

*The Space in Between: Métis Self-Governance within the Canadian Federation*

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## **Abstract**

The Métis are a distinct Indigenous group in Canada, having mixed lineage of First Nations and Settlers. Prior to the Supreme Court of Canada's 2017 *R v. Daniels* decision, Métis peoples were excluded from the s.91(24) definition of 'Indians' in the *Constitution Act, 1867*. This effectively meant that Métis peoples did not have a place within the Canadian federation and its division of powers. Consequently, Métis rights were largely ignored by both provincial and federal governments in Canada. In response, Métis peoples developed their own federal regimes to protect their rights and identity as a nation. Métis peoples are not homogenous and communities can have different, and even competing, interests. To be sure, federal solutions allow for a recognition of this diversity, while at the same time strengthening the collective claims of the Métis. This paper will explore how Métis peoples can continue to use federal systems to secure their rights as Indigenous peoples in Canada, and in particular through the use of a national written constitution.

## **Introduction**

Unlike other constitutionally recognized Indigenous groups in Canada, the Métis have never truly 'fit' within the Canadian federation. As the descendants of two minorities within Canada— that is, the First Nations people and the French settlers— the Métis have long since struggled to assert their rights as an Indigenous Nation. While the Métis did sign scrips<sup>1</sup> to the federal government, this did not give rise to a federal recognition of the Métis as an Indigenous Nation. To be sure, the federal government has never had the same fiduciary obligations to the

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<sup>1</sup> Scrips are essentially contracts between individual Métis peoples and the Government of Canada which signed over Métis land rights to the Crown.

Métis as they did towards the First Nations, because the First Nations fit into the Canadian federation by way of the division of powers found in s.91(24) of the *Constitution Act, 1867*. Nor did the Métis occupy territory comparable to the Inuit in the North, which the federal government recognized through legislative action. Indeed, Métis peoples have traditionally found themselves within a gap of the Canadian federal structure. Arguably, in response to this the Métis peoples developed their own federal structures to secure their rights and protect their status as an Indigenous Nation.

Without a doubt, it is an interesting study of federalism— a minority group that was excluded from a federation developed their own federations in order to stake their claim within the federation that had traditionally excluded them. However, for the Métis to guarantee their rights as a self-governing Indigenous Nation within the Canadian federation, this paper argues that the Métis Nation must adopt a modern constitution that defines and affirms their own federal structures.

The first section of this paper will be dedicated to explaining the methodological approach of this research. Following this, there will be a discussion of the place— or lack thereof— of the Métis within the Canadian federation. This will include a brief history of the Métis, an overview of how Métis peoples define themselves, and an analysis of the legal developments that have led to the recognition of Métis peoples within the Canadian federation. The third section will detail the existing federal structures of Métis governance bodies. This will provide an overview of provincial Métis federations and the Métis National Council. In addition, this will include an introduction to the Métis constitution that is currently being developed by the Métis National Council. The fourth section of this paper is committed to discussing academic analysis of federalism, and will explain why federalism has been an ideal choice for Métis peoples to

govern themselves. Included in this will be a discussion of federalism within an extraterritorial context, an exploration of how the origins of Métis federalism have accommodated and limited diversity, and an analysis of the ways in which the Métis have used federalism to contribute to the development of a nation-to-nation relationship between the Métis and Canada. Next, in order to develop a better understanding of the function of Métis federations, there will be a comparative case study between the Manitoba Métis Federation and the Métis Nation – Saskatchewan. These two Métis federations were chosen because they are both located in Prairie provinces with similar histories. They were also chosen because the Manitoba Métis Federation and the Métis Nation – Saskatchewan both have ratified constitutions, thus lending to more concrete comparisons. This case study will help develop an understanding of best practices within Métis federations in regard to constitution building. Finally, based on the learnings articulated in this paper, the conclusions will offer a series of recommendations for the Métis constitution that is currently being developed.

## **Methodology**

This paper uses research from peer-reviewed journals as a means to explain and explore federalism debates within academia. However, there has been relatively little academic research on the ways in which the Métis have engaged with federalism to create their own federal governance institutions. The research on the Métis federations largely comes from the websites of the Manitoba Métis Federation, the Métis Nation – Saskatchewan, and the Métis National Council. Research on the proposed national Métis constitution comes from a website called the Métis Portal, which is administered by the Métis National Council.<sup>2</sup> This is a website with access

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<sup>2</sup> The Métis Portal can be retrieved by accessing <<http://metisportals.ca/wp/>>.

to information on all aspects and initiatives related to Métis governance, including the developments related to the adoption of a national Métis constitution, which would aim to ‘federate’ existing Métis federations.

The research in this paper also comes from my personal experiences as a member of the Manitoba Métis Federation. I was raised in Winnipeg, traditionally the Red River Settlement, and grew up learning about my culture, history, and identity as a Métis person. Several of my family members have been elected representatives within the Manitoba Métis Federation. I have had the privilege of working for the Manitoba Métis Federation, specifically with planning cultural events and processing Métis membership applications. In addition, I have participated in several forums and events put on by the Métis National Council. I am also a member of a national network of young Métis peoples. These experiences have helped me develop a robust and intimate understanding of both the structural and ‘on the ground’ aspects of Métis federations. As such, my experiences and knowledge as a Métis person have informed the research in this paper.

### **The Métis within the Canadian federation**

Beginning with a brief history of the Métis, the following section will outline the role of the Métis within the Canadian federation. This will be followed by an explanation of how the Métis have chosen to define Métis identity and an overview of legal developments supporting Métis claims to self-governance.

