

Métis land claim participation in the North: Implications for Southern Canada

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The question of Métis treaties and land claims remain outstanding in regions south of 60.¹ With some notable exceptions, early colonial and federal government policy denied the Métis the option to secure treaty relations with the Crown. Generally, the federal government refused to negotiate with Métis under the old treaty process and continues to refuse under the current modern claims process. Yet, it is interesting that this obligation to negotiate has not been resisted in recent times regarding Métis claims North of 60°.

The Métis Treaty Process in the North

By 1921, there was a well-entrenched Métis presence in the Northwest Territories, especially along the Mackenzie River, which was a major fur-trade route. During the 1921 Treaty 11 negotiations, as was generally the case in the South, Métis were offered scrip but, unlike in the South, Métis in the North were only offered money scrip in the amount of \$240.00 in extinguishment of their “Indian title” or they could choose to enter Treaty 11 and become a member of a treaty band. Treaty 11 and the Métis scrip disbursement’s legal validity were put into question, leading to a renewed treaty process beginning in the 1970s. Since that time, four comprehensive claims have been settled in the Northwest Territories, while others remain in different stages of negotiation.

Of these processes, the *Sahtu Dene and Métis Comprehensive Land Claim Agreement* is only one completed comprehensive claim in the Northwest Territories where Métis remain distinctly Métis after signing the agreement. Other agreements allow for Métis to become Gwitch’in beneficiaries or Tlicho citizens, but do not retain an independent political status after doing so. In describing the Métis participation in respect of the Gwitch’in and Tlicho land claims, Giokas and Morse stated that “[t]he Métis have subsequently been merged organizationally and in relation to both collective and individual identities for all essential purposes for those two [now three] joint Dene-Métis Nations outside of the fairly narrow continuing role of the Indian Act.”² Arguably, this conclusion may be true regarding the Métis in-

volvement in the Gwitch’in and Tlicho claims, but with due respect it is not accurate with regard to the Métis involvement in the Sahtu claim.

Unlike the Métis in the Gwitch’in and Tlicho claims, the Métis in the Sahtu agreement have maintained their separate organizational structures and identities.³ And unlike most treaties in Canada that only have Indian and Canada as parties, there are three distinct parties to the Sahtu region treaty: the Métis communities (acting collectively), the Dene communities (acting collectively), and Canada. Although the Sahtu Tribal Council represents both Dene and Métis Aboriginal communities for the purposes of implementing the land claims agreement, the Métis communities are politically organized separately with their own land management corporations.

Moreover, the Directors of the Sahtu Secretariat include leaders from the separate Métis land corporations and Dene land corporations. Arguably, this is the only completed modern land claims agreement where the Métis and Canada are in a direct treaty partnership as separate political entities, notwithstanding that the agreement was entered into jointly with the Dene community.⁴ Although most of the provisions of the agreement for the purposes of certain co-management boards do not create separate boards for the Métis and Dene, the Métis have maintained a distinct political and social status within the region that finds expression within the joint Sahtu Tribal Council.

The 1993 agreement provides that the Dene of the Sahtu region cede their rights to the territory in exchange for specific rights and special benefits such as financial compensation, land, rights to collect resources on the ceded territory, and the right to participate in decision making for the land, and they reserve the right to negotiate self-government agreements. In consideration of these benefits, the Dene agree to forego “all their claims, rights or causes of action whether collective or individual which they ever had, now have or may hereafter have under, arising out of or by reason of any obligations made in to them in Treaty 11.”⁵ Likewise, the agreement also states in

regard to the Métis in particular that they too must forego all their claims “by reason of ... any Imperial or Canadian legislation or Order-in-Council or other action of the Governor in Council in relation to the Métis or half-breed scrip or money for scrip.”⁶ Arguably a waiver of any potential claims for outstanding scrip would be necessary only if there is a credible argument that could be made that the original scrip process was equally ineffective in extinguishing the “Indian title” of the Métis in the Treaty 8 and 11 territory where scrip was issued.

