Minister of Supply and Services, 1996) at 141. This was not the first overall RCAP recommendation, but was the one selected by the Commission as being the first in thematic importance.
[9] AJI Report, Vol. 1 at 731-32.

In any event, and in keeping with our understanding of the AJI recommendations, this paper will attempt to provide some of the elements of a possible provincial Métis policy, drawing where appropriate on a variety of sources including general socio-economic and demographic information, court rulings and the recommendations of the AJI and RCAP Reports. Before beginning, it is important to set out four general limiting principles that must be borne in mind throughout

The first lies in the fact that the identity of the Métis remains to be clarified, the result being that other Aboriginal peoples within provincial boundaries may well be affected by any new Métis policy. The second concerns the unknown nature of provincial constitutional jurisdiction over the Métis however they may be defined or identified. The third involves the capacity of the Métis people and their institutions to respond to any new provincial initiatives and to work harmoniously and effectively with the federal and provincial governments. The fourth is tied up with the pressing need to effect reconciliation and a new partnership between government and the Métis people as a precondition to any step involving joint action.

1. *Other Aboriginal Peoples*

Since the advent of s. 35 of the *Constitution Act, 1982* the issue of how to define the Métis has been a thorny one for the federal and for the provincial governments. As many commentators have noted, there is a singular lack of agreement among Aboriginal people about who is, and who is not, entitled to be called Métis.[10] Partly for that reason, Métis enumeration has been at the heart of constitutional discussions concerning Métis rights since the 1980s. It is to be noted in this context that the Supreme Court, (at least in the Ontario context) has taken judicial notice of the fact that the issue of how to define "Métis" remains politically and legally contentious."[11]

This is so, even in Manitoba where the Red River Métis made so important a contribution to the creation of the province. In 1994 in the *McPherson Case* the Manitoba Court of Queen's Bench upheld the earlier Provincial Court finding that the accused persons were

[10] See for example, Bradford W. Morse and John Giokas, "Do the Métis Fall Within s. 91(24) of the Constitution Act, 1867?" In Royal Commission on Aboriginal Peoples, *Aboriginal Self-Government: Legal and Constitutional Issues* (Minister of Supply and Services Canada, 1995) 144 at 148-68 for a review of the issue of Métis identity.

Métis for purposes of s. 35 of the *Constitution Act, 1982*, even though neither was apparently descended from the historic Red River Métis Nation.[12] In addition, in the leading Manitoba Métis hunting case, the Provincial Court made the following statement about the meaning of the term "Métis":

> The question of exactly who is a Metis within the meaning of this section of the *Constitution Act* is a difficult one. It is complicated by the fact that the term Metis has been used in different ways at different times. Even today, there is dispute as to the correct meaning of the term at any given period of history. It is further complicated by the fact that there are at least two distinct cultural backgrounds for the mixed blood people known today as Metis. There are the descendants of British (English and Scottish) "half-breeds" as they were originally known, who were the children of Hudson's Bay Company employees; and there were the original French Metis who, for the greater part, were the children of North West Company employees, from Quebec.
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> Another complicating factor is the evolution in the use of the term "Metis", which saw the Government of Canada adopt a protocol by at least 1870 whereby all mixed blood descendants of European and Indian people were referred to in English as "half-breeds" and in official documents in French as "Metis". Beyond this, the question of who is or is not a Metis has been highly politicized by some fairly disparate organizations claiming to speak for the Metis of today.
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> A further, final complicating factor has been the change by the Government of Canada of the criteria for status as an Indian under the *Indian Act* in 1985. This apparently has resulted in a substantial number of people, who might otherwise have claimed status as a Metis, now taking status as Indians.[13]

Nonetheless, the Manitoba Métis Federation would likely assert that the question of Métis identity is less problematic in Manitoba because the Métis in this province know who they are and are able to define themselves with some precision on the basis of descent from an identifiable Métis nation and modern Métis community acceptance criteria as reflected in the current MMF definition.

While that may be so, and as *McPherson* and other cases show, there are nonetheless large numbers of Aboriginal persons who are not necessarily included within the MMF definition, but who may nonetheless claim to be Métis in the constitutional sense. These are persons who may not be recognized by the federal government as being status

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[11] *Lovelace*, *supra* note 2 at paragraph 13.
[12] *R. v. McPherson* [1994] 2C.N.L.R. 137, upholding the acquittal in the Provincial Court ([1992] 4 C.N.L.R. 144 in which the Court held that (at 146) that "both can be described as what is sometimes referred to as 'fringe' Métis i.e. people of mixed blood who live in areas adjacent to remote Indian reserves and who in large measure have retained a traditional lifestyle close to the land…".
[13] R. v. Blais [1997] 3 C.N.L.R. 109 at 114-15 per Swail J.

Indians, but who nonetheless live what the courts sometimes refer to as an "Indian" or a "traditional" lifestyle. This type of lifestyle is also followed by many self-identifying Métis communities in Manitoba as well as by communities that might otherwise be identified as being non-status Indians.

From the federal perspective such persons are not "Indians" for purposes either of s. 91(24) of the *Constitution Act, 1867* or s. 35 of the *Constitution Act, 1982*. Instead, they are referred to loosely as Métis or as non-status Indians by the federal government in the sense of being of mixed ancestry and culture, but without federal Indian status. Increasingly, such persons describe themselves as Métis (but also as non-status Indians, non-treaty Indians etc.[14]) in order to exercise constitutionally protected rights that they cannot access under the rubric of "Indians" due to the reliance of federal and provincial authorities on the narrow definition of Indian in the *Indian Act*. Manitoba has large numbers of such persons whose lifestyles, histories of discrimination and exclusion from mainstream non-Aboriginal Manitoba society may be similar or identical to those of MMF-recognized Métis .[15]

This raises two challenges. First, how is Manitoba to distinguish between MMF Métis and other Aboriginal peoples who may call themselves Métis but who are not accepted as such by the MMF? Does Manitoba wish to adopt a Métis recognition policy different from the criteria used by the MMF in order to gather a larger number of Aboriginal persons under its Métis policy umbrella? Even if Manitoba may not wish to do this, what will it do if the expansive judicial view of who the Métis are that was espoused by the trial

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[14] In a case concerned with whether the Métis had rights under the *Natural Resources Transfer Agreement*, for instance, the accused in *R. v. Grumbo* [1998] 3 C.N.L.R. 172 (Sask. CA) variously described himself as Métis, non-status Indian and non-treaty Indian.

[15] In *Lovelace*, *supra* note 2, the Supreme Court noted (at paragraph 69) that the off-reserve, non-status Indian and Métis people who had challenged Ontario's casino proceeds policy had suffered the same type of discrimination as Indian band communities and (at paragraph 75) had the same needs as the Indian bands. A similar point was made by the Saskatchewan Court of Queen's Bench in *R. v. Morin and Daigneault* [1998] 1 C.N.L.R. 182 at 203:

> The evidence at trial, both oral and documentary, established that in northern Saskatchewan, historically and now, there was very little, if any distinction between the Indian and Metis Aboriginal people. The distinction has always been primarily a legal one based on whether ancestors opted for Scrip or Treaty.

judge in the *McPherson* and *Powley*[16] *cases* finds support in the Supreme Court of Canada?

Secondly, if Manitoba were to restrict its Métis recognition policy to the membership of the MMF, is Manitoba then prepared to address the situation of non-MMF Aboriginal communities, especially where they may be similar or identical to that of recognized MMF Métis communities? Failure to do so may leave the province open to the type of legal challenge that Ontario faced recently in the *Lovelace Case* with regard to its casino proceeds policy if the non-status, non-Métis persons and communities can mount a "similarly situated" *Charter* s. 15 case on the basis of an allegedly discriminatory provincial policy.

2. Jurisdiction: Moving Beyond Deadlock

Another limitation on provincial action is posed by the uncertainty surrounding Canada's constitutional jurisdiction over "Indians, and Lands reserved for the Indians" in s. 91(24). The uncertainty about the relative scope of provincial and federal law-making power will remain present for the foreseeable future. As discussed below, short of framing a court reference to achieve certainty, Manitoba is constrained to work within a reasonable interpretation of existing constitutional limits.

This paper will seek a reasonable middle ground between the existing federal stance denying all jurisdictional restraints on provincial action, and the provincial position that the federal government has jurisdiction over, and responsibility for all Aboriginal peoples, including the Métis. Recent jurisprudence on this issue will be examined in passing, and a number of possible approaches to initiate change will be proposed. The jurisdictional uncertainty and limitations may disclose opportunities for a new approach to recognizing

[16] In *R. v. Powley*, [2000] 2 C.N.L.R. 233, the trial judge adopted a broad definition of Métis (at 259) as being "a person who,

(a) has some ancestral family connection (not necessarily genetic),
(b) identifies himself or herself as Métis and
(c) is accepted by the Métis community or a locally-organized community branch, chapter or council of a Métis association or organization with which the person wishes to be associated."

This is a very broad and circular definition that would allow persons with no connection to the historic Red River or Rupertsland Métis to call him or herself Métis so long as a community of similar persons that was in the process of forming accepted him or her as such.

Aboriginal governmental autonomy and jurisdiction and institutional capacity within the current constitutional framework.

3. *Institutional Capacity*

The fiscal context for Aboriginal policy initiatives has changed in the past few years from one of restraint to one of cautious optimism in the capacity to re-build the social infrastructure as deficits and debts are progressively eliminated or reduced. This shift in perspective has been accompanied by increasing recognition of the lack of institutional capacities amongst Manitoba Métis. The AJI pointed out in 1991 that there was an urgent need to provide Aboriginal governments with an ongoing, consistent revenue base and this need appears no less urgent today.

