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Date: 20240328

Dockets: T-611-23
T-589-23

Citation: 2024 FC 487

Ottawa, Ontario, March 28, 2024

PRESENT: Mr. Justice Sébastien Grammond

Docket: T-611-23

BETWEEN:

METIS SETTLEMENTS GENERAL COUNCIL

Applicant

and

THE MINISTER OF CROWN-INDIGENOUS RELATIONS AND THE MÉTIS NATION OF ALBERTA ASSOCIATION

Respondents

Docket: T-589-23

AND BETWEEN:

FORT MCKAY MÉTIS NATION ASSOCIATION

Applicant

and

THE MINISTER OF CROWN-INDIGENOUS RELATIONS AND MÉTIS NATION OF ALBERTA ASSOCIATION

Respondents

JUDGMENT AND REASONS

Table of Contents

[1] Canada and the Métis Nation of Alberta [MNA] entered into an Agreement to recognize the self-government of a collectivity called the "Métis Nation within Alberta". The Agreement recognizes the MNA as the exclusive representative of the Métis Nation within Alberta, in particular for the exercise of its rights protected by section 35 of the *Constitution Act, 1982*.

[2] Canada did not consult the applicants before entering into the Agreement. The applicants each assert section 35 rights independently of the MNA. They say that they are affected by the Agreement, because it includes them against their will in the definition of the Métis Nation within Alberta and therefore grants the MNA the exclusive power to assert their section 35 rights vis-à-vis Canada. They applied for judicial review of the Agreement, based on Canada's breach of its duty to consult them.

[3] I am granting their applications. In the ordinary meaning of its terms, the Agreement defines the Métis Nation within Alberta as including the applicants. Consequently, it grants the MNA a monopoly over the applicants' asserted section 35 rights. What it exclusively grants to the MNA, it necessarily withholds from the applicants. It prevents the applicants from negotiating separately with Canada for the recognition of their rights, effectively forcing them to assert their rights before the courts. These effects, which are far from speculative, trigger Canada's duty to consult the applicants before entering into the Agreement. Canada's complete lack of consultation with the applicants requires me to quash the offending provisions of the Agreement.

I. Background

[4] For a proper understanding of the issues that arise in this case, it is necessary to begin by setting out the current state of the law with respect to the constitutionally-protected rights of the Métis. I will then briefly describe the parties to this case, which are organizations that seek to represent various groups of Métis in Alberta. Next, I will provide a brief account of the

negotiations that culminated with the signing of the Agreement that is the target of the present applications.

A. *Legal Background*

[5] Section 35 of the *Constitution Act, 1982* is at the heart of this case. Its first two paragraphs read as follows:

35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.	**35 (1)** Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.
(2) In this Act, aboriginal peoples of Canada includes the Indian, Inuit and Métis peoples of Canada.	**(2)** Dans la présente loi, peuples autochtones du Canada s'entend notamment des Indiens, des Inuit et des Métis du Canada.

(1) Section 35 Rights

[6] The aboriginal rights recognized by section 35 include harvesting rights, such as the right to hunt, trap and fish or the right to harvest wood: *R v Van der Peet*, [1996] 2 SCR 507; *R v Sappier; R v Gray*, 2006 SCC 54, [2006] 2 SCR 686 [*Sappier*]. Depending on the circumstances, these rights may be exercised for commercial purposes: *R v Gladstone*, [1996] 2 SCR 723. Aboriginal rights also include aboriginal title, which is a right to exclusive possession of land: *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot'in Nation*]. Legislation that infringes upon aboriginal rights may be declared of no force or effect, unless the government demonstrates its justification: *R v Sparrow*, [1990] SCR 1075 [*Sparrow*]. Although

aboriginal rights enjoy constitutional protection, proving them in court is often a long, costly and cumbersome process.

[7] Large-scale natural resource extraction activities may affect the exercise of aboriginal rights. However, given the difficulty of proving these rights, a timely remedy is often elusive. To give practical effect to section 35 rights in such circumstances, the Supreme Court of Canada held that governments have a duty to consult Indigenous peoples whose section 35 rights may be affected by such projects: *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*]. The precise contours of this duty are described below. One of its salient features is that it arises as soon as an Indigenous people credibly asserts an aboriginal right, without the need to make full proof. It also bears noting that proponents of natural resource extraction projects often conclude impacts and benefits agreements with Indigenous peoples whose section 35 rights will be affected by their projects.