In addition to the Sahtu Métis treaty, Canada and the Northwest Territory Métis Nation (NWTMN) have recently entered into an Agreement-in-Principle – an important preliminary step under the comprehensive claims policy. This agreement, if it follows through to conclusion, would be the first stand-alone modern treaty with a Métis group where the only parties to the treaty are a Métis representative political authority and Canada.

This claim is contentious as the Akaitcho Dene, who occupy overlapping territory claimed by the NWTMN, has filed a lawsuit against Canada which questions the legitimacy of the MWTMN claim. In addition, the North Slave Métis Alliance (NSMA), which represents Métis on the North shore, have also filed a lawsuit claiming that Canada was obligated to consult with them about their negotiations with the NWTMN. Interestingly, Canada has refused to negotiate a comprehensive claim with the North Slave Métis Alliance, notwithstanding the fact that the NSMA has obtained judicial recognition that it has established a *prima facie* case that it is a “distinct Métis community which developed following contact with Europeans but also pre-dates the effective establishment of control by the Crown in the Great Slave Lake area.”⁷ It is not clear why Canada is prepared to accept the NWTMN claim and not negotiate with the NSMA.

Indeed, in the Statement of Claim filed by the Akaitcho Dene against the validity of the NWTMN Agreement-in-Principle, they argue that it is not possible to reconcile the two positions: “Akaitcho Dene demand an explanation from Canada as to why it has taken diametrically opposed positions in the very similar circumstances of those cases and in this matter.”⁸

Notwithstanding these ongoing contentious issues, the experience in the Northwest Territories demonstrates that the federal government is prepared to include Métis communities as eligible for the comprehensive claims process.

Implications for Southern Canada

The federal government has concluded one land claim agreement in Northern Canada with Métis

political collectives, and is currently in negotiations with another Northern Métis political collective to settle a comprehensive land claim agreement. This willingness to engage with Métis communities in the North, however, does not exist in relation to Métis claims south of 60°.

Jean Teillet summarizes the current position of federal and provincial governments to claims by Métis as follows:

The Métis situation has become a game of denial. The federal and provincial Crowns have made the following claims about the Métis: they are not within either federal or provincial jurisdiction; there is no definition of who they are; the Crowns do not know where Métis communities are; and Métis corporate organizations cannot defend Métis rights or be consulted.⁹

The federal denial of legislative jurisdiction or responsibility over the Métis has been a constant refrain resulting in Métis Peoples falling through the cracks. Since the federal Crown is engaged in claims negotiations with Métis communities in the Northwest Territories, the only possible legitimate explanation for the denial of claims in the South is the question of jurisdiction, as it is the only factor that is different between claims in the North and claims in the South.

The courts have consistently stated that the rights of the Aboriginal Peoples, including the Métis, under s. 35 of the Constitution are independent of questions of jurisdiction and are thus not a valid basis for distinguishing Métis claims in the south from the North. Moreover, as the court noted in *Haida Nation v. British Columbia*, the “honour of the Crown requires that these rights be determined, recognized and respected.”

In any event, the *Daniels* case recently decided by the Federal Court of Appeal has clarified that Métis fall within federal jurisdiction, so the excuse that the federal government is not responsible for dealing with Métis claims based on lack of jurisdiction is no longer available. There are Métis claims south of 60° to lands and resources that are arguably no different in kind than those in the North and should be equally acknowledged. Consequently, the existence of Métis specific modern treaties in the North offers a solid precedent for the promotion of Métis treaties in other parts of Canada.