RCAP highlighted capacity-building (under the name "institutional development) as a priority in the multi-year action plan laid out in the volume entitled *Renewal: A Twenty Year Commitment.*[17] This theme has also been adopted by the federal government in its policy statement, *Gathering Strength: Canada's Aboriginal Action Plan*. RCAP, as with the AJI, was concerned with the limited Aboriginal institutional basis for adequate representation, social service delivery, policy development and negotiation (within both Aboriginal organizations and governments).

Manitoba has direct experience with the extent to which lack of institutional capacity can impede the ability of government and Aboriginal organizations to achieve shared goals. While not all of the controversies surrounding the court-ordered supervision of the electoral practices and administration of the MMF can be explained by resource shortages, there is little doubt that the itinerant funding base of the organization has contributed to the controversies of the recent past.

4. The Need for Reconciliation[18]

A fourth limiting factor is the need to avoid imposing yet another policy devised by non-Aboriginal people and institutions on Manitoba Métis. Partnership was a core theme

[17] *Supra* note 7. The rationale for this was set out clearly at page 17: "Progress in developing Aboriginal social and economic institutions can break habits of control and dependence. Effective institutions can function as a powerful stimulus to community revitalization and nation building."

[18] This theme is explored in more detail in John Giokas, *Recognition, Reconciliation and Healing, supra* note 3.

expressed both by the AJI and RCAP - a theme that has also emerged as a touchstone for future initiatives in the federal policy outlined in *Gathering Strength*, itself launched through the announcement of an official federal Statement of Reconciliation. It is also noteworthy that recent Supreme Court pronouncements on the need for consultation, negotiation and even Aboriginal consent in certain situations seem to be proceeding towards a partnership model.[19] Evidently, adherence to a partnership approach entails limitations on the ability of non- Métis commentators to map out options and outcomes in the absence of a mechanism for joint decision-making in a policy context

This limits expresses itself in three ways. First, the government's elaboration of broad social and/or economic policy objectives and related initiatives must, in their application to Métis, be made subject to some measure of consultation. There will be instances when this will create friction, controversy and delays in applying policies or extending programs. Secondly, a reconciliation agenda pressures both the government and the Métis to align their respective priorities. Some vehicle to integrate and accommodate differing social and political objectives will likely be is required to bring about a mutual adaptation. Thirdly, the federal government is also active in framing broad policies and programs, both for the population as a whole and for Aboriginal people, including the Métis. The province is therefore faced with the challenge of adapting its preferred approach to engaging Métis in joint decision making to take into account the on-going inter-governmental dynamic of federal-provincial-territorial-Aboriginal processes.

I-3. Methodology

The Commission has formed a sub-committee comprised of the Commissioner Chartrand and a group of external consultants coordinated by *The Aboriginal Affairs Group Inc*. and led by the former Director of Research for the AJI, Professor Bradford Morse of the University of Ottawa Faculty of Common Law.

Other members of the sub-committee were Mssrs. Jean-Yves Assiniwi, John Giokas and Robert Groves. Mr. Assiniwi contributed his experience as both a federal and Aboriginal negotiator in constitutional, comprehensive claim and self-government contexts, as well

[19] The most prominent recent example is *Delgamuukw v. British Columbia* [1998] 1 C.N.L.R. 14 in the context of unextinguished Aboriginal rights and title.

as his background as a Ministerial policy advisor. Mr. Giokas is a legal policy expert on Aboriginal issues and federal jurisdictional capacities, and advised the Royal Commission on Aboriginal Peoples on recognition models for Métis and First Nations. Mr. Groves, who has advised Métis organizations nationally and regionally for more than two decades, participated in the development of Métis policy for the Royal Commission, and is a senior advisor to federal departments on Aboriginal policy as well as to national, regional and community-level Métis and First Nation organizations.

While this policy team offers the Commission, and the Manitoba government, considerable breadth of expertise and experience, this policy paper is not based on direct consultations with Manitoba Métis organizations. In making decisions on the overall thrust of a Métis policy, as well as in deciding amongst the more central options we advance as feasible, it may be advisable to canvass the views of Métis leaders. However, the broad policy model advocated here is fundamentally a procedural one, the hallmark of which is partnership and the principles of which Manitoba Métis have largely embraced in their responses to both the Aboriginal Justice Inquiry (AJI) and the Royal Commission on Aboriginal Peoples (RCAP).

In the development of policy options, the determination of jurisdictional and institutional capacities and the assessment of achievable goals, the sub-committee also held "think-tank" sessions to refine implementation options against a range of considerations. These included potential legal challenges, fiscal and institutional capacity considerations, Métis demographics, federal policy directions and popular opinion. This exercise was followed by a re-drafting of the policy paper for consideration of the Commission, together with senior Manitoba public officials.

II. GROUNDS FOR A MANITOBA MÉTIS POLICY

The first question to ask is why Manitoba should develop a policy position regarding Métis people at this time. Manitoba's consistent response to Métis issues in the context of federal/provincial relations has been to argue that Métis are a federal jurisdictional and financial responsibility. This approach would seem to leave little incentive or scope for any provincial policy initiative. Nonetheless, it is possible to list a number of reasons why Manitoba may wish to develop a provincial Métis policy. These reasons may be grouped

under the following headings: constitutional morality, constitutional uncertainty; symbolism; socio-economic conditions; internal government operations; and laying the groundwork for the future.

II-1. Constitutional Morality

The basis of this argument is that Manitoba ought, as a matter of the honour of the Crown in Right of Manitoba, and in order to carry out a positive constitutional obligation, develop and implement a policy grounded in the recognition of the historical importance to the province of the Métis as a founding people and the contemporary requirement to harmonize constitutionally affirmed Métis rights with provincial powers and prerogatives. Even if the Métis were not a constitutionally recognized Aboriginal people, a similar argument could be made on the basis that they are a constitutionally protected minority (like the religious and linguistic minorities mentioned throughout Canada's constitutional documents) deserving of special measures to ensure that the purpose of the Constitution in explicitly referring to them and to their rights and privileges should not be defeated by (among other things) government inaction.

Section 31 was enacted as part of the overall scheme of the *Manitoba Act* - one purpose of which was to safeguard the existence of the Métis people as a people in the establishment of the province of Manitoba – and reflects part of what might be referred to as the "Confederation Pact" between the Métis of the Red River colony and Canada. Métis rights were then made a constitutional obligation through the *Constitution Act, 1871*, being further reinforced in s. 35 of the *Constitution Act, 1982* with its reference to the existing rights of the Métis.[20] And, as the courts have noted, it is not only the judiciary that has the responsibility to see that constitutional obligations are met. It is also for the legislature[21] and indeed for the government of the day.

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[20] A similar point was made by the Ontario Superior Court of Justice in the *Powley Case*, *supra* note 17 at 240 as follows: " Surely, at the heart of s. 35(1), lies a recognition that Aboriginal rights are a matter of fundamental justice *protecting the survival of Aboriginal people, as a people*, on their lands."[emphasis added]

[21] In *Hunter v. Southam*, [1984] 2 S.C.R. 145 the Court made the following comment (at 169) on the importance of seeing that legislative safeguards are applied to constitutional guarantees: "While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature' responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements…". This statement was made in the context of individual rights under the *Charter*. Given the importance to Canada's confederal make-up of the rights of religious and linguistic minorities and Aboriginal collectivities, it is easy to imagine the Court making an even stronger statement in terms of collective constitutional rights.

The fact that the Crown in Right of Canada may not yet have acknowledged its continuing constitutional and other obligations to the Métis people of Manitoba cannot and should not impede the province from honouring its own obligations and recognizing the Métis people as a distinct community of Manitoba residents whose historical role, special circumstances and constitutional position merit special treatment within Manitoba.

It is a well-known fact of Canadian history that when the first Imperial settlers under the leadership of Miles Macdonell arrived in 1812 in what is now Manitoba they encountered several indigenous peoples: the Ojibway (Saulteaux), Assiniboine, Dakota, Cree and Métis.[22] The latter consciously referred to themselves as "Natives" of the region and defended their territory and lifestyle against the new arrivals a few years later in the battle of Seven Oaks – an event that reflected their emerging sense of identity as a new "nation". By the mid-nineteenth century the Métis people had established the hallmarks of an indigenous nation including a distinctive culture based on the collective, organized buffalo hunt, a distinctive type of music and dance, a distinctive language blending Aboriginal and European elements, a flag and an anthem celebrating the Métis victory over the Selkirk settlers at Seven Oaks.[23]

The existence of the Métis as an indigenous nation was recognized not only by the local First Nations, but also by the local Imperial authorities in the form of the Hudson's Bay Company, which found itself increasingly unable to enforce Hudson's Bay Company laws against them because of their unity and military strength. Importantly, the Métis as a group were also formally recognized by the new Dominion of Canada, which found itself obligated to negotiate on a government-to-government basis with the Métis provisional government in order to bring about the entry of the province of Manitoba into Confederation in 1870.

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[22] Sometime between 1763 and 1821 the Assiniboine and western Cree abandoned the Red River area and were replaced by the Ojibway (Saulteaux). The Métis appear to have been in the area since well before 1800. Some time prior to that the Odawa people of the upper Great Lakes were also present, but had migrated away prior to contact with Europeans. See A.J. Ray, *Indian Exploitation of the Forest-Grassland Transition Zone in Western Canada, 1650-1860: A Geographical View of Two Centuries of Change*, Doctoral Thesis, University of Wisconsin, 1971 at 141.

[23] Donald Purich, *The Metis* (Toronto: James Lorimer and Company, 1988) at 38.