[8] For the last 30 years, it has been the policy of the government of Canada to acknowledge that section 35 encompasses some form of self-government. Courts, however, have not made extensive pronouncements on the existence and scope of an aboriginal (or "inherent") right to self-government recognized by section 35. Recently, the Supreme Court of Canada declined to address the issue in the *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 [the *Bill C-92 Reference*]. For the purposes of the present applications, I do not need to reach any definitive conclusions as to the scope of section 35 as it pertains to self-government. I need only acknowledge that the matter involves initiatives by the executive and legislative branches of the state to recognize self-government.

(2) Identifying the Holders of Section 35 Rights

[9] Although they are often exercised by individuals, aboriginal rights recognized by section 35 are generally understood as being collective in nature and as belonging to a group: *Sparrow*, at 1112; *Sappier*, at paragraph 31; but see the more nuanced discussion in *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at paragraphs 33–36, [2013] 2 SCR 227.

[10] For a long time, the only form of Indigenous government recognized by the federal government was the Indian band, a form of local government created by the *Indian Act*, RSC 1985, c I-5. Most Indian bands are now known as First Nations. Largely for practical reasons, it has often been assumed that local First Nations are the holders of aboriginal rights recognized by section 35. Thus, when the duty to consult laid out in *Haida Nation* is triggered, the usual practice is to conduct consultations with the potentially-affected First Nations. Nevertheless, courts have sometimes alluded to the possibility that it is for an Indigenous people's legal system to determine who the proper holder of aboriginal rights is: *William v British Columbia*, 2012 BCCA 285 at paragraphs 132–157, aff'd by *Tsilhqot'in Nation*, without discussion of this point.

[11] Until recently, the federal government did not pay attention to Métis claims and did not even recognize that the Métis fell under its constitutional jurisdiction. For this reason, there is no legislation similar to the *Indian Act*. While the enactment of section 35, in particular its paragraph (2), was a victory for the Métis, issues of definition and representation remained

unsettled. There was no accepted definition of which individuals could exercise Métis rights and of which Métis collectives were the holders of section 35 rights.

[12] The Supreme Court of Canada brought some clarity to these issues in *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207 [*Powley*]. In particular, it found that it was sufficient for individual claimants to show that they were members of a "Métis community", defined as "a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life": *Powley*, at paragraph 12. It did not find it necessary to decide whether the Métis community at issue, located in and around Sault Ste. Marie, was part of a larger entity.

[13] In the wake of *Powley*, courts have begun to address the issue of what a Métis rights-holding community is. While the structure of the test for aboriginal rights tends to focus the inquiry on a localized community, courts in Saskatchewan and Manitoba have identified Métis communities at a regional level: *R v Laviolette*, 2005 SKPC 70 at paragraph 30; *R v Belhumeur*, 2007 SKPC 114 at paragraph 167; *R v Goodon*, 2008 MBPC 59 at paragraphs 46–48. In *R v Hirsekorn*, 2013 ABCA 242 at paragraphs 62–64 [*Hirsekorn*], the Alberta Court of Appeal accepted that Métis rights could be asserted on a regional basis, but declined to decide whether there is only one Métis community spanning the Prairie provinces or several, smaller regional communities. The case was decided on another issue. In *R v Boyer*, 2022 SKCA 62, the Saskatchewan Court of Appeal ordered a new trial to allow the defendants to argue that a Prairie-wide Métis community can assert section 35 rights.

[14] The Supreme Court in *Powley* also discussed the need for a better definition of individual membership in Métis communities. While it did not purport to lay out a rigid definition, it emphasized "three broad factors as indicia of Métis identity for the purpose of claiming Métis rights under s. 35: self-identification, ancestral connection, and community acceptance" (at paragraph 30).

B. *Factual Background*

[15] I can now turn to a description of the parties and the manner in which they asserted their section 35 rights and negotiated with Canada for their recognition.