#### **A brief history of the Métis in Canada**

From the time of Canadian confederation in 1867 the Métis have struggled to achieve recognition as a distinct Indigenous Nation within the Canadian federation. In the past this struggle was often expressed through war, and in modern times this struggle is typically

expressed through the courts. There is no fixed date of when the Métis Nation was ‘born’, however the existence of Métis people pre-dates Canadian confederation. The traditional homeland of the Métis is the Red River Settlement in the province of Manitoba, where many Métis participated in the fur trade. Today, Winnipeg continues to have the highest Métis population in Canada.<sup>3</sup> However, largely as a result of the territorial expansion of Canada, Métis peoples also live across the provinces of Ontario, Saskatchewan, Alberta, and British Columbia.

The province of Manitoba— which at the time consisted almost exclusively of the Red River Settlement — joined the Canadian federation in 1870 as a result of the political efforts of Louis Riel, the first Premier of Manitoba. Louis Riel is also widely recognized by the Métis as the Father of the Métis Nation. As noted by Métis political advisor John Weinstein:

The Manitoba Act established the Métis as one of Canada’s founding peoples or nations, and it is this status, together with the aspirations associated with it, in particular the right to a land base and political autonomy, that remains the driving force behind Métis nationalism to the present day.<sup>4</sup>

Immediately following the enactment of the *Manitoba Act* in 1870, the Canadian government began to issue scrips to the Métis peoples that lived in the newly formed province. This was in direct contradiction to the promises to land and self-government set out in the *Manitoba Act*.<sup>5</sup> Scrips were similar to the treaties signed by First Nations as they extinguished the legal title that the Métis held to their lands. Effectively, scrip was a colonizing tool used to dispossess the Métis peoples of their land. Scrip also weakened Métis claims to nationhood

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<sup>3</sup> Statistics Canada, “Aboriginal Peoples in Canada: First Nations People, Métis and Inuit” (25 July 2018) online: < <https://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm#a4>>.

<sup>4</sup> John Weinstein, *Quiet Revolution West: The Rebirth of Métis Nationalism* (Calgary: Fifth House Limited, 2007) at 13.

<sup>5</sup> *Manitoba Act*, 33 Victoria (Canada) 1870, c 3, s.31.

within the Canadian federation, as scrips were considered to be ‘contracts’ or ‘receipts’ between the Canadian government and individuals rather than a treaty between Canada and a collective Indigenous group. Scrip was used as a tool to dispossess the Métis of their lands in order to facilitate Canada’s westward expansion. Several battles followed, which gave rise to the Red River Resistance. In May of 1885, during what is now known as the Battle of Batoche (in Saskatchewan), the Métis were finally forced to concede to the Canadian government. Louis Riel was then taken into custody by the Canadians, and he was executed in November of 1885. Métis scholar Larry Chartrand notes that the Battle of Batoche was never formally surrendered and there was no peace treaty between the Métis and the Canadians.<sup>6</sup> This seems to provide an accurate characterization of the relationship between the Métis and Canada. In many ways, the ongoing negotiations between the Métis and Canada are shaped by this history of subjugation and oppression. After all, even though the Métis were excluded from the *Indian Act* of 1876, they were often victims of racist colonial policies like Residential and Day Schools. Moreover, the exclusion of the Métis from the *Indian Act* also meant that the Métis did not have any constitutional right to their land. This exclusion also resulted in the Métis Nation having no formal recognition as an Indigenous Nation within the Canadian federation. Indeed, were it not for the self-determination of the Métis, it is likely that their rights would have fallen through the cracks of Canada’s federal system.

### **Defining Métis Identity**

The Métis Nation was created through the union of French settlers and Indigenous peoples. As a result, the Métis have two identity markers of minority status within Canada— that

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<sup>6</sup> Larry Chartrand, “We Rise Again: Métis Traditional Governance and the Claim to Métis Self-Government” in John Hylton & Yale Belanger, eds, *Aboriginal Self-Government in Canada: Current Trends and Issues* (British Columbia: UBC Press Purich Publishing, 2008) 145 at 145.

is, their Indigenous identity and their Francophone identity. Of course, there are several variables that can be analyzed to understand the construction of Métis identity. However, language is an interesting and poignant point of analysis for understanding Métis identity vis-à-vis the Canadian federation, because the Canadian federation is often understood as a union between the Anglophones and the Francophones. To be sure, the Francophones were the minority of the federation, and the Métis were a minority within the Francophone community. Furthermore, the Métis had their own language, Michif, which is a mix of French and Cree. Arguably, the Michif language only served to further marginalize the Métis amongst Francophones.

In spite of its history as French and Michif speaking, the Métis community today is largely Anglophone. It is arguable that, as a result of their double minority status, Métis people felt as if they had to choose between their identities as Indigenous peoples and as Francophones or Michif-speakers. For many Métis, to be doubly discriminated against would be too large a burden to bear. To be sure, this is exactly what Louis Riel had hoped to avoid. However, it is important to note that the province of Manitoba was unilingual<sup>7</sup> until the *Manitoba Language Rights Reference* in 1985, where the Supreme Court of Canada recognized the right to the provision of services in French pursuant to section 23 of the *Manitoba Act* of 1870 and section 133 of the *Constitution Act, 1867*.<sup>8</sup> There is little doubt that the exclusive use of English in Manitoba had an impact on the Métis. Moreover, this brings into question the extent to which the Métis had any meaningful choice in regard to language. Within my own family, when my mother and her family moved from their French-speaking Métis community of St. Ambroise, Manitoba to Winnipeg in 1974, they almost immediately stopped speaking French at home.