Federal Reform Proposals

There is room for cautious optimism. For example, in 2015 Douglas Eyford was appointed as Special Representative on behalf of the federal government. He was mandated with the task to review and examine



Photo Credit: Brendan Forward

Silent Crowd, Brendan Forward

Canada's interim comprehensive land claims policy. Importantly, Eyford states:

Despite succeeding more than 30 years ago in their quest for constitutional recognition, the Métis regard Canada as having failed to accept their status as an Aboriginal group with constitutionally protected rights. The 1986 Policy, like its predecessors, is silent on Métis rights, and the Interim Policy does not specifically address their interests either. Any rights recognition obtained by the Métis has been in the courts, and there have been several successes in recent years.¹⁰

The Eyford report made two important recommendations concerning the Métis. The relevant recommendations state that "Canada should develop a reconciliation process to support the exercise of Métis section 35(1) rights and to reconcile their interests" and that "Canada should establish a framework for the negotiations with the Manitoba Métis Federation to respond to the Supreme Court of Canada's decision in *Manitoba Métis Federation v. Canada...*"

Problematic, however, is the placement of these recommendations within the report. The discussion of Métis options is addressed in the sub-section entitled "Reconciling Métis Rights Using Other Reconciliation Arrangements." This discussion of Métis arrangements falls within a larger discussion concerning other reconciliation arrangements which is explained as an alternative to modern treaties. This "alternative option" is explained as necessary because full modern treaties may not be a realistic option for many Aboriginal groups. This report and the explicit placement of the discussion of Métis options suggests that the federal government is hesitant to recognize the Métis right to participate in processes that would lead to constitutionally recognized modern treaties.

Indeed, this contentious issue arose in the recent negotiations between Canada and the NWTMN. In order to get an Agreement-in-Principle finalized, the parties had to agree to defer the issue of whether the final agreement would be a constitutionally protected treaty.¹¹ This hesitancy by the federal government is disconcerting and is reminiscent of the discriminatory colonial policy that denied the political existence of Métis distinct communities, let alone the right to assert Aboriginal claims as Métis.

However, it has been pointed out by legal counsel for a Métis organization that such a restriction may not necessarily result in a lack of constitutional status for such an agreement. One could argue that regardless of the label given to the agreement, the courts may still declare such an agreement as a treaty based on the language of s. 35 (3) of the Constitution.

However, I am not so optimistic.

If the parties mutually and expressly state, as has been the case with some other recent agreements, that the agreement is not to be construed as a treaty for the purposes of s.35, it would be difficult to argue that a court would decide to go against such express wishes of the parties and characterize it otherwise.

It is significant that following the release of the Eyford report, Tom Isaac was appointed as the Ministerial Special Representative to lead engagement with Métis by the Bernard Valcourt, former Minister of Aboriginal Affairs and Northern Development. His mandate to map out a process for dialogue on Section 35 Métis rights has been seen as a positive development for the Métis. Yet, again, I worry that, given the nature of the recommendations in the Eyford report, Isaac may follow its lead and develop framework recommendations for a Métis process "outside the comprehensive land claims policy" which would continue to exclude Métis communities from processes that currently apply and are available to First Nations, thus resulting, arguably, in a separate process that would essentially be an inferior non-constitutionally protected treaty process simply because the Aboriginal party involved is Métis. This is discrimination hiding as accommodation and indirectly reinforces the historical injustice of denying the separate political existence of distinct Métis communities.

The Liberal party in its 2015 pre-election campaign made certain promises in relation to Métis-specific issues that mirrored the Eyford recommendations. Campaign documents stated that a Liberal government would "Work with Métis people, as well as the provinces and territories, to establish a federal claims process that sets out a framework to address Métis rights protected by s. 35 of the Constitution Act, 1982, recognize Métis self-government, and resolve outstanding Métis claims against the Crown."¹² This language is very positive but, against the backdrop of the Eyford report, remains ambiguous.

If anything, it seems to mirror the language of the Eyford report, which was commissioned under the previous Conservative government. If this is the case, the Liberal government may not be promising anything different than the Conservatives were already promising. However, there is a chance that Métis politicians may wish to highlight this concern and use it to leverage an actual commitment that the Métis should not be discriminated against and kept from full inclusion in the comprehensive claims process or be limited to the use of "other reconciliation processes" as Eyford describes it. Of course, other alternative arrangements should be made available to address circumstances where a modern treaty is

not practical or possible, but the Métis should not from the very start be limited to only “other reconciliation processes.”