(1) The Parties

[16] The origins of the Métis Nation are well known. In *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 at paragraph 5, [2011] 2 SCR 670, the Supreme Court of Canada provided the following summary:

> The Métis were originally the descendants of eighteenth-century unions between European men — explorers, fur traders and pioneers — and Indian women, mainly on the Canadian plains, which now form part of Manitoba, Saskatchewan and Alberta. Within a few generations the descendants of these unions developed a culture distinct from their European and Indian forebears. In early times, the Métis were mostly nomadic. Later, they established permanent settlements centered on hunting, trading and agriculture. The descendants of Francophone families developed their own Métis language derived from French. The descendants of Anglophone families spoke English. In modern times the two groups are known collectively as Métis.

[17] Because Parliament did not enact comprehensive legislation regarding the Métis and did not impose membership criteria and local political structures as it did for First Nations, the Métis were left to organize themselves politically. They did so at the local, regional and provincial level and, beginning in 1983, at the national level. Three organizations representing Métis are parties to the present proceedings.

(a) *Métis Nation of Alberta*

[18] The Métis Nation of Alberta [MNA] was founded in 1932 under the name of *Association des Métis d'Alberta et des Territoires du Nord-Ouest*, and later the Métis Association of Alberta. One of the MNA's early achievements was to secure a land base for the Alberta Métis, then known as "colonies" and now as "Settlements". These Settlements and their governance are described in the next section.

[19] Generally speaking, the MNA represents its membership politically, in particular in their relations with the governments of Canada and Alberta. It also offers a range of services to Métis individuals, for example with respect to health, housing, and child and family services. The MNA has a provincial governing structure, regional districts and "locals". The MNA is also a governing member of the Métis National Council [MNC], an organization representing the Métis Nation at the national level.

[20] After the Supreme Court issued its decision in *Powley*, calling for more structured and objective criteria for membership in Métis communities, Canada provided the MNA with funding to develop a registry of Métis citizens. The MNA is the only organization in Alberta that

received such funding. The MNA currently has approximately 57,000 registered members. The Government of Alberta relies on the MNA registry as one manner of identifying Métis persons who have harvesting rights protected by section 35 of the *Constitution Act, 1982*.

(b) *Metis Settlements General Council*

[21] Alberta is the only Canadian province to have set aside a land base for its Métis population, through legislation enacted in the 1930s. As mentioned above, it created what was then known as Métis "colonies". The Alberta Federation of Métis Settlements was created in the 1970s to represent the colonies' interests. In the 1980s, discussions with the Government of Alberta led to the signing of the Métis Settlements Accord and an overhaul of the legislation, the main piece of which is the *Metis Settlements Act*, RSA 2000, c M-14.

[22] The *Metis Settlements Act* sets aside land for eight Métis Settlements. Each Settlement is governed by an elected council and is represented in the Metis Settlements General Council [MSGC], the applicant in one of the present proceedings. The MSGC is the successor to the Alberta Federation of Métis Settlements. The legislation grants powers to both the MSGC and each Settlement council, dealing broadly with the management of Settlement land.

[23] Sections 74–95 of the *Metis Settlements Act* regulate membership in the Métis Settlements. Despite certain differences, the criteria for membership in the MNA and in a Métis Settlement are broadly similar. For example, status Indians are excluded in both cases. As a result, one can be a member of both the MNA and a Métis Settlement. At the hearing, the parties

informed me that a large proportion of Settlement members are also registered with the MNA, although the evidence does not reveal a precise figure.

[24] According to the *Métis Harvesting in Alberta Policy*, effective as of 2019, the Government of Alberta recognizes membership in a Métis Settlement as sufficient proof of Métis self-identification for the purposes of exercising aboriginal rights protected by section 35.

[25] The parties have made a number of assertions regarding the links, or lack thereof, between the Métis Nation within Alberta and the Métis Settlements or between the MNA and MSGC. For the purposes of deciding the MSGC's application, it is not necessary for me to assess the nuances of the historical relationship between the parties.

(c) *Fort McKay Métis Nation Association*

[26] The Fort McKay Métis Nation describes itself as the successor to a historic Métis community that arose when French Canadian fur traders were present in northeastern Alberta in the late 18th and early 19th centuries. The community is located approximately 45 km north of Fort McMurray. It currently has 116 members, mainly from three families.

[27] From the 1990s, Fort McKay Métis Nation was represented by two successive MNA Locals, Local 122 and then Local 63. In the early 2010s, however, disagreements arose regarding membership, representation and consultation issues. Fort McKay Métis Nation established an organization independent from the MNA, now called the Fort McKay Métis Nation Association [FMMNA or Fort McKay], one of the applicants in these proceedings. In 2018, the Fort McKay

Métis Nation decided to dissolve MNA Local 63 and to completely dissociate itself from the MNA. This led to protracted litigation in the Alberta courts between the MNA and FMMNA, which need not be described in detail here. The evidence suggests that there are other local Métis communities in a similar situation, although they are not parties to the present applications.