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<sup>7</sup> This was the result of legislative action: *An Act to Provide that the English Language shall be the Official Language of the Province of Manitoba*, S.M. 1890, c. 14.

<sup>8</sup> *Re Manitoba Language Rights* [1985] 1 SCR 721.



Despite the challenges to identity experienced by the Métis, as was seen in regard to language, the Métis Nation now has a clear working definition of what it means to be Métis. In 2002, the General Assembly of the Métis National Council adopted the following definition of a Métis person: “a person who self-identifies as Métis, is distinct from other Aboriginal peoples, is of historic Métis Nation Ancestry and who is accepted by the Métis Nation.”<sup>9</sup> To prove ancestry, it is only necessary to provide proof of a genealogical connection to one scrip. Indeed, as Elders have taught me, there is no ‘blood count’ for the Métis, because in accordance with the teachings of the infinity symbol, a Métis bloodline carries on forever. Essentially, if one has some Métis lineage, interactions with other groups will not dilute nor lead to a loss of Métis identity. In regard to acceptance by the Métis Nation, individuals are required to meet with Locals– which are made up of community members– before going to submit an application to become a member of a Métis federation.

### **Legal developments clarifying the position of the Métis within the Canadian federation**

When the Canadian constitution was repatriated in 1982, legislators included a provision, s.35, which recognizes the inherent rights of Aboriginal peoples in Canada.<sup>10</sup> Aboriginal peoples are defined as the First Nations, the Inuit, and the Métis. As a result of this constitutional recognition, Métis rights were solidified as Aboriginal rights in Canada. Moreover, as a response to this recognition the Métis organized to create the Métis National Council. Following the constitutional inclusion of s.35, Métis federations were able to move forward with litigation that would ultimately give actual meaning to their *de jure* rights as Aboriginal peoples. As noted by

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<sup>9</sup> Janique Dubois & Kelly Saunders, “Rebuilding Indigenous nations through constitutional development: a case study of the Métis in Canada” (2017) 23:4 Nations and Nationalism 878 at 887. [Rebuilding Indigenous nations through constitutional development]

<sup>10</sup> *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 at s.35.

Dubois and Saunders, “ongoing concerns regarding their exclusion from the division of powers in the country’s federalist model led Aboriginal peoples to seek redress through the constitutional process.”<sup>11</sup> In the 2003 decision *R v. Powley*, the Supreme Court of Canada set out the criteria that would define Métis people pursuant to s.35 of the *Constitution Act, 1982*. This case was largely pushed forward by the Métis Nation of Ontario. Then in 2013, the Supreme Court recognized in *Manitoba Métis Federation v. Canada and Manitoba* that the Crown has a fiduciary obligation to Métis peoples. Again in 2016, in *R v. Daniels* the Supreme Court found that Métis peoples should be considered ‘Indians’ as per s. 91(24) of the *Constitution Act, 1867*. *R v. Daniels* was an important decision because it finally recognized that the Métis did in fact have a place within the Canadian federation’s division of powers. Unfortunately, it took 149 years for this recognition.

### **Current models of Métis governance**

This section will provide overviews of the existing federal models of Métis governance, both provincially and federally. Following this, there will be an introduction to the current draft of the Métis National Council’s constitution.

#### **Existing federal models of Métis governance: provincially and nationally**

In Ontario, Manitoba, Saskatchewan, Alberta, and British Columbia there are Métis organizations which govern the Métis within that province. These organizations all use a similar federal structure. As a whole, each organization covers the entire territory of a province. Within each respective province, the Métis organization recognizes different Regions. Within these Regions there are Locals, which are essentially community groups. This structure bears many

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<sup>11</sup> Janique Dubois and Kelly Saunders, ““Just Do It!”: Carving Out a Space for the Métis in Canadian Federalism” (2013) 46:1 *Canadian Journal of Political Science* 187 at 190.

similarities to the Canadian division of powers between the federal government, provinces, and municipalities. As observed by William Riker, former British colonies have a tendency to adopt federalist models.<sup>12</sup> This demonstrates the extent to which the Métis Nation had its own relationship with the British, completely independent and prior to Canadian confederation. Each of the five provincial Métis organizations are provincially incorporated, meaning their governance structures are bound by corporate regulations. This is not always compatible with the goals of a self-governing Indigenous Nation. Only three of the provincial Métis organizations – the Manitoba Métis Federation, the Métis Nation – Saskatchewan, and the Métis Nation of British Columbia– have officially ratified a constitution. As of 2017, the Métis Nation of Ontario has been working towards the creation of a constitution.<sup>13</sup> On their website, the Métis Nation of Alberta has stated that they are also working towards building a constitution.<sup>14</sup> Evidently, constitutions play an important role within Métis self-governance.

All five of the Métis organizations practice democratic elections. While the Métis organizations have a variety of elected positions– e.g. only some organizations have a Vice-President– all of the provinces do elect a President. The Métis National Council represents all Métis organizations in Canada. It is composed of an elected President and the Presidents of all five provincial Métis organizations. The Métis National Council is also a federally incorporated organization, which means that they are bound by federal corporate regulations. The Métis National Council organization plays an important role for the Métis, because the Métis National

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<sup>12</sup> William Riker, “The origin and purposes of federalism” in *Federalism: Origin, Operation, Significance* (Boston: Little, Brown and Company, 1964) 11 at 25.