The entrenchment in the Canadian Constitution of the *Manitoba Act* included several provision referring directly or indirectly to the special situation of the Métis people: Catholic denominational schools (s. 22), French language (s. 23) and Métis land rights (s. 31). In the latter regard, a Métis legal writer has noted that "Section 31 represents the first equitable response to the fact of Aboriginal use and occupancy of lands by a people descended partly from European forebears, but who had, in its particular historical circumstances, evolved in advance of the establishment of 'settled colonies.'"[24]

In a case addressing s. 23, the Supreme Court has noted that it "was the culmination of many years of co-existence and struggle between the English, the French, and the Métis in the Red River Colony…"[25] Should s. 31 be addressed by the Court in the future, it is likely that it would utter a similar statement focussing on the context and purpose in which the provision was enacted. The historical record of the negotiations preceding Manitoba's entry into Confederation made it clear that Ottawa desired to settle the claims of the Métis regarding their culture and land rights with a view to satisfying their demand that they continue as a viable community in a province that would soon see its demographics radically altered through massive immigration from eastern Canada.[26]

In short, and from many perspectives, it would not be inaccurate to say that the very existence of Manitoba as a province is due largely to the efforts of the historic Métis nation. In the same vein, Manitoba's ability to control the lands within its boundaries owes its legitimacy not only to the agreement recorded in s. 31 regarding Métis Aboriginal title, but also to the 8 treaties signed by Canada with the First Nations originally in possession of the land.[27] Modern Manitoba thus owes more than a mere notional debt to its founding Aboriginal peoples.

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[24] Paul Luc Chartrand, *The Obligation to Set Aside and Secure Lands for the "Half-Breed" Population Pursuant to Section 31 of the Manitoba Act, 1870*, Master of Laws Thesis, University of Saskatchewan, 1988 at 119.
[25] *Reference Re language Rights Under the Manitoba Act, 1870*, [1985] 1 S.C.R. 721 at 731.
[26] The Métis desire was expressed as follows in W.L. Morton (ed.), *Manitoba: The Birth of a Province* (Winnipeg: Manitoba Record Society, 1984) at xvi:

> …to make such terms with Canada as would enable the people of the North West to control its local government in the early days of settlement, and as would allow them to possess themselves as individuals and as a people enough of the lands of the North West to survive as a people, and to benefit by the enhancement of the wealth of the North West that settlement would cause.

[27] Treaties 1, 2, 3, 4, 5, 6, 9, and 10, signed between 1871 and 1930, cover parts of modern Manitoba.

And, as the wording of s. 35 of the *Constitution Act, 1982* reflects, these treaties are more than a mere historical curiosity. In exactly the same way (and whether or not s. 31 is ultimately found by the courts to comprise the written memorial of a land claim agreement or treaty[28]" with the Métis), the reference to the Métis people and their rights in s. 35 indicates that Métis rights are equally alive and compelling. And they must sooner or later be dealt with as such. In its earliest important s. 35 case, the Supreme Court observed that the insertion of Aboriginal and treaty rights in the *Constitution in 1982* was not designed to undermine the ability of governments to plan how to use the resources in the lands and waters acquired from Aboriginal peoples, rather it is "to guarantee that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously."[29]

In that same case, as in others that have followed, the Court noted what it views as the optimum way for governments to take the rights of Aboriginal peoples seriously: through negotiations in good faith designed[30] to reconcile the pre-existence of Aboriginal peoples with the present sovereign authority of the Crown. Neither the province of Manitoba nor Canada has done this in modern times.[31] It is high time that Manitoba should do so. A Métis policy would be the principled and honourable way to begin. It would recognize the role of the Métis as a founding people of the province, reflect the government's intention to redress current inequities and provide a framework within which the negotiations in good faith to which the Supreme Court has alluded so often in recent years may be brought about.

II-2. Constitutional Uncertainty

[28] At least one Manitoba judge sees this historic agreement as a treaty: *see Dumont v. Attorney-General of Canada*, [1988] 3 C.N.L.R. 39 per O'Sullivan JA (dissenting).

[29] *Sparrow v. The Queen* [1990] 1 S.C.R. 1075 at 1119. The comment was made in the context of federal fishing regulations.

[30] This point was made strongly in *Delgamuukw*, *supra* note 20 at 86:

> As was said in Sparrow…, s. 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place." … Moreover, the Crown is under a moral, if not a legal duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet* … to be a basic purpose of s. 35(1) – "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown." Let us face it, we are all here to stay."

[31] Although Manitoba may well be forced to do so in the context of the *Natural Resource Transfer Agreement* if the Métis are recognized by the courts as falling within its "Indian" hunting and fishing guarantees.

Given the long standing provincial position that the federal government has legislative jurisdiction over and primary responsibility for Métis under s. 91(24) of the *Constitution Act, 1867*, it could be argued that it would be counterproductive to embark on provincial policy-making in an area of exclusive federal jurisdiction. This line of reasoning is deceptive, however, and should not be allowed to impede the development of a provincial Métis policy.

In the first place, the exclusivity of federal constitutional jurisdiction and responsibility over the "core of Indianness"[32] is more apparent than real in the era of the cooperative federalism, tripartite federal/provincial/Aboriginal service delivery, self-government and related agreements. For instance, even if Métis do fall within federal law-making authority, as argued by Manitoba and most other provinces, the fact remains that the constitutional category "Indians" constitutes in essence a field of shared federal and provincial jurisdiction. This is due to the fact that not every aspect of the lives of Indians falls to be regulated by Parliament. Constitutionally valid provincial laws of general application apply to Indians as they do to every other provincial resident.[33] In practice this means that it will be the province that will enforce the majority of laws that apply to Métis persons, including wildlife, wild rice, and timber harvesting laws and regulations (this point will be discussed in more detail below).

In the second place, Métis people in Manitoba do not live on reserves or on any other land base that could be argued to be partially immune from provincial regulation. For example, on marriage breakdown on an Indian reserve, provincial family law is unable to affect the division of assets in the form of the matrimonial home because this area falls to be regulated by Parliament under its s. 91(24) authority over "Lands reserved for the Indians."[34] In practice, this is another area where the provincial laws will govern the lives of Métis, even if they were found to be within federal law-making authority as "Indians".

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[32] This is the term used by the courts to describe the fact that "s. 91(24) protects a core of federal jurisdiction [over Indians] even from provincial laws of general application, through the doctrine of interjurisdictional immunity.": Delgamuukw, *ibid* at 84-85. The cases prior to *Delgamuukw* did little to tell legislators or policy-makers the precise areas where the province could not regulate Indians. In *Delgamuukw*, the Supreme Court has now indicated that the activities covered by the term "core of Indianness" are largely identical to the activities protected by s. 35 of the *Constitution Act, 1982*. These activities are still being discovered through the litigation process.

[33] *Dick v. The Queen* [1985] 4 C.N.L.R. 55 (S.C.C.).

In the third place, even if a federal legal opinion, judicial decision or court reference were to conclude that Métis do fall within federal law-making authority under s. 91(24), the assertion of federal legislative authority and financial and related responsibility would not likely be either immediate or complete. There are two primary reasons for this. In the first place, constitutional jurisdiction under s. 91(24) is permissive and does not obligate Parliament to legislate for all those who may be under its law-making authority. Parliament has not legislated for Inuit as such, despite the decision in *Re Eskimos* in 1939 that Inuit are "Indians" for purposes of s. 91(24).[35]

In the second place, even if Parliament were disposed to include all the Métis under its legislative umbrella, it would be necessary to determine who these new "Indians" may be (for the reasons mentioned earlier regarding the disputed definitions of Métis). Moreover, and as it has done with regard to "Indians", the federal approach might be to create a "status Métis" register or other recognition regime to distinguish those Métis persons over whom it wished to take responsibility from those that it considered a provincial responsibility. In short, the federal government might then seek to confront the province with two populations of Aboriginal persons over whom the province would be expected to take responsibility: non-status Indians and non-status Métis.

In the fourth place, the trend of the federal government regarding s. 91(24) has been to attempt to exhaust or at least reduce its scope not only by the creation (by exclusion) of a non-status Indian population, but also through tri-partite self-government arrangements that link Aboriginal peoples more tightly to the provinces in terms of service delivery and jurisdiction. Sooner or later Manitoba would be faced with the need to develop a self-government policy regarding Métis and to enter into arrangements with Métis groups in the same way that it has done with Indian Bands regarding policing, gaming and child welfare, for instance.

Finally, even if all these challenges were met and the federal government were to assume law-making jurisdiction over and financial responsibility for Métis, the practical problem remains that it would be difficult, if not impossible, for the federal government to

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[34] *Derrickson v. Derrickson* [1986] 2 C.N.L.R. 45 (S.C.C.).
[35] 1939 S.C.R. 104.

properly service its new population of constitutional "Indians" in the absence of a designated land base. Indeed, that is one of the primary federal rationales for refusing to provide services to status Indians once they leave the reserve. In such an eventuality, Manitoba would be faced with the issue of either providing a land base to Métis communities, or of entering into some kind of service-delivery arrangements with the federal government in this regard. Under either scenario, Manitoba will be required to have thought through its potential approach from a policy as well as from a legal perspective.

II-3. Symbolism

There is a powerful symbolic importance to measures adopted by governments with regard to Aboriginal peoples and to other constitutional minorities. This includes the issuance of a policy statement or document. The pure symbolism (among other more practical reasons) is one of the reasons that Métis people have been seeking federal recognition as "Indians" under s. 91(24).