(2) The Genesis of the Impugned Agreement

[28] In *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 SCR 99 [*Daniels*], the Supreme Court declared that the Métis are comprised within Parliament's jurisdiction over "Indians, and Lands reserved for the Indians" in section 91(24) of the *Constitution Act, 1982*. In the wake of that decision, Canada began negotiating for the recognition of Métis rights under federal jurisdiction, including rights to self-government.

[29] In anticipation of the *Daniels* decision, Canada commissioned Mr. Thomas Isaac to meet with various Métis organizations and other stakeholders to "map out a process for dialogue on Section 35 Métis rights." In his report, among other things, Mr. Isaac recommended that Canada engage with the Métis in the development of a section 35 Métis rights framework. For this purpose, he recommended that "[t]he MNC and its Governing Members [including the MNA], along with the Métis Settlements and the Métis Settlements General Council should be core to any federal engagement on these matters." He also suggested that other organizations who assert section 35 rights should be invited to participate in the dialogue.

(a) *The MNA's Negotiations with Canada*

[30] The MNA and Canada began negotiations that first led to a Memorandum of Understanding, signed on January 30, 2017, which committed the parties to exploratory discussions. Interestingly, it contains the following provision:

> The Parties recognize the unique history and jurisdictions of the Métis Settlements General Council and the eight Alberta Métis Settlements (collectively the "Métis Settlements"), as defined by the *Metis Settlements Act*, RSA 2000, c M-14, as well as the importance of having the Metis Settlements' participation in a process to advance reconciliation, and will, when and where appropriate, identify mutually agreeable mechanisms for the Métis Settlements to contribute to or potentially participate in the exploratory discussion table.

[31] As will later become clear, the aspiration expressed in this provision was not realized.

[32] On November 16, 2017, the parties entered into a Framework Agreement setting a roadmap for comprehensive negotiations addressing a wide range of issues. The Framework Agreement is based on the premise that the MNA represents an entity called the "Métis Nation within Alberta," not precisely defined.

[33] On June 27, 2019, the MNA and Canada signed the Métis Government Recognition and Self-Government Agreement. Section 1.01 of this agreement contains the following definition:

> "Métis Nation within Alberta" means the Metis collectivity in or of the Province of Alberta that is comprised of the Members of the MNA, or, as the case may be, the Citizens of the Métis Government, who collectively hold the right to self-government as set out in this Agreement;

[34] This agreement sets out a process leading to the federal legislative recognition of a government for the Métis Nation within Alberta. It is not necessary to describe all the components of this process. It is sufficient to mention that it includes the development of a Constitution for the Métis Government and the enactment of legislation implementing a future intergovernmental relations agreement.

(b) *The MSGC's Negotiations with Canada*

[35] On its part, the MSGC initiated discussions with the Department of Crown-Indigenous Relations in the summer of 2016. In 2017, in the course of these discussions, the Senior Assistant Deputy Minister expressed a preference for a "province-wide" solution. The MSGC reacted vigorously to this proposal and asserted that the Métis settlements are holders of section 35 rights and that the MNA does not represent them.

[36] These discussions led to a Memorandum of Understanding dated December 14, 2017 and to a Framework Agreement dated December 17, 2018, aimed at developing a "government to government relationship". The process laid out by this agreement included "exploring the intent and scope of section 35 rights . . . of Settlement members", although Canada did not take a position regarding those rights. Moreover, the parties to the Framework Agreement recognize the following as a principle informing the negotiation of future agreements:

> 2.1.2 Recognition of the MSGC as the political governing body of the Metis Settlements, which is separate and apart from the Metis National Council and its affiliates, including the principle that MSGC is the appropriate government to engage with on collaborative policy development that affects the Metis Settlements.

[37] On a number of occasions during these discussions, the MSGC asserted to Canada that the Métis Settlements are "*Powley*-compliant", in the sense that they are communities holding section 35 rights, that they are not represented by the MNA and that Canada cannot recognize the MNA as the sole representative of the Alberta Métis for the purposes of section 35 rights.