<sup>13</sup> Métis Nation of Ontario, “Self-Government”, 1 March 2017, online: <  
<http://www.metisnation.org/governance/governing-structure/mno-commission-on-metis-rights-and-self-government/métis-nation-of-ontario-self-government/>>.

<sup>14</sup> Métis Nation of Alberta, “A Métis Nation of Alberta Constitution,” online: <  
<http://www.albertametisgov.com/metis-nation-alberta-constitution/>>.

Council represents the Métis both nationally and internationally. However, despite this important role, the Métis National Council does not have a constitution in which it can entrench their federal organizing principles.

### **Creating a constitution for the Métis Nation**

Historically, the Métis Nation has had, “numerous written documents, oral traditions and unwritten conventions [which] provide a constitutional framework that has guided their interactions internally as well as with external groups.”<sup>15</sup> An example of one of these traditional constitutional sources is the Law of the Hunt, which played a critical role in Métis governance as the survival of the Métis were contingent upon these laws.<sup>16</sup> Evidently, constitutions have historically played an important role in Métis governance. Today, the Métis National Council has recognized that the Métis Nation needs a modern constitution to affirm and assert their right to self-governance.

On the Métis Portal website, there are several documents which discuss the need for a modern Métis constitution. The 2003 document ‘Towards A Métis Constitution’ describes the need for the development of a constitution as a means to strengthen the governance of the Métis.<sup>17</sup> This document also recognizes that the corporate structure of the Métis National Council is not conducive to self-governance and nation-building.<sup>18</sup> After all, corporate by-laws are a creation of the Canadian state and were clearly not developed to support Indigenous self-governance models and initiatives. Interestingly, the Métis National Council also describes the

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<sup>15</sup> Rebuilding Indigenous nations through constitutional development, *supra* note 5 at 880.

<sup>16</sup> *Ibid.*

<sup>17</sup> Jason Taylor Madden, “Towards a Métis Constitution” (2003) Métis National Council at 4. [Towards a Métis Constitution]

<sup>18</sup> Towards a Métis Constitution, *supra* note 17 at 11.

need for a constitution as a way to strengthen the identity of the Métis Nation.<sup>19</sup> Indeed, constitutions are foundational documents that can define the values and aspirations of a people. Constitutions are also critical because they concretize roles and responsibilities within federal divisions.

The Métis National Council currently has a draft constitution that was last updated in June 2009. Moreover, while there has been a consultation process on the development of a constitution,<sup>20</sup> there are no new updates on the progress of these consultations. Perhaps part of the reasons for the delay in adopting a constitution is the fact that judicial developments resulting from Métis litigation have ended up being relatively successful. Yet, these judicial developments have not eliminated the need for a national Métis constitution. After all, as noted by Dubois and Saunders, “a constitution is quintessentially foundational to self-government.”<sup>21</sup> As will be further described, there is nevertheless a need for the Métis National Council to move forward with enacting a constitution in order to secure, not only the federal structure of the Métis Nation, but also to secure the position of the Métis within the Canadian federation.

### **Métis self-governance: Choosing federalism**

This section will highlight the reasons why federalism has been an ideal structure for Métis self-governance. These reasons include extraterritorial considerations, diversity within the Métis Nation, and a concern for maintaining a nation-to-nation relationship with Canada.

#### **Extraterritorial considerations**

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<sup>19</sup> Métis National Council, “The Need for a Constitution”, online:

<<http://www.metisnation.ca/index.php/who-are-the-metis/metis-constitution>>.

<sup>20</sup> Towards a Métis Constitution, *supra* note 17 at 16.

<sup>21</sup> “Rebuilding Indigenous nations through constitutional development”, *supra* note 9 at 890.

Ironically, federalism has been an ideal choice for the Métis, because it has allowed them to create their own governments even though they do not have their own territory. The Métis live within Canadian provinces. They are bound by provincial and federal laws and regulations. As such, the fact that federalism might not always be contingent upon territory<sup>22</sup> is particularly useful for the Métis, because while they have harvesting rights, they do not have exclusive control and autonomy over a defined territory. As argued by Bertus De Villiers, within a federation “decentralisation in its different forms can be applied on a community rather than a territorial basis whereby a legal persona established by a cultural minority can provide services to its members regardless of where they live.”<sup>23</sup> Indeed, the Métis Nation has benefitted from the fact that federalism is not necessarily bound by territory.

It is extremely likely that, for the foreseeable future, the traditional land of the Métis will remain Crown land. However, through harvesting rights, the Métis Nation has secured their right to the use of territory. Nevertheless, by virtue of s.35 of the *Constitution Act, 1982*, the Canadian federation has a constitutional obligation to respect those rights. In this context, federalism reflects and reinforces Métis’ Nation’s position within the Canadian state.

### **Accommodating (and limiting) diversity within the Métis Nation**

The federal origins of the Métis Nation demonstrate that the Métis have used federalism to both accommodate, and limit, diversity within the Métis Nation. Palermo and Kössler describe the differences between federal origins of coming-together and holding- together as “only

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<sup>22</sup> Of course, this is not without debate. For the purposes of this paper I have accepted this modern premise of federalism. See Poirier *Autonomy and Diversity SSRN*

<sup>23</sup> Bertus De Villiers, “Community Government for Cultural Minorities – Thinking beyond ‘Territory’ as a Prerequisite for Self-Government” (2018) *International Journal on Minorities and Group Rights* 1 at 9.

historical, not legal, in nature.”<sup>24</sup> Coming-together federalism is defined as previously independent and sovereign states coming together to create a unitary state.<sup>25</sup> Alternatively, holding-together federalism is the result of a unitary state dividing its power to create a federal system.<sup>26</sup> It is important to recognize that, despite a strong common identity as Members of the Métis Nation, Métis peoples do have different experiences based on the province<sup>27</sup> and their in which they live.