A. Political

An NDP government could distinguish itself from the prior government through the creation of an overall Métis policy that was fair, honourable and fiscally responsible. The previous government eschewed a global approach in the Aboriginal area, preferring to proceed incrementally at the local community level. At the same time, it downplayed Aboriginal initiatives in public statements such as the Throne Speech, categorizing them under different headings so as to avoid impliedly committing itself to particular actions (beyond the establishment of wildlife co-management agreements).[36]

This is to be contrasted with the approach of the previous NDP government during the 1980s that supported the broad issue of Aboriginal self-government during the constitutional discussions in that era, including the ill-fated Meech Lake round of conferences[37]. This is not to say that this provincial government did not have

[36] The approach of the Filmon Conservative government is described briefly in Dr. Kathy Brock, *Relations With Canadian Domestic Governments: Manitoba,* Research paper prepared for the Royal Commission on Aboriginal Peoples, 1995 at pp 62-93.

[37] A reflection of the broad supportive policies of the NDP, and Liberals, while in opposition is reflected in the unanimous Legislative resolution passed in 1989 in support of the resumption of formal constitutional negotiations

reservations, and did not espouse careful wording and cautious steps, it is simply to say that it had a track record of support for broad policy initiatives that the following government did not.[38]

The issuance by Manitoba of a comprehensive Métis policy could be seen as the logical next step to its earlier support of self-government, especially if the policy were to focus on co-management of resources, capacity-building and fiscal responsibility and accountability – all areas vital to modern self-government arrangements that might strike a positive responsive chord among the public.

B. Policy Precedent

Manitoba is able to cite several precedents for the adoption of a policy supportive of the special circumstances of Manitoba Métis people. The first such initiative occurred in the 1940s and 1950s when Manitoba responded to the poor living conditions of the Métis people through a registered trapline and co-operative assistance program in regard to stores, fish, wild rice, fur and pulpwood. The second began in the 1950s and continued into the 1960s with the creation of community development programs.[39] The fact that these earlier policies were only partly successful in addressing the special circumstances of Métis people might serve to justify such a comprehensive policy now.

C. History

As described earlier, Manitoba can fairly claim to be the crucible of the Métis Nation. In fact, the Métis are one of the founding peoples of Manitoba. While this has been acknowledged in various ways over the past century, it has yet to find an enduring and concrete expression in Manitoba government policy.

The very term “Métis” can be said to be Manitoban (despite the fact that the term was sometimes applied to mixed-descent persons elsewhere). The historical fact that the Métis as a self-conscious group emerged in Rupertsland in the Red River district has a

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concerning self-government, a resolution moved by the Opposition after the Filmon government declined a request from the Manitoba Métis Federation to formally adopt a similar resolution by government sponsorship.

[38] This is also discussed by Dr. Brock, *ibid* at 3-4.

[39] Dr. Brock discusses these initiatives, *ibid* at 25.

powerful hold on the Canadian imagination that arguably ought to find symbolic representation in official acts of government of the type proposed in this paper.

Moreover, the events of 1870 and the formal admission of Manitoba to the Dominion of Canada represented a pair of "firsts" for Canada that should be commemorated: (1) the agreement between the Métis provisional government and Canada was the first formal contact between Canada and an already well-established Métis population (as mentioned earlier, in essence it was a government-to-government relationship); (2) this was also the first time in Imperial history that a British Dominion was required to deal with an established Aboriginal population whose identity was based partly on non-Aboriginal sources (this also occurred later in South Africa[40]).

A formal Manitoba policy would reflect the cultural and historical distinctiveness of the Métis Nation, and its central origins in what is now Manitoba and would strongly commemorate the two "firsts" mentioned above. This is particularly important given the long shadow of that other uniquely Manitoban experience – the Métis relocation in the 1870s, triggered by the appearance of often brutally biased troops in the Red River after union, and in reaction to the much-criticized implementation of the land provisions in s. 31 of the *Manitoba Act* that have culminated in the *Dumont* litigation. This point leads directly to the next symbolically important reason why the province may wish to adopt a formal Métis policy at this time.

D. Reconciliation and Healing

Another related symbolic value that a comprehensive Métis policy might have would be to enhance reconciliation and healing of the long standing relationship between Métis people and non-Aboriginal Manitobans that has been the focus of Métis complaints about their treatment since the 1870s. Despite the generally good working relationship between Manitoba governments and the MMF, as the launching of the *Dumont Case* and the recent issuance by the MMF of a document critical of Manitoba's child welfare

[40] See Alvin Kienetz, "The Rise and Decline of Hybrid (Métis) Societies on the Frontier of Western Canada and Southern Africa" (1983), 2 No. 1 *The Canadian Journal of Native Studies*, 3.

policies illustrate[41], the roots of Métis discord run deep and involve a strong emotional component that is based on a real sense of grievance.

As the federal experience with its 1998 Reconciliation Statement show, there is little point in discussing reconciliation with Aboriginal groups in the absence of concrete policy initiatives by government to take action in the areas where relationship healing needs to occur. A formal policy would not only provide the framework for such action, it would also buttress any statements made by government and show good faith on the government side of the equation.[42] With the motive force of the AJI and RCAP, the time would appear propitious to establish a new basis for true partnership.

II-4. Socio-economic Conditions

The Aboriginal Justice Commission, as with the RCAP, provided Manitoba with a detailed portrait of the demographic and social conditions of Métis people.

Table II-1: Comparative 1996 Census Data for Manitoba:
Self-Identified Métis, Registered Indian and Non-Aboriginal People[43]

Population	*Total*	*Over 15*	*Income*	*Unemployed*	*% Children in Sole Parent Families*	*Home Ownership*		*Education*	
Métis	46,195	67%	$15,891	21%	38%	*rent*	49 %	*<9*	16 %
						own	50 %	*12*	11 %
						Band	1 %	*Univ.*	3 %
Status Indian	81,725	60%	$11,564	31%	33%	*rent*	36 %	*< 9*	27 %
						own	15 %	*12*	5 %
						Band	49 %	*Univ.*	3 %
Non-Aboriginal	971,615	79%	$22,667	8%	17%	*rent*	25 %	*<9*	13 %
						own	72 %	*12*	12 %
						Band	3 %	*Univ.*	12 %

[41] *They Are Taking Our Children From Us*, MMF policy document released July 6, 1999.
[42] See Giokas, *Recognition, Reconciliation and Healing*, *supra* note 3 at pp 7 *et seq*.
[43]These data are all drawn from a recent special tabulation run by Statistics Canada using self-identified definitions for the Aboriginal population (20% survey data). It should be noted that in Manitoba the difference between the self-

It is clear that the achievement of broader social equity remains unfinished business in Manitoba. Income and employment data indicate that Métis fare only marginally better than First Nations members, and in some categories, such as housing, they find themselves worse off than all other Manitobans. Income and employment data are strongly co-related to the education achievement, and opportunity. Of interest is that Métis are twice as likely than First Nations members to complete high school, yet are no more likely to complete a university education. This suggests success in federal programs for post-secondary support for First Nations, but at the same time underscores the penalty paid by Métis for the absence of any equivalent government assistance, whether federal, provincial or shared-cost in nature.

Another important measure of social health and cohesiveness is home ownership. This tends to reflect not only income levels, but also the degree of inter-generational family and community stability. These factors, in turn, illustrate the degree to which a population is successfully integrated into the economic fabric of the broader society through land and resource ownership, etc. As indicated by the 1996 census data, Métis characteristically have relatively low levels of home ownership when compared to both Manitobans generally and (viewing band owned homes as more equivalent to owned homes) to First Nations members.

First Nation housing shortages and poor quality housing on reserve are well known. Less well appreciated, but no less significant, is the social housing disparity that Métis people are experiencing. This disparity has become all the more obvious with the termination in the early 1990s of all new federal spending on Métis housing. Since the mid-1990s the province has assumed full responsibility for social housing, but no clear Métis housing component of provincial social housing initiatives has emerged, whether cost-shared with Canada or not.

A final note from the census data concerns family structure. Métis display a high level of single-parent households: almost 40% of Métis children are found within single-parent homes. This is a higher rate than for either the First Nation or non-Aboriginal

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identified Métis population and the total population reporting Métis origins is less than 2%, fewer than 1000 persons.

populations. These figures lead to the conclusion that Métis families are facing unique challenges that are likely related to the absence of stable community structures.

In conclusion, the demographic context of the Manitoba Métis population provides ample grounds for a new policy of engagement and focused effort. From the perspective of social policy and programs, Métis are a distinct and distinctly disadvantaged segment of Manitoba's population who arguably deserve better and more focussed programs than they are now receiving.[44]

Of particular relevance is the apparent need for social program initiatives targeting education and economic development opportunities, together with more aggressive intervention policies aimed at the reduction of social dependency, particularly amongst youth and single parents (the vast majority being women). Targeted programs are the most effective in dealing with particular sectors of society, and this is especially the case with Aboriginal groups. A cogent example is provided by homelessness programs in Ontario that have been found to work with regard to Aboriginal persons in Toronto only when specifically targeted at, planned by, and implemented through them.

In this connection, Manitoba Métis people themselves have recently pointed out that Métis persons and agencies are more effective than non- Métis at addressing Métis issues:

> The Manitoba Métis Federation has long maintained that Métis in this province would be better served by their own people in all social sectors that require knowledge of Métis culture and society and sensitivity to the particular issues affecting Métis and communities. Undertaking these responsibilities will require a government commitment to capacity-building in Métis communities in which Métis and child and family service agencies would be viewed as equal partners.[45]

In this vein, and as the recent *Lovelace Case* shows, even if the Métis were found to fall within federal s. 91(24) constitutional law-making authority, the province could likely have a policy targeting the Métis (as Ontario did with regard to *Indian Act* Bands and reserves with respect to casino proceeds) with little or no constitutional impediments.

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[44] *Supra* note 2.
[45] *They Are Taking Our Children From Us, supra* note 40 at 5.