(c) *Fort McKay Métis Nation's Assertions*

[38] Contrary to the MNA and MSGC, Fort McKay has not engaged in negotiations with Canada. Rather, it sought recognition from the Alberta government, mainly for the purposes of exercising section 35 harvesting rights, and consultation and accommodation.

[39] In this regard, Fort McKay was one of the communities Alberta recognized as a "historic and contemporary Métis community" for the purposes of its 2007 Métis Harvesting Policy.

[40] Moreover, Fort McKay sought recognition pursuant to Alberta's 2019 credible assertion process. In essence, to determine which Métis communities need to be consulted before approving resource extraction projects, Alberta conducts an advance review of evidence regarding the existence of a Métis community and its asserted aboriginal rights. The outcome of the process, however, does not constitute a final determination of rights. On February 13, 2020, Alberta's Department of Indigenous Relations recognized Fort McKay's credible assertion of aboriginal rights. The MNA is seeking judicial review of this decision in the Alberta Court of King's Bench, but the matter has apparently been kept in abeyance.

[41] Beginning in 2021, Fort McKay, together with other local Métis communities in Alberta, wrote to the Minister of Crown-Indigenous Relations to express concerns with the scope of the negotiations between Canada and the MNA. In particular, they reminded the Minister that the MNA did not represent them and could not claim authority over non-members. Fort McKay also provided the Minister with the evidence that was put forward in the Alberta credible assertion process.

(d) *The MNA's Constitution*

[42] In the summer of 2022, the MNA published the *Otipemisiwak Métis Government – The Government of the Métis Nation within Alberta* [the MNA Constitution], which contained an expanded definition of "Métis Nation within Alberta":

> 2.1 The Métis Nation within Alberta includes all of its Citizens, all Métis who live within Alberta, and the Métis communities of the Territories of the Métis Nation within Alberta.
>
> 2.2 The Métis Nation within Alberta is an indivisible, indissoluble, and united Métis collectivity that is an inseparable and distinct part of the Métis Nation. This section of the Constitution cannot be amended.

[43] Thus, the Métis Nation within Alberta includes not only members of the MNA (or "Citizens"), but all persons who are considered Métis, irrespective of their registration. Beyond individuals, the definition also includes "communities", which are associated with "Territories". Chapter 3 of the Constitution describes five Territories, which are large regions that, taken together, cover the whole of Alberta. Moreover, section 12.5 states that the Otipemisiwak Métis Government, which will succeed the MNA, is the only organization with the mandate and authority to represent the Métis Nation within Alberta.

[44] Chapter 19 of the Constitution deals with the Métis Settlements. It contains the following provisions:

> 19.3 The Métis Settlements exist for the benefit of all Métis in Alberta and are an integral part of the Métis Nation within Alberta.
>
> . . .
>
> 19.6 All Settlement Members who are eligible may register as Citizens of the Métis Nation within Alberta.

[45] On September 26, 2022, the MSGC wrote to the Minister of Crown-Indigenous Relations to express deep concerns regarding the MNA's Constitution, especially the provisions reproduced above asserting the MNA's right to represent all Métis living in Alberta and those concerning the Métis Settlements. Fort McKay and seven similarly situated local Métis communities also wrote to the Minister to express similar concerns.

[46] On November 2, 2022, the MNA's president wrote an open letter to Métis Settlement members regarding the proposed MNA Constitution. It included a statement that "[n]othing in our Constitution impacts the rights, jurisdiction, or lands of the Métis Settlements as recognized in Alberta's *Metis Settlements Act* and related legislation" and an invitation for the Métis Settlements to join the Métis Government created by the Constitution. The Constitution was officially ratified by the MNA's members in November 2022.

(e) *The 2023 Agreement*

[47] The MNA and Canada signed the agreement targeted by the present applications for judicial review on February 24, 2023. It is styled *Métis Nation Within Alberta Self-Government Recognition and Implementation Agreement* [the Agreement].

[48] MSGC and Fort McKay received two weeks' notice of the impending signature of the Agreement, by way of a letter dated February 10, 2023 from the Senior Assistant Deputy Minister of Crown-Indigenous Relations. I will return to this letter later in these reasons.