It may be argued that there are two ‘streams’ of federalism within the federal origins of the Métis Nation. The provincial Métis federations each have their own federal origins that are separate and prior to the origins of the Métis National Council. As a result of these two ‘streams’, federalism for the Métis has arguably served both purposes of coming-together and holding-together. On the one hand, there has been coming-together federalism as the provincial Métis federations joined together to create the Métis National Council in 1983. The Métis recognized that their provincial differences were important, thus they made accommodations for this difference within the Métis National Council’s federal framework. On the other hand, provincial Métis federations have origins in holding-together federalism, as provincial Métis federations were first rather centralized, but they have distributed power among their Regions and within their Locals. The Métis recognized the diversity within their provinces, and they subsequently divided power as a means to accommodate for this diversity. The end result of this is a complex three-level federal organization.

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<sup>24</sup> Francesco Palermo & Karl Kössler, “Manifestations” in *Comparative Federalism: Constitutional Arrangements and Case Law* (Oxford/Portland Oregon: Bloomsbury, 2017) 34 at 40. [Manifestations]

<sup>25</sup> Manifestations, *supra* note 24 at 39.

<sup>26</sup> Manifestations *supra* note 24 at 43.

<sup>27</sup> This also includes their history prior to the creation of provinces.

I would argue that federalism serves another purpose for the Métis Nation. In addition to the goals of holding-together and coming-together, federalism for the Métis has served a “defining-together” purpose. That is, federalism has been ideal for the Métis because it has empowered them to collectively establish and enforce their own definitions of what it means to be Métis. For the Métis, this has proven to be of critical importance. Métis identity is not something that can be claimed by individuals simply because they have a mixed Settler and Indigenous ancestry. As was noted earlier, there are clear definitions for what it means to be a Member within the Métis Nation. In spite of this, there continues to be a misconception that to be Métis means to be of mixed-ancestry.

Currently, there is controversy over this in several eastern Canadian provinces, where groups are emerging and staking claim to Métis identity. For example, between 2006 and 2016 there was a 125% increase in individuals claiming Métis identity in Nova Scotia.<sup>28</sup> President Clément Chartier,<sup>29</sup> the current President of the Métis National Council, has stated that Métis identity is contingent upon kinship and culture and not simply upon a mixed ancestry.<sup>30</sup> President Chartier has also confirmed that himself, and other Métis leaders, will be discussing ways to respond to these issues at the General Assembly of the Métis National Council.<sup>31</sup> The General Assembly took place on November 28<sup>th</sup> and 29<sup>th</sup>, 2018. It will be extremely interesting to see how the Métis Nation chooses to respond to this. Undoubtedly, a constitution for the Métis Nation would be a useful tool in such a situation, because it would give the Métis Nation a

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<sup>28</sup> The Canadian Press, “Mi'kmaq, Métis agree to address people 'misrepresenting' themselves as Métis”, *CBC News* (3 October 2018), online: <[www.cbcnews.ca](http://www.cbcnews.ca)>.

<sup>29</sup> Clément Chartier is from Saskatchewan.

<sup>30</sup> Brittany Hobson, “‘They’re stealing our identity’ Métis National Council calls out eastern Métis groups”, *APTN News* (26 November 2018), online: <[www.aptnnews.ca](http://www.aptnnews.ca)>. [They’re stealing our identity]

<sup>31</sup> They’re stealing our identity, *supra* note 25.



concrete document to reference as they define and limit the parameters of what it means to be Métis.

### **Building a nation-to-nation relationship with Canada**

Federalism has been indispensable as the Métis have worked to build a nation-to-nation relationship with Canada. The Métis have been, and continue to be, a self-governing Indigenous Nation within the Canadian federation. Moreover, both the common law and the constitutional law of Canada “can and should” recognize this right to self-government.<sup>32</sup> Indeed, there is no doubt surrounding the fact that the Métis constitute an independent Nation, separate from other recognized Indigenous peoples and separate from the Canadian federation. This has been affirmed in the 2017 Canada-Métis Nation Accord, as the preamble states that the Métis Nation “emerged with its own collective identity, language, culture, way of life and self-government in the historic Northwest prior to Canada’s westward expansion following Confederation.”<sup>33</sup>

As a consequence of the colonial context in Canada, the Métis Nation has struggled to assert its right to self-government. Since 1870 the federal and provincial governments have denied Métis rights to land and self-government, even when those same rights had been extended to other Indigenous groups.<sup>34</sup> This struggle has led to the need for the Métis to adopt measures to guarantee their rights, because it was evident that Canada had completely failed to position Métis rights within the Canadian federation.

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<sup>32</sup> Albert Peeling & Paul L. A. H. Chartrand, “Sovereignty, Liberty, and the Legal Order of the Freeman (Otipahemsu'uk): Towards a Constitutional Theory of Metis Self-Government” (2004) 67 Saskatchewan Law Review 339 at 357. [Sovereignty, Liberty, and the Legal Order of the Freeman]

<sup>33</sup> *Canada-Métis Nation Accord*, Her Majesty the Queen in Right of Canada and the Métis National Council, 13 April 2017.

<sup>34</sup> “Rebuilding Indigenous nations through constitutional development”, *supra* note 9 at 884.