II-5. Internal government purposes

Many commentators have observed that the current approach to Métis issues is fragmented, *ad hoc* and subject to the differing political philosophies of successive governments. For example, in a study for RCAP, Professor Brock noted that "[f]ragmentation within the current policy framework results in confusion, inaction and may pose an obstacle to the realization of self-government."[46] Thus, one of the main reasons why Manitoba should consider establishing an overall Métis policy would be to enhance internal governmental clarity, consistency and coherence with regard to the variety of provincial social programs that affect Métis people.

A comprehensive policy would allow the province to pull together the disparate strands of the various policies and programs that affect Métis and re-organize them under a more rational policy umbrella with coherent guidelines and clearer accountability mechanisms. This would also permit more fulsome global and sectoral consultations with Métis people and organizations in order to refine the targeting and delivery of particular elements of the new policy that are now being delivered in a less structured way. A coherent policy would also allow more precise tracking of expenditures directed at the resolution of Métis issues and this would enable more accurate audits of the effectiveness of services and programs under the new policy umbrella.

A comprehensive policy in which all the elements were coherently linked together would also allow more consistency through time and avoid the "adhockery" that has characterized program delivery up to the present where pressures (such as child welfare, for example) lead to minimalist or short-term responses that cannot properly address long standing social problems form which longer term remedies are appropriate. They also often give rise to largely avoidable criticism by the MMF of the government approach. In this context, a comprehensive policy would permit the provincial government to be much more proactive and to refine the overall policy guidelines over time as the need arose and as a function of ongoing consultations with Métis persons and organizations.

[46] *Relations With Canadian Domestic Governments: Manitoba*, *supra* note 36 in the executive summary. Beginning on page 62 *et seq*. Professor Brock elaborates, with examples, her observation that "[I]n Manitoba, the framework for Aboriginal policy is loose and not highly structured."

A comprehensive policy would also force the various government departments and agencies that now deliver or coordinate Métis programs and services to work together more efficiently with less internecine squabbling and the resultant waste of human and financial resources. It might also serve to educate different departments and agencies about the roles and responsibilities of the others and in that way reduce internal competition.

Finally, a comprehensive policy would serve an internal educative purpose, compelling departments and agencies that presently deliver programs and services to Métis as a sideline to their main business to learn more about the nature of the target Métis populations. This might in itself reduce the perceived cultural inappropriateness of provincial government program and service delivery that the MMF has complained about in recent years.

II-6. Laying the Groundwork for the Future

A. Litigation Pressures

From 1982 until approximately 1992 the constitutional rounds of discussions provided a venue where Métis people could attempt to resolve the issues confronting them in terms of land rights and access to natural resources. The end of constitutional discussions has led to a spate of Métis and non-status Indian cases challenging, among other things, the prevailing practice of the federal and provincial governments to restrict access to rights protected in the *Constitution Act, 1982* and under the *Natural Resource Transfer Agreements* to *Indian Act* band members and (in the north) to members of recognized Inuit communities.[47]

Since the late 1980s however, and with increasing tempo since 1992, the absence of a negotiated framework or process for implementing a Manitoba Métis rights policy has invited legal challenge. And as the delay in implementation of constitutionally affirmed Métis rights approaches the 20 year mark, the prospect of litigation overload is

[47] *R. v. Perry* [1998] 2 C.N.L.R. 79 (Ont. CA) is a good example. There, prior to 1995, the province of Ontario had an Interim Enforcement Policy that exempted status Indians but which provided that hunting and fishing laws would continue to be enforced against non-status Indians and Métis.

increasing. Aside from the fragmented and judge-driven nature of Aboriginal policy directions emerging from this shift from political to judicial solutions, this has also meant additional pressures on Crown enforcement and legal officers. In addition, the consistent call of the Supreme Court of Canada for negotiated solutions to these issues has led to frustrations on the part of Aboriginal people and to a consequent souring of relations between Aboriginal organizations and governments.

There are four primary issues being litigated by Métis (and non-status Indians[48]) across Canada (but primarily in western Canada):

(1) whether Métis fall under federal law-making authority under *Constitution Act, 1867* s. 91(24)[49];

(2) whether Métis have *Constitution Act, 1982* s. 35 Aboriginal and treaty rights[50];

(3) whether pursuant to s. 15 of the *Charter* "similarly situated" Métis communities have the right to receive the same level of programs and services from the federal government as do status Indians[51];

(4) whether Métis have access to resource harvesting rights under the *Natural Resource Transfer Agreements.*[52]

A finding under any of (2), (3) or (4) that they do hold such rights would have an enormous impact on the first issue and would make it very difficult for the federal government to defend its current position that Métis do not fall under s. 91(24) jurisdiction. In fact, a victory by the Congress of Aboriginal peoples in its lawsuit against the federal government for refusing to treat Métis and non-status Indians as being under

[48] The Courts, and the writers, have difficulty distinguishing between the two populations.

[49] This is precisely the issue being dealt with in the pending case of *Daniels et al v. The Queen*, (Federal Court Trial Division, Court file no: T-2172-99) launched in Edmonton Alberta by the Congress of Aboriginal Peoples.

[50] This issue has been pursued in a number of western Canadian cases such as *R. v. McPherson*, *supra* note 12 and is currently being litigated in Ontario: *R. v. Powley*, *supra* note 17. If the Métis are eventually found to have such rights, this will lead almost directly to a related finding that they are s. 91(24) "Indians" on the logic expressed by the Supreme Court in *Delgamuukw*, *supra* note 20 that s. 35 and s. 91(24) cover the same type of activities.

[51] In the recent decision in *Corbiere v. Canada* [1999] 3 C.N.L.R. 19 the Supreme Court of Canada stated in the context of a Charter s. 15 action to allow non-resident band members to vote for chief and council that "aboriginality-residence now stands as a constant marker of suspect decision-making or potential discrimination. This may mean that in future, any attempt by the federal government to distinguish its programs and services to Aboriginal people on the basis of residence will lead to a (rebuttable) presumption against its constitutional legitimacy. This will make it difficult for the federal government to maintain its current distinctions between status Indians on reserve and those off-reserve, as well as with regard to services delivered to Indian reserve communities and those delivered to Métis communities under a different head of constitutional power.

[52] In *Blais*, *supra* note 13 the Manitoba courts have denied that Métis have this right. The opposite conclusion has

federal 91(24) jurisdiction[53] would obviate the need for the Manitoba government to pursue the issue itself. Thus, from one perspective, the province would seem to be favoured by the potential results of a success for the Aboriginal litigants under any of these four categories of cases.

However, and as mentioned earlier in the section on constitutional uncertainty, it is not clear that a court ruling that Métis are constitutional "Indians" will make much of a practical difference to Manitoba in many areas.

In addition, and as mentioned above, enforcement of hunting, fishing and trapping falls to the provincial authorities in any event *i.e.* whether the right claimed is one under s. 35 or the *NRTA* and whether or not the Aboriginal persons in question are constitutional "Indians" under s. 91(24).

In this connection, the preferred approach for most provinces (discussed in some detail in the *Perry Case* [54]from Ontario) has been to negotiate resource harvesting arrangements with *Indian Act* bands: they have status cards allowing easy identification and benefit from the *Indian Act* protection of their core of Indianness under s. 88 of the *Act* and, in Manitoba at any rate, clear access to s. 35 treaty and NRTA rights. Given their easy identifiability[55] and the fact they have a land base with a local government and a province-wide organization in the form of the Assembly of Manitoba Chiefs, it is possible to enter into consultations and negotiations with them in such a way as to minimize prosecutions for infringing provincial hunting, fishing and trapping laws. In this context, it is a relatively straightforward matter for the province to establish a negotiated enforcement policy that takes into consideration their rights and to relieve its own administrative burden that way.

It is entirely different with the population of Métis and non-status Indians. They may have rights, and, as discussed above, the scope of those rights may expand as a result of the

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been reached by the courts in Saskatchewan in *Grumbo, supra* note 13.

[53] *Supra* note 46.

[54] *Supra* note 46.

[55] It is important to note that the ease of identification for access to s.35 rights is only a happenstance consequence of the *Indian Act* registration system. The *Indian Act* itself is largely silent on aboriginal or treaty rights, and the registry

litigation under way, but that in itself will not relieve the pressure on Manitoba unless and until they are identifiable as rights-holders and unless and until the limits of their rights are clearly established. Currently, this is a burden for the province, which must prosecute Métis and non-status Indians (or else acquiesce to the informal policies of local enforcement officials of the type discussed in *McPherson*.[56]) In the absence of negotiated resolutions or effective consultations of the type that is possible with regard to *Indian Act* bands, this will continue to place an administrative burden on the province and permit the courts, once they are seized of the issues, to find ever more creative ways of enlarging the current *Indian Act*, s. 35 and *NRTA* limits on who may exercise the rights protected under these instruments

There is yet another reason why a finding that the Métis fall under federal s. 91(24) law-making jurisdiction may not assist Manitoba. If Métis are "Indians" for constitutional purposes, then they must be "Indians" for all constitutional purposes – including the *NRTA*. This "continuity of language" approach was advanced by the appellants in the Blais case and was rejected by the Provincial Court. However, it was not examined by the Queen's Bench because the Court was able to dismiss the appellants' appeal on other grounds. However, the Court acknowledged that its conclusions might be different if Métis are "Indians" within the meaning of s. 91(24):

> For the purpose only of deciding the narrow issue in this case, I express my present view that Metis are not included in the reference to "Indians" in s. 91(24) of the *Constitution Act, 1867*... The continuity of language argument raised on behalf of the appellant, therefore, need not be considered. I will acknowledge, however, that if the law were to establish that Metis were included under s. 91(24) that would have an impact and would require a very careful analysis of the language continuity submission.[57]

If Métis are within s. 91(24) it is at least arguable that they have *NRTA* rights and if that is so, it is undeniable that Manitoba would have the resulting burden of defining the persons

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system includes persons who may well hold no s.35 rights at all.