Conclusion

As colonized peoples who are Indigenous to territories in North America, there is no logical or compelling reason to distinguish Métis rights from First Nation rights.

Colonial imposed racial concepts used to manage the civilization of the peoples Indigenous to North America was contradictory to Métis political independence and fueled federal policy of not recognizing independent Métis communities nor engaging in treaty relations. However, the factual existence of Métis polities resulted in inconsistent application of this policy of denial. Exceptions are evident in the history of Métis-colonizer relations. There is an extensive history of treaty making beginning with the HBC/Selkirk Treaty of 1815, the Métis-United States treaties in the 1840s/50s, the *Manitoba Act* Treaty of 1870, and the Fort Frances Métis Adhesion to Treaty Three of 1875. Moreover, there are modern treaties with Métis communities and ongoing negotiations with Métis communities in the Northwest Territories.

There is no logical basis to distinguish between Métis claims processes and First Nations claims processes. As the Supreme Court of Canada stated in *Powley*, the Métis Peoples possess “full status as distinctive rights-bearing peoples whose own integral practices are entitled to constitutional protection under s. 35(1).”¹³ Métis are entitled to recognition and reconciliation requires that the injustice of the past should not haunt the present. Métis should have a right to participate in the comprehensive claims process throughout Canada. The Northwest Territories Métis claims, for reasons described above, cannot be seen as a legitimate exception to a policy that excludes the Métis as a general rule. ●

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Editor’s note: This article was written before the Supreme Court of Canada’s landmark decision in *Daniels v. Canada*.

Endnotes

- 1 The author would like to thank the University of Alberta Press for permission to publish this short extract from a longer book chapter on Métis Treaties in Canada to be published in the second edition of *Métis in Canada*.
- 2 Robert K. Groves and Bradford W. Morse, “Constituting Aboriginal Collectivities: Avoiding New Peoples ‘In Between,’” (2004). 67 *Sask. L. Rev.* 257.
- 3 Even the titles of the relevant land claims exemplify an important distinction between the claims as the Sahtu agreement explicitly names and describe the Métis as a separate entity from the Sahtu Dene whereas in the case of the Gwitch’in and Tlicho claims, there is no separate reference for the Métis in the Agreement title. However, this does not mean that the Métis and Dene live in separate communities geographically. Dene live side by side in the communities of Fort Good Hope, Norman Wells and Tulita along the Mackenzie river.
- 4 Arguably, this situation is akin to a modern day version of the Métis adhesion to Treaty 3 with the result that the Métis, as a distinct political community, became treaty partners with the Crown under the same treaty with their Anishinaabe relations.
- 5 *Sahtu Dene and Métis Comprehensive Land Claim Agreement, Volume 1*, (Ottawa: Public Works, 1993), s.3.1.12.
- 6 *Ibid.*
- 7 *Enge v. Mandeville*, [2013] 4 C.N.L.R. 50 (NWT Supreme Court) at para. 218.
- 8 *Akaiicho Dene v. Canada*, Statement of Claim at para. 48.
- 9 Jean Teillet, “Federal and Provincial Crown Obligations to the Métis” in Wilson and Mallet, *Métis – Crown Relations* (Toronto: Irwin Law, 2008) at 88.
- 10 Douglas Eyford, *A New Direction: Advancing Aboriginal and Treaty Rights* (Ottawa: Government of Canada, 2015) at 44.
- 11 NWTMN Agreement-in-Principle, *supra*, note 16 at s. 2.2.5.
- 12 Liberal Party of Canada, *Real Change: Advancing and Achieving Reconciliation for the Métis Nation* (2015). Online: <https://www.liberal.ca/files/2015/09/Advancing-and-achieving-reconciliation-for-the-Métis-people.pdf>
- 13 *R. v. Powley*, [2003] 2 S.C.R. 207 at para. 38.