Abele and Prince have identified four self-government pathways for Indigenous peoples in Canada: Indigenous self-government as public government, the creation of mini-municipalities, third order models of government, and nation-to-nation relationships.<sup>35</sup> Within their analysis, they distinguish between nation-to-nation relationships and third order of government models.<sup>36</sup> Abele and Prince note that, with third order of government models, power remains vested in the provincial and federal governments, but “through treaty negotiations, interim measures, administrative arrangements, and policy innovations, certain jurisdictions and authorities can be transferred to Aboriginal governments and institutions.”<sup>37</sup> In contrast to this, Abele and Prince describe nation-to-nation relationships as having two separate sources of legitimate power— that is, a Canadian basis of power and an Aboriginal basis of power, which would be combined in some new type of partnership.<sup>38</sup> Inherent to this distinction is an assumption that the Métis Nation and the Canadian federation share the same zero-sum definition of power. However, for Métis peoples, power is a holistic concept. Again, Elders have taught me to draw on the teachings of the infinity symbol to understand the concept of power. Power is not something that can be divided— power is something that exists within every individual, and we all have an obligation to recognize and respect this.

Through the creation of their own federal systems the Métis have demonstrated that both of these models— the third order of government and the nation-to-nation relationship— can co-exist to create a multi-faceted relationship with the Canadian federation. Moreover, these federal systems have allowed the Métis to maintain their own definition of power and governance.

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<sup>35</sup> Frances Abele & Michael J. Prince, “Four Pathways to Aboriginal Self-Government in Canada” (2006) 36:4 *American Review of Canadian Studies* 568 at 570 to 571. [Four Pathways]

<sup>36</sup> Four Pathways, *supra* note 35 at 576 to 583.

<sup>37</sup> Fourth Pathways, *supra* note 35 at 578.

<sup>38</sup> Fourth Pathways, *supra* note 35 at 580.

Indeed, while the Métis have successfully negotiated tripartite agreements with the provincial and federal governments,<sup>39</sup> these agreements have never compromised Métis claims to a nation-to-nation relationship with Canada. Arguably, the analysis put forward by Abele and Prince fails to take into account the ways in which alternative conceptions of power allow marginalized groups to use multiple pathways to assert their rights to self-government.

### **Comparing federations: Manitoba Metis Federation and Metis Nation – Saskatchewan**

The Manitoba Metis Federation was founded in 1967 and the Metis Nation – Saskatchewan was founded in 1935. As prairie provinces, these federations have similar histories. In addition to this, both have ratified a constitution. In order to compare them, I will look at their federal skeletons. This ‘skeleton’ is described by Palermo and Kössler:

...the ‘skeleton’ of a federal state is represented by: a) the division of state functions between at least two different orders of government both enjoying political autonomy; b) the supremacy of the federal/ national constitution; and c) a system of cooperation among the levels, including the judicial adjudication of disputes between and among the entities over the respective constitutional powers. Put differently, federally organised states find (different) ways to divide public powers among different spheres of government, combine (in different ways) self-rule and shared rule and (in different ways) unite without merging and divide without separating.<sup>40</sup>

Thus, when comparing the Manitoba Métis Federation and the Métis Nation – Saskatchewan, I will consider the following questions:

- I. How does each federation divide ‘power’?
- II. What is the ‘supreme’ function of the constitution?

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<sup>39</sup> Government of Canada, “New Agreements Since 2016”, online: <<https://www.rcaanc-cirnac.gc.ca/eng/1487192822059/1529105739261>>.

<sup>40</sup> Manifestations, *supra* note 24 at 39.

III. Is there a system of cooperation?

### **Federal structure of the Manitoba Métis Federation<sup>41</sup>**

#### I. The Division of Responsibilities

The Manitoba Métis Federation divides power between the Executive, the Regions, and the Locals. The Locals are comprised of a Chair, a Vice-Chair, and a Secretary-Treasurer. These bodies act as local governance representatives in their communities. Growing up, my mother and aunties were the representatives of the Seven Oaks Local in Winnipeg. Some of their community initiatives included hosting community dinners and fundraising to provide Christmas packages for Métis families in the area. Within the Manitoba Métis Federation's division of powers, the Locals are quite separate from the higher levels of government. The Regions are composed of an elected Vice-President and two elected Directors. There is a total of seven Regions. The Regions are responsible for processing citizenship requests and for implementing policies and projects. At the level of the Regions, there is no obligatory representation from the Locals. The Executive is then solely composed of the President. The Executive is responsible for representing the interests of the Métis at both provincial and federal levels.

#### II. The Supremacy of the Constitution

The Manitoba Métis Federation's Constitution is highly detailed. It has provisions to regulate key areas of governance, including citizenship, elections, and harvesting

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<sup>41</sup> All information in this section was retrieved from the *Manitoba Métis Federation Inc. Constitution, 2017*. Can be found online: [http://www.mmf.mb.ca/docs/mmf\\_constitution2017.pdf](http://www.mmf.mb.ca/docs/mmf_constitution2017.pdf).

rights.<sup>42</sup> The inclusion of harvesting rights is critical, as the Law of the Hunt has always been a founding ‘constitutional’ principle for the Métis Nation. It is worth noting that there is no mention of the Métis National Council in the Manitoba Métis Federation’s Constitution, even though it was amended in 2017.