[56] *Supra* note 12. In this regard, the Provincial Court judgment refers to the testimony of the an official of the Department of Natural Resources (at 150) as follows:

> … there never was a policy that Metis people not be charged but Metis people living off the land were treated with discretion. There appears to have been in the past an unspoken convention between the law enforcement officers and the Metis living off the land.

[57] *R. v. Blais* [1998] 4 C.N.L.R. 103 (QB) at 111 per Wright J.

who may exercise this right, enumerating them, negotiating harvesting limits and enforcing violations as it does now with regard to status Indian band members.

The actions of the Manitoba government in the *McPherson Case*[58] are illustrative of the challenge facing provincial governments in respect of Métis resource harvesting issues. In this instance, the accused – described as "fringe Métis" because of their traditional Aboriginal lifestyle and their close proximity to Indian reserve communities – were given a conditional discharge by the Provincial Court for hunting moose during a closed season. This was a function of the Court's decision to strike down the regulations in question, but to suspend the declaration of invalidity in order to allow the province to carry out an enumeration of the Métis and to consult with them about how to accommodate their s. 35 rights.

On appeal to the Queen's Bench, counsel for the province and for the accused agreed that the Provincial Court remedy was too extensive and urged the Court to simply acquit the accused and not to carry out the Provincial Court's order. This is what the Queen's Bench did. The dilemma for the province was clear. If it had pursued the matter and reargued the merits of the case, a number of difficult issues would have been aired.

In the first place, it would have had to try to define "Métis" because on the evidence it seemed that the accused (who called themselves Métis) were not the descendants of the Red River Métis, but instead were the descendants of Indians who had lost status under the rules of the *Indian Act*. In short, they were equally characterizable as being non-status Indians or non-treaty Indians (under earlier terminology). However, both levels of court accepted that they were Métis and had the case gone farther up the judicial chain, it might have had the effect of clarifying the definition of Métis in a way that would have added an enormous number of people to that category of s. 35 rights-holders. In this regard, the Provincial Court had stated that "today's Métis could be someone with some degree of Aboriginal blood who holds himself out as such."[59]

[58] *Supra* note 12.

[59] *Ibid* at 150.

In addition, had the matter proceeded further, drawn more attention and been won by the accused, the province also risked seeing the issue of a Métis enumeration become a public issue, with the concomitant pressure on the province to engage in consultations with a large number of people with whom it currently has no such relationship in the context of harvesting rights. In this vein, it would also have had to open up hunting to an unspecified but relatively large number of Aboriginal hunters, thereby leading to further difficulties in allocating a scarce resource.

The Queen's Bench was able to seize on a spurious argument advanced by the Crown to avoid having to consider the validity of the regulations and the identity of the accused to the effect that they were entitled to the protection provided to "Aboriginal persons because such laws conflict with treaty rights or federal legislation in relation to Indians…"[60]. The problem with this argument, of course, is that it only applies to the *Indian Act* and the accused were not registrable as "Indians". Be that as it may, the province was able by this means to dodge the bullet of Métis identity and rights and to put off the inevitable day of reckoning.

The province will not be able to put off this day of reckoning much longer, and for this reason alone it would seem advisable in the face of the burgeoning litigation to begin to prepare for the time when a larger category of Aboriginal persons has access to constitutionally protected rights by developing a policy of constructive engagement with them now.

B. Métis Claims to Collective Land Rights

Though land rights have been at the core of the Manitoba Métis political agenda since the time of Riel, there is relatively little litigation now underway. Nevertheless, any new land-reform or claims based policy for Métis communities in Manitoba will likely be framed in the context of the *Dumont C*ase. This case, dealing with the lack of redress for scrip fraud and non-implementation of the *Dominion Lands Acts*, was aimed at federal policy as of 1981, which had turned aside a land claim advanced by the MMF.

[60] *Supra* note 12 (Queen's Bench) at 137.

Even though the action as framed is aimed at the federal government, there are reasons for the province to be concerned since there would be repercussions in Manitoba flowing either from a judgment in favour of the Métis case, or as a result of any out of court settlement. The MMF plaintiffs are seeking lands and federal compensation that could amount to $2 billion or more in value. In negative terms, there would be obvious disruptions in land ownership and (possibly) in governance patterns in southern Manitoba (since the lack of a land base that has foiled Métis self-government aspirations would, theoretically at least, be addressed).

There might also, however, be positive flow-through effects on the Manitoba economy, with a considerable infusion of federal compensation funding. Though it is most likely that any compensation settlement would involve a "willing buyer, willing seller" arrangement common to treaty land entitlement settlements, care must be taken to avoid public relations difficulties in the province. In this regard, the recent Caldwell treaty land settlement difficulties encountered in southern Ontario provide a worst-case scenario of lack of federal and provincial preparation for a cash infusion to a land-hungry Aboriginal people in an already developed area inhabited by a relatively large, uninformed and largely unsympathetic non-Aboriginal population.

What is clear is that the land question for Manitoba Métis is not one that will be readily deferred. There are dozens of Métis communities in rural and more remote areas of the province that are seeking a land base around which to solidify their social and cultural identities. For the Métis leadership, the 1870 accord is regarded as a sacred pact intended to provide a collective land base. The individually alienable scrip that followed was never sanctioned by the Métis leadership, nor ratified by a collective vote of Métis. It is this approach, toward the re-establishment of collective and self-governing Métis communities in rural Manitoba, which has the greatest potential impact for the current framework of provincial policy and law.

Before leaving this area it should also be observed that there exist profound moral reasons why Manitoba ought to be seen to be addressing the land hunger of the provincial Métis population. This has to do with the lack of moral leadership shown by the federal government in regard to the implementation of the land settlement provisions

of the *Manitoba Act*. Even 125 years ago, there was clear evidence that something was going terribly wrong with the scheme of land distribution. The architect of the original agreement that satisfied the demands of the Métis delegates to Ottawa, Sir John A. Macdonald, was keenly aware that a great wrong had occurred under the leadership of the federal Liberal Party, and stated as much in the House of Commons some years afterwards:

> So, with a largeness of heart unparalleled in their dealings with the Half-Breeds of Manitoba or any other section of the people of Canada, the Government decided that they would give to each halfbreed (sic) child entitled to share in the reserve a free patent for 240 acres. That might look like liberality to the halfbreeds, but if we take a peep behind the screen we might find that before that date [1876], apparently despairing of ever receiving patents for their lands, the majority of the claimants had disposed of their rights for a mere song, to speculative friends of the Government; and it was no doubt for the benefit of cormorants of this class that the hearts of Mr. Laird and his colleagues so suddenly expanded.[61]

C. Prodding Federal Action and Cost-Sharing

Another, related reason for a provincial Métis policy has to do with the current stance of the federal government regarding Métis and non-status Indians. The provinces, with the exception of Alberta and Quebec, have consistently argued that Métis and off-reserve Aboriginal people are the jurisdictional and financial responsibility of the federal government.

The forces being exerted on the federal government to acknowledge a higher level of at least financial responsibility are greater than they have ever been due to the litigation pressures discussed above, all of which point to confirmation that section 91(24) includes Métis. However, for the reasons discussed in relation to constitutional uncertainty, any assumption of responsibility by the federal government even in the face of a court ruling will be neither immediate nor complete and will likely involve further wrangling with the provinces regarding the permissive nature of Parliament's authority under s. 91(24). In addition, the province would be faced with an even larger population of persons that may have both Aboriginal and *NRTA* rights with whom it would have to negotiate harvesting agreements or against whom it would have to pursue enforcement of modified game laws.

[61] Canada, House of Commons, *Debates*, at 3114 (July 6, 1885).

The province could take measures now to begin thinking through the ramifications of possible judicial findings in favour of Métis litigants with a view to developing a rational policy on administrative and cost-sharing with the federal government in the event any of the four lines of cases discussed earlier results in additional Métis rights being recognized. A Manitoba Métis policy might encourage the federal government to take a more open attitude towards sharing financial responsibility for Métis people in Manitoba.

D. Public Education

Few Manitobans are fully aware of significance of the Métis people in Manitoba's early political and social order, let alone of the degree to which the Canadian government sought to accommodate its own vision of political society to the dominant Métis culture and politics of the 1870s. The realities are simple to understand. The census of the Assiniboine District in 1871 reported 5,720 Métis, about 4,800 "half-breeds" and 1,600 non-Aboriginal settlers. Outside this area, and still within Manitoba's current borders, the population approached 80% First Nations and 15% Métis, with the balance being, again, itinerant traders from the Hudson's Bay or Montreal companies or from religious missions. In short, Canada had little choice but to deal with the Métis, and First Nations people, in order to effect the sought after goal of forging a single country from sea to sea. The *Manitoba Act* of 1870 was the first price to be tendered in this cause. It was tendered and received as a partnership accord.

Manitobans need to know more about this, if only because Métis nationalism, which being renewed and strengthened, needs to be understood if it is to be accommodated through a respectful and peaceful process of reconciliation. Providing this type of balanced interpretation of history is something that could, and should, be accomplished as part of a broader Manitoba government policy of laying the groundwork for the anticipated changes in the *status quo* that the litigation and pressures on federal and provincial positions described earlier appears increasingly likely to bring about. Manitoba does not want to awaken one day facing the same kind of public backlash that has greeted governments in British Columbia, Ontario and the Maritimes following upon court rulings or claims settlements.