### III. A System of Cooperation

There are two decision-making spaces within the Manitoba Métis Federation whereby inter-governmental cooperation is facilitated: the Board of Directors and the Annual General Assembly. The Board of Directors is composed of the Vice-Presidents and Directors from each Region, the President, and one Representative for Women. While power is more concentrated within higher levels of government, the Manitoba Métis Federation’s Annual General Assembly is a forum that *all* Members of the Manitoba Métis Federation can attend. There is also a quorum of one delegate from at least 50% of the Locals. I have been fortunate enough to attend several of these meetings, and as a Métis person it is always very encouraging to feel as if I am part of the self-governance process. Despite the fact that power is more concentrated within higher levels of government, it is arguable that the model of the Annual General Assembly facilitates cooperation between the Locals, Regions, and the Executive.

## **Federal structure of the Métis Nation – Saskatchewan<sup>43</sup>**

### I. The Division of Responsibilities

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<sup>42</sup> It is worth mentioning that in the Manitoba Métis Federation, individuals can apply for two separate cards: a Membership card that gives voting rights and a Harvester card that gives hunting and harvesting rights.

<sup>43</sup> All information in this section was retrieved from the *Constitution of the Métis Nation – Saskatchewan*, 1993. Can be found online: <https://www.metisnationsk.com/ckfinder/userfiles/files/Constitution%20of%20the%20Métis%20Nation-Saskatchewan.pdf>.

Within the Métis Nation – Saskatchewan, power is also divided between the Executive, the Regions, and the Locals. The Executive is comprised of the President, the Vice-President, the Secretary, and the Treasurer. The Regions are then comprised of representatives from the Locals. There is a total of twelve Regions. In contrast to the Manitoba Métis Federation, the Métis Nation – Saskatchewan’s Locals have significant powers. The Locals have nine elected positions, an enumerated list of powers, and their own constitutions. While I do not have any personal experience with the Locals in Saskatchewan, it is noteworthy that the Locals have so much power. After all, Locals play an important role within Métis federations because they are the most involved with community Members.

## II. The Supremacy of the Constitution

The supremacy of the Métis Nation – Saskatchewan’s Constitution is clear in its language, but almost immediately (in Article 2) the Constitution asserts deference to the Métis National Council. It states that the Constitution can be amended to align with any changes put forward nationally. As was noted, this is absent from the Manitoba Métis Federation’s Constitution. Another key constitutional element– the right to harvest– is not detailed in the Métis Nation – Saskatchewan’s Constitution.

## III. A System of Cooperation

The Métis Nation – Saskatchewan has two decision-making bodies whereby inter-governmental cooperation is facilitated: the Legislative Assembly and the Provincial Métis Council. The Legislative Assembly is comprised of the Provincial Métis Council, the Presidents of the Locals, four Representatives for Women, and four Representatives for Youth. The Provincial Métis Council is comprised of Regional

Representatives, the Executive, one Representative for Women, and one Representative for Youth. Interestingly, the Métis Nation – Saskatchewan also has a provision stating that Members of the Métis Nation – Saskatchewan can run in Canadian federal and provincial elections. The inclusion of this provision seems to indicate that the Métis Nation – Saskatchewan has considered the importance of cooperation, not just within its own federation, but also with the Canadian federation.

### **The benefit of a constitution**

As a Métis person and as a law student, it is clear to me that the Manitoba Métis Federation and the Métis Nation – Saskatchewan have both benefitted from the federal balance that is guaranteed by their constitutions. Indeed, a constitution must adequately capture the realities of a particular federal balance— that is, there must be clearly articulated divisions, but these divisions must not be so rigid that inter-governmental cooperation becomes impossible. As can be seen with the Manitoba Métis Federation and the Métis Nation – Saskatchewan, there are multiple ways of achieving this balance. Striking the right federal balance will be extremely important for the Métis Nation, as the Nation must benefit from its provincial differences as well as its national unity.

There is no doubt that a written constitution is the best way for the Métis Nation to ensure their federal system of self-governance. The constitutions of the Manitoba Métis Federation and the Métis Nation – Saskatchewan demonstrate that Métis constitutions are not simply aspirational documents that outline broad overarching principles. Rather, existing Métis constitutions have the capacity to be implemented in a way that gives meaning to its provisions. Furthermore, given the Canadian federations’ current commitment to reconciliation with Indigenous peoples, it is indeed an opportune time for the Métis Nation to finalize a constitution.

Arguably, this climate of reconciliation has created a moment whereby a Métis constitution would, by and large, be welcomed by the Canadian federation.

### **Constitutionalizing Métis federalism**

In this section we will review the existing draft constitution put forth by the Métis National Council. This will include an identification of gaps and will provide recommendations.

#### **Evaluation of the existing draft constitution**

Constitutionalizing the federal structure of the Métis Nation will not be without challenge. As pointed out by Dubois and Saunders, it is important to keep in mind that “the very process of constitution-building is entangled with the legacy of colonialism. The destruction of their historic governance practices, their exclusion from state policies and the denial of their right to land have posed significant challenges for the Métis in the constitution-building process.”<sup>44</sup> Nevertheless, it is important for the Métis to recognize and overcome these challenges as a means to strengthen their governance. For the Métis, a constitution is largely about securing their self-governing federal model. In “The Métis Nation’s Self-Government Agenda: Issues and Options for the Future,” Métis scholar Jason Madden has identified several gaps in Métis self-governance. Indeed, several of these gaps are also found in the current draft of the Métis constitution. Recommendations to fill these gaps will follow in the section below.

#### *Gap 1: Clarifying the nation-to-nation relationship*

Madden mentions that the Métis Nation needs to clarify its position vis-à-vis the provincial and federal governments, because there continues to be misconceptions that the Métis

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<sup>44</sup> Rebuilding Indigenous nations through constitutional development, *supra* note 9 at 887.



want to be treated as Status Indians.<sup>45</sup> The Métis draft constitution does not clarify this, as it fails to mention the Métis Nation's understanding of a nation-to-nation relationship with Canada, in a way that clearly rejects the subordinate "status" approach,

*Gap 2: Sovereignty versus right to land*

Another gap that Madden identifies is the determination of a land base, as many Métis believe that this is essential for their self-governance.<sup>46</sup> The issue of sovereignty will need to be clarified with regards to land, especially if the Métis are interested in land but not necessarily in sovereignty. After all, the current draft of the constitution does not mention sovereignty, but it does mention the right to land. For the Métis, it is unclear whether or not, when they discuss the right to land, that they mean the exclusive and sovereign right to land or simply the right to the use of land.

*Gap 3: Division of responsibilities*

Madden also notes that there is a need to clarify the roles of the Métis Nation at the national, provincial, and local levels.<sup>47</sup> As it stands, the draft of the constitution does not have a clear division of responsibilities at the Regional and Local level. For the constitution to be most effective, and to be the most far-reaching, the constitution must at least include an articulation of the basic functions of the Regions and the Locals.

## **Recommendations for the Métis Nation's constitution**

*Recommendation 1: Establish expectations for the nation-to-nation relationship*

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<sup>45</sup> Jason Madden, "The Métis Nation's Self-Government Agenda: Issues and Options for the Future" in Melanie Mallet, ed, *Métis-Crown Relations: Rights, Identity, Jurisdiction, and Governance* (Place: Irwin Law Incorporated, 2008) 323 at 336. [Issues and Options]

<sup>46</sup> Issues and Options, *supra* note 45 at 337.

<sup>47</sup> Issues and Options, *supra* note 45 at 336.

The Métis Nation’s constitution should articulate a definition of what a nation-to-nation relationship looks like between the Métis Nation and Canada. To be sure, a strengthened constitution should help towards further developing a nation-to-nation framework by establishing clear expectations for what this framework means to the Métis. As a means to clarify this, the Métis Nation’s constitution should look to the Métis Nation – Saskatchewan’s Constitution as an example of how to encourage the integration of Métis federalism within Canadian federalism.

*Recommendation 2: Define the right to land*

The Métis constitution should clarify the Métis’ position on sovereignty versus the right to land. As recognized by Albert Peeling and Paul L.A.H. Chartrand, for the Métis “questions of sovereignty are political questions rather than legal questions.”<sup>48</sup> In contrast to sovereignty, the question of the right to land— particularly the right to the use of land— is largely a legal question. The Métis constitution must take this differentiation into account, especially as Indigenous sovereignty continues to be an elusive, yet highly relevant, concept for the Canadian federation. It would be beneficial for the Métis to have this position clarified as a way to manage the expectations of the Canadian federation. A solution to clarify the Métis position on sovereignty and land could be found in the Manitoba Métis Federation’s Constitution, which uses the language of the ‘right to harvest’ as opposed to the ‘right to land’.

*Recommendation 3: Articulate a clear division of roles*

With no defined territorial control, the question of ‘who does what’ is important for the Métis Nation to answer within its constitution. Legislative federalism, which is seen in most former British colonies, employs a division of powers that delegates powers to different levels of

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<sup>48</sup> Sovereignty, Liberty, and the Legal Order of the Freeman, *supra* note 32 at 340.

government. This results in “watertight compartments”<sup>49</sup> whereby power does not readily move from one level of government to another. Rather than adopting a similar division of powers, the Métis Nation’s constitution should include a division of *functions*. This is an alternative that has been used in the German federal system, which interlocks powers rather than dividing them.<sup>50</sup> In Germany, the national order is responsible for most law-making and policy development. The subnational governments are then responsible for implementation of both national and Lander laws and programmes.<sup>51</sup> This type of federalism would be ideal for the Métis to concretize within their constitution. Instead of forcing the Métis Nation to constitutionalize a division of powers that mirrors the Canadian division of powers, this alternative bears similarity to the current governance structure of the Métis Nation. Indeed, this interlocking of powers seems most fitting for the Métis who do not see power as divisible and hierarchical.

## **Conclusion**

For hundreds of years the Métis have fought to secure their rights as a people. There is no doubt that the governance institutions, which the Métis developed based on federal principles, have empowered the Métis to advocate for their rights as a Nation. Federalism has also enabled and mobilized the Métis, as they have collectively worked within their own federal systems to define and guarantee their position in Canada. A constitution will create the necessary foundation for the Métis as they continue to move forward and assert their rights as an Indigenous Nation within the Canadian federation. As noted by Louis Riel, “we may be a small community and a

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<sup>49</sup> Thomas O. Hueglin & Alan Fenna, “Dividing Powers” in *Comparative Federalism: A Systematic Inquiry*, 2<sup>nd</sup> ed. (Toronto: U of T Press, 2015) 135 at 136. [Dividing Powers]

<sup>50</sup> Dividing Powers, *supra* note 49 at 150.

<sup>51</sup> Dividing Powers, *supra* note 49 at 136.

Half-breed community at that – but we are men, free and spirited men and we will not allow even the Dominion of Canada to trample on our rights.”<sup>52</sup>

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<sup>52</sup> Cited by Kenneth William Kirkpatrick McNaught, *The History of Canada* (1970) at 143.