This type of broad public education effort could be accompanied by elements described in an earlier paper on Reconciliation prepared for the AJIC involving historical monuments and similar symbolic measures designed to recognize and validate the contributions of Métis people to modern Manitoba's existence, culture and vibrancy.[62]

In short, it is the view of the authors that major changes in the political, legal and economic environment of the province of Manitoba are bound to occur as a result of the judicial and related political and policy activity underway in regard to Métis issues across Canada. Sooner or later the heartland of the historic Métis nation will have to begin the job of digesting these changes. A crucial factor contributing to the successful adaptation to the changes we anticipate will be to lay the groundwork for public acceptance in Manitoba in advance. Put another way, the absence of a clearly enunciated Métis policy, and the failure to accommodate Manitoba society to these realities in advance of their judicial imposition, would reflect poorly on the government's far-sightedness.

E. Precedent

As the initial homeland for western Métis, Manitoba should not need to look to other jurisdictions for leadership in establishing policy. Yet initiatives elsewhere are clearly of relevance, particularly in the Prairies.

Alberta, with the only Métis specific legislation in Canada, has developed two quite distinct policies. For Métis residing on provincially established settlement lands, there is a statutory basis for local governance as well as a quasi-constitutional (though still statutory) protection for the 1.2 million acres of land held for the use and benefit of Métis. While not formally admitting a distinction, Alberta policy regarding non-settlement Métis (by far the majority), has been to focus on economic and social program initiatives through a five-year, $17 million framework agreement.

Saskatchewan has, particularly since 1991, initiated a number of policies to engage its Métis population, including the signing of a protocol with the Métis Nation of Saskatchewan and the establishment of a formal bilateral process to address provincial

[62] John Giokas, *Recognition, Reconciliation and Healing, supra* note 3.

policies of interest to Métis, including natural resource initiatives, harvesting issues and gaming.

In British Columbia, the province has established a governance "table" with the recently amalgamated Métis Nation of B.C.. While this table nominally can address land claims matters, its focus has been primarily on adjusting provincial programs, services and social policies to accommodate Métis interests and needs. A separate tripartite process was also established with Canada, though at present that process is languishing.[63]

[63] In connection with land claims, the federal and provincial statutes that established the B.C. Treaty Commission nominally include Métis land claims within their ambit, since both define "First Nation" as "any aboriginal organization within its traditional territories". However, to our knowledge the Métis Nation of B.C. has not yet attempted to trigger the BCTC process in relation to any of its membership's land claims.

III. WAYS AND MEANS: OVERCOMING CONSTRAINTS TO IMPLEMENTATION

This section reviews the envelope of known and likely jurisdictional, financial and institutional constraints on provincial action in relation to a new Métis policy. Of particular focus is potential action that Manitoba could take to clarify issues of jurisdictional contest, including obtaining legal advice and framing reference questions to the courts.

III-1. Section 91(24)

The single greatest constraint to the emergence of Métis policy initiatives has been the debate, continuous since the 1970s, over whether or not Métis fall within federal jurisdiction for "Indians, and lands reserved for the Indians" or, alternatively, are completely outside s.91(24). Aside from the legal arguments for and against the inclusion of Metis within s.91(24), discussed below, the debate has essentially involved three statements of interest:

Métis	*91(24) includes Métis* and means • continuity of relations with the Queen; • better protection of Métis interests when they conflict with local/provincial ones. • a right of equitable access to federal programs for Indians/Inuit; equity in application of claims policies, etc.
Provincial	*91(24) includes Métis* and means • full federal responsibility for Métis (including any programs, services, policies focused uniquely on Métis) • the province's "responsibilities" are limited to Métis as provincial citizens, not as Métis, qua Métis.
Federal:	*91(24) does not include Métis,* and means • provinces hold the "main" responsibility for Métis • if Métis have harvesting or title rights, its solely against the province • If 91(24) does include Métis, it changes nothing since Parliament's power is permissive, not obligatory.

The federal government in recent years has insisted that the 91(24) question is not, in fact, of any relevance at all since "jurisdiction" does not compel action, and what is of real importance is which government has "responsibility" for the Métis. Since there is no legal definition of "responsibility", this really appears to suggest that the province should take the lead in Métis initiatives simply because Métis are citizens of the province and are not

resident on federal property. The federal stance says nothing about whether it is appropriate or pragmatic for one government to hold exclusive legislative authorities and another government to carry out all program and policy initiatives, without any legislative framework. The contemporary federal position on s.9 1(24) seems rooted as much in a bargaining strategy as in a legal view: i.e. to implicate the provinces in defraying expected costs for on-reserve First Nations & Inuit.

In conclusion, the 91(24) issue stands as a significant constraint on the generation of new Métis policy. Therefore a key question of policy is whether or not s.91(24)'s scope should be clarified. This question has been recently answered in the affirmative by the Congress of Aboriginal Peoples Federal Court action.[64] However, such actions at trial are much less likely to frame appropriate questions than a reference case, which can only be brought by either a province or Canada. A reference case would also, naturally, take far less time to judgment, an important consideration in framing the implementation of a new provincial policy framework.

Options for Clarifying the Law

Assuming on the foregoing that a judicial decision would be in favour of the provincial view, and at least partially that of the Métis, what is the potential utility for Manitoba of seeking to clarify this core jurisdictional question? We consider here three broad options to set out the respective advantages and disadvantages for the province in advancing a Métis policy.

> ***Option 1***: ***Supporting a Métis sponsored action***
>
> This option would see the province offer to join in (and likely defray costs of) a Métis sponsored test case (whether at the Federal Court or at Manitoba Queen's Bench). This approach would be most suitable in connection with an evidentiary question directly tied to s.91(24) jurisdictions, such as a hunting case (in which the province would lay charges and proceed on agreed statements of fact and legal issues) or a fishing case (in which federal charges would trigger a defence in which the province would join itself in support of the Métis defendant.

[64] *Supra* note 48.

Pros:

- Will be perceived as less aggressive an action by the federal government than a broadly stated reference case.
- Maximizes provincial control over the timing of legal decisions and permits the province considerable flexibility on specific points of law or evidence at all stages.
- Would be positively received by Métis leadership, particularly where costs are concerned.

Cons:

- Involves a potentially far longer time between initiation and final appeal judgement, ranging from as little as 3 to as long as 10 years.
- Trial based costs are likely to exceed costs for a reference case given the necessity for detailed evidentiary findings.
- The courts might not agree to focus on s.91(24) arguments and may rule as narrowly as possible, leaving the jurisdiction issue as uncertain as it currently is.

Option 2: Mounting a Manitoba Appeals Court reference

The province could mount a direct appeal to its most senior appellate court on one or more direct questions of constitutional law. A wide range of sub-options are available under this approach. One would be to place a fairly limited question with a high likelihood of a positive decision, and inform all parties that other reference questions, involving greater uncertainty, will follow in train. This would maximize the short term likelihood of success in motivating early federal interest in joining in a broader Métis policy initiative (if only to avoid wider rulings on follow-up questions, such as those of interest to the Métis concerning federal program and service entitlements).

Pros:

- Affords maximum control over the scope and timing of any decision.

- Requires no prior agreement on facts or procedures with either Métis interveners or Canada.
- Could be stated, as part of a formal policy announcement, as an intention to proceed should Canada choose not to participate in one or more critical components of the policy process (e.g., participation in mandating and cost-sharing a successor body to the AJI Commission).
- Would likely involve less cost overall than a trial/appeal action, even where the province defrays Métis intervener costs.

Cons:

- If set as a precondition to the implementation of a new policy, could be challenged as being a continuance of a "you first Alphonse" position.
- Would set a clear precedent for provincial activism in gaining guidance from the courts, and make it more difficult to avoid setting follow-on reference cases on other Métis related issues.
- Will expose the province to pressures from other provincial governments, all of which will be implicated. This is particularly the case of Alberta.
- Would involve up to 3 years of legal action between deciding on a reference and a Supreme Court judgement (assuming an appeal were sought).

Option 3: A joint reference to the Supreme Court

This approach would involve Manitoba offering to participate with Canada (and likely the MMF) in a joint reference on s. 91(24)'s scope to the Supreme Court.

Pros:

- Leaves the ultimate decision on a reference up to a shared political process of decision-making, with a consequently greater sharing of political fall-out for any decision.
- If taken up, would likely see a Canada share Métis intervener costs.
- Has a precedent in the 1985 federal offer by Hon. John Crosbie to the MNC and NCC to mount a federal reference to the Supreme Court.
- Would involve the least amount of time between a decision on a reference and a judgement (typically, 12-18 months).

Cons:

- Less control for the province over the actual questions to be put to the court than in a direct reference to the Manitoba Appeal Court.
- If declined by the federal government, strongly implies a fall-back requirement to proceed to the Manitoba Appeal Court.

Any one of these three options could find a place in a broader Métis policy initiative, particularly one that stresses the critical importance of active federal engagement and a take-up of federal obligations regarding Metis s.35 rights (e.g., land claim compensation, fishery and harvesting rights regulation, etc.). On balance, however, Option #2 (reference to the Manitoba Court of Appeal) would be preferred as providing the greatest degree of latitude. Option #2 is implied as a necessary fall-back to Option #3 (joint reference) and could give way to the latter as well. In addition, Option #1 (provincial support of a Metis trial action) though having political significance, is the least likely option to garner a clear decision on the scope of s.91(24), as opposed to a ruling on harvesting or other s.35 rights.

III-2. Other Constraints on Federal Engagement

At present the federal government's approach to Métis policy is threefold:

- Disavowal of a legislative or jurisdictional capacity
- Provision of selected bilateral program initiatives to Métis (most notably in the area of labour market training)
- A "tripartite self-government" policy, in place since 1985, reliant upon provincial take-up, process cost-sharing and having a generally limited focus on non-statutory program and service improvements or adaptations.

The federal approach to Métis is highly regionalized and could not really be classed as a policy so much as a general position. Indeed, the only truly "hard" government policy is to ensure that no action undermines the federal stance on s.91(24), a policy that merely belies the public assertion that jurisdictional disputes are not of great importance. The benefit of this lack of a firm or nation-wide policy is that any Manitoba policy that specifically requires or relies upon federal engagement would not have to await a broader

consensus emerging from other provincial governments. As discussed above, however, it might have to take firm steps to deal with s. 91(24).

In the past two decades the other major constraint on federal engagement has been monetary. However, the elimination of the deficit and the continuing growth of the economy is not likely, on its own, to reverse the traditional federal insistence on provincial "lead responsibility". This federal stance is not solely concerned with Métis or non-reserve aboriginal peoples so much as it is with containing what it sees as rapidly escalating costs for the on-reserve population. In short, Canada is very unlikely to depart from its current position on provincial lead responsibility without seeking new and expanded provincial contributions to First Nations, whether by way of expanded program coverage or through in kind economic or resource sharing arrangements. As in the case of resolving harvesting rights access issues, resource sharing and many other issues common to Aboriginal peoples, provincial policy will have to draw clear linkages between its First Nation and its Métis policies, with the stance of the federal government likely becoming a major factor in how the balances and linkages are drawn.

III-3. Constraints on Provincial Legislative Capacity

Two general constraints on provincial policy flexibility have traditionally been regarded as closely tied to the jurisdictional debates surrounding s. 91(24). The first deals with the degree to which the provincial Legislature or government can identify the Métis, or accommodate Métis land or resource interests, or even establish programs or policies for Métis, without being *ultra vires* s. 91(24). The second constraint relates to the degree to which the province should (rather than can) proceed to legislate or enact policies for Métis in any one particular area of concern without at the same time establishing, with federal participation, a broader framework for Métis governance, resource rights, etc.

A. Provincial Legislative Capacity

This issue has been given added complexity by the Supreme Court's decision in *Delgamuukw* [65] to the effect that provinces have never held any legislative powers to extinguish section 35 rights to land (despite holding ultimate title to those lands). The

[65] *Supra* note 19.

Court's position was stated on the basis that section 91(24)'s exclusive grant of jurisdiction to Parliament encompasses *all* s. 35 rights, and thus the rights of *all* of the three Aboriginal peoples of Canada, including the Métis. In effect, the Court has clarified that in relation to Aboriginal peoples, including Métis, the Constitution effects a separation of powers as between the province (with the powers of ownership over lands and in relation to general laws of application under s.92) and Parliament (with the sole legislative jurisdiction over Aboriginal interests in or connected to the land, as well as sole jurisdiction of the "core" of "Indianness"[66]).

What is important here is that the Court did not preclude or rule against positive provincial enactments that advance the capacity of Métis (or First Nations) to exercise their s.35 rights. This capacity is perhaps most clear in relation to provincial heads of jurisdiction as applied to Aboriginal people and in the absence of either Treaty provisions or federal statutes to the contrary. Examples include legislation concerning education[67] and child and family services.[68]

That being said, the province would not appear prevented in principle from legislating positively (as opposed to negatively) in respect of even "core" matters under s.91(24), such as in relation to making provision for Métis harvesting rights. For example, a provincial *Wildlife Act* provision requiring the Minister responsible to enter into consultations and agreements with the relevant Métis authorities for the purposes of ensuring conservation measures respect Métis harvesting entitlements would not, on its face, be *ultra vires*.

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[66] The Supreme Court's deliberate reference in *Delgamuukw*, *ibid*, to the first part of s. 91(24) as encompassing all s.35 matters relating to aboriginal identity, culture, etc. would seem to signal its likely position in relation to legislative jurisdiction regarding the Métis.

[67] Though subject of course to the rights set out in s.93 of the *Constitution Act, 1867*. As alluded to earlier in this paper, a case could be made that the *Manitoba Act* provisions regarding French languages and Catholic denominational schooling were provided specifically for the Metis, and thus could well be sheltered under s.35. The question here would be whether the province would have competence to legislate in this field, as opposed to the general assumption in s.93 that the province has such powers, subject only to Parliament's right to pass remedial laws in the absence of provincial ones.

[68] See for a precedent Ontario's *Child and Family Services Act*, RSO 1985, in which there is specific provision for the assignment of agency status to Indian Bands and to any "Native" community, though not for purposes of apprehension.

Where some care would have to be exercised would be in connection with any discretionary ruling by the Minister on the existence or non-existence of a Métis entitlement, or on with which Métis group to conclude agreements. The latter could attract controversy and litigation contesting the legislation if discretion was overly unilateral. It is in part for this reason that a less orthodox approach to arbitrating rights disputes is recommended in the next Part, dealing with conflicts over the nature and extent of s.35 rights. Put briefly, a dispute resolution panel or tribunal with sufficient political distance from all parties, and with sufficient respect from the courts, could aid in identifying for all parties what a reasonable balance as between claimed rights and provincial statutes or regulations would be. Such a body could well be made a function or part of a successor body to the AJIC, in much the same fashion as the *Canadian Human Rights Act* provides for both a promotive or facilitative Commission as well as a quasi-judicial Tribunal.

B. Sectoral vs. Integrated Policies

The RCAP and, to a lesser extent, the AJI, advanced the importance of integrated national approaches to implementing their recommendations. This was in part a measure to avoid “cherry picking” by governments and in part based upon the belief that the success of any rights implementation strategies – for example, in relation to community control over child and family services – would depend directly on the degree to which a broader framework was put in place for community governance and resource entitlements.

Governments, both provincial and federal, have struggled for decades with the ”chicken and egg” quandary of how to initiate change without biasing the results. In the absence of a broad consensus on the “final picture” of the Métis – government relationship, or in the absence of federal-provincial cooperation, it would seem reasonable to simply start where there is consensus, and set out a wider set of goals to guide subsequent initiatives and negotiations. As advised by both the RCAP and AJI, the absence of agreement on particular outcomes should be managed by initial agreement to establish and oversee negotiations. Process initiatives, therefore, are seen as the

preferred avenue to take in the absence of agreed-to outcomes to guide legislation or policy on specific topics.

In conclusion, the absence of clarity about final outcomes is often viewed as a crippling constraint for any policy initiative, and sometimes highlighted as harbouring untold financial or legal risks. On the contrary, the pith and substance of the recommendations from the AJI, from RCAP and, indeed, from the Courts, is that it is process, and not substance, that is key to the reconciliation of Aboriginal rights with Canadian and Manitoba law and society. For this reason it is recommended that the procedural recommendations of both AJI and RCAP be given greater priority than some of their more substantive guidance on particular outcomes.

III-4. The Policy Legacy

A final major constraint that must be considered is the degree to which the provincial government, its institutions, statutes and policy precedents, are implicated in any new Métis policy initiative. While this effort will of necessity have to engage provincial officials in a careful review of existing statutes, programs and policies, it is generally the case that current provincial policy for Métis is largely comprised of four basic elements:

- The general assertion that the province will provide Métis with assistance in accessing broader programs and services available to all citizens, and will establish specific Métis programs only where this would not be in violation of the Manitoba *Bill of Rights* or *Charter*-based guarantees of equality.
- The historic (and promised renewal of) provincial core funding to the Manitoba Métis Federation, a policy that is, however, not Métis specific in light of similar funding for Friendship Centres and Native women's groups.
- A preference for addressing rural northern Métis community needs and aspirations by way of extending their integration into the broader policy for providing northern municipalities with culturally relevant support and responsibilities (but a concomitant lack of a policy response for southern rural Métis communities).

- A willingness to address province-wide or local initiatives in the existing tripartite “self-government” forum, but with a pointed focus on program and service improvements, rather than on jurisdictional, s.35 rights or delegated/recognized governance powers for Métis authorities.

With the exception of potential advantages of the existing policy in respect of enhanced Métis representation in relevant local governance operations in northern parts of the province, these four elements of current practice cannot, taken together, be described as the product of a determined policy decision by government. Instead, they and the program and service arrangements they reflect grew from an accumulation of responses to different pressures over the past several decades. In essence, Manitoba has historically avoided taking decisions on a global Métis policy, and as discussed above, this has largely been driven by concerns about both financial responsibility and legal jurisdiction.

While the existing range of Métis specific policies would not therefore seem to pose any great obstacle to establishing a comprehensive Métis policy, there will be a need to continue, under a new policy, to respect the different regional and local contexts appropriate to implementation of policy. This context includes relatively homogenous Métis communities in certain south-central rural and northern locations, as well as more dispersed and less “communal” Métis minorities in larger towns and urban areas. It will be important to ensure that governance initiatives are applied flexibly. Land and resource requirements are relevant mostly to rural and Crown land areas where agriculture and primary harvesting activities predominate. The implementation of gaming or similar economic development opportunities will of necessity centre on available and sustainable markets, such as in larger rural towns or in major centres. Thus any policy initiative should and can establish triggers or criteria relating to the local or regional social and demographic context. However, what is essential is that these triggers or pre-conditions be established on the basis of careful joint assessment with Métis authorities.

In summary, the relative lack of progress made to date in redressing socio-demographic disparities, or in achieving the sort of reconciliation that the Courts, and the Constitution,

have demanded, speaks against the *status quo* and quite strongly in favour of a new approach along the lines recommended by the AJI and RCAP. Implementation strategies may take the form of province-wide initiatives, regionally discrete or variable approaches (e.g., as between rural and urban) or locally specific ones (e.g., with local initiative driving take-up). However, while there is a preference in provincial practice for such variable approaches, caution must be exercised to avoid the continuance or reinforcement of imbalance. A province-wide policy is called for, but with clear and contextual variance in implementation, in keeping with the need to respect community autonomy and the approach of the Courts in determining the nature of Aboriginal rights.