[49] The Agreement is a binding contract. However, it does not purport to be a definitive statement of the relationship between Canada and the Métis Nation within Alberta, as represented by the MNA. Rather, it envisions the conclusion of a treaty. The Agreement is not itself a treaty.

[50] I will not endeavour to provide a detailed analysis of the contents of the Agreement. Rather, I will summarize the features that are directly relevant to the present matter. In broad strokes, the Agreement can be described as a recognition of certain aspects of the Métis Nation within Alberta's right to self-determination and self-government. In this regard, Chapter 8 provides for the recognition of "internal" aspects of self-government, including citizenship, political structures, the selection of leaders and financial management. The intention appears to be that other aspects of self-government will be recognized when a treaty is negotiated. Chapter 11 provides that legislation will be introduced in Parliament, before any treaty is

concluded, recognizing the Métis Nation within Alberta's right to self-determination and self-government and confirming that the Métis Government (in effect, the MNA or its successor) is exclusively mandated to represent the Métis Nation within Alberta. Moreover, the legislation will provide that any treaty is given effect upon its signature.

[51] Of particular importance for the present matter is the definition of Métis Nation within Alberta. In the Agreement, it includes not only registered citizens of the MNA, but also "Métis communities", which may be comprised of citizens and non-citizens. Moreover, section 6.06 grants the Métis Government (or the MNA) a right of exclusive representation of the Métis Nation within Alberta, with respect to self-government generally (not only its "internal" aspect), consultation and accommodation regarding section 35 rights and "outstanding collective claims", in particular those related to the scrip system. These provisions will be analyzed in detail in a later part of these reasons.

(3) Bill C-53

[52] Pursuant to the promise made in the Agreement, the Minister of Justice tabled Bill C-53 in Parliament on June 21, 2023. Its long title, *An Act respecting the recognition of certain Métis governments in Alberta, Ontario and Saskatchewan, to give effect to treaties with those governments and to make consequential amendments to other Acts*, reveals, in reverse order, the Bill's two main components.

[53] First, sections 5 to 7 provide for the statutory validation of treaties to be concluded between Canada and certain Métis governments. Other than the fact that they contemplate the

validation of future treaties instead of treaties that have already been signed, these provisions closely follow the language used by Parliament to validate previous treaties; see, for example, the *Nisga'a Final Agreement Act*, SC 2000, c 7; or the *Nunavik Inuit Land Claims Agreement Act*, SC 2008, c 2.

[54] Second, sections 8, 8.1 and 9 provide for the recognition of Métis governments. In particular, subsection 8(1) does not depend on the conclusion of any treaty. It states that

8 (1) The Government of Canada recognizes that a Métis government set out in column 1 of the schedule is an Indigenous governing body that is authorized to act on behalf of the Métis collectivity, including its citizens, set out in column 2 opposite that Métis government and that the Métis collectivity holds the right to self-determination, including the inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act, 1982*.	**8 (1)** Le gouvernement du Canada reconnaît que le gouvernement métis dont le nom figure dans la colonne 1 de l'annexe est un corps dirigeant autochtone autorisé à agir pour le compte de la collectivité métisse, y compris ses citoyens, dont le nom figure dans la colonne 2 en regard de ce gouvernement et que cette collectivité est titulaire du droit à l'autodétermination, y compris le droit inhérent à l'autonomie gouvernementale reconnu et confirmé par l'article 35 de la *Loi constitutionnelle de 1982*.

[55] In the schedule to the Bill, the MNA is listed as a Métis government in column 1, and the corresponding Métis collectivity in column 2 is the Métis Nation within Alberta.

[56] At the time of writing, Bill C-53 has received second reading in the House of Commons. It was also studied and amended by the Standing Committee on Indigenous and Northern Affairs.

II. Analysis

[57] I am allowing the applications and quashing the offending provisions of the Agreement. I find that the Agreement defines the Métis Nation within Alberta in a manner that includes the applicants against their will and that the exclusive powers of representation it gives the MNA will necessarily affect the applicants' asserted section 35 rights. Therefore, Canada had a duty to consult the applicants before signing the Agreement. Instead of consulting, however, Canada kept the applicants in the dark and provided inaccurate information regarding the scope of the Agreement. This cannot count as consultation.

[58] In the following pages, I will begin by explaining the concept of recognition, which is a recurring theme of this case. I will then address an objection to the jurisdiction of the Court. Next, I will describe the framework for the analysis of claims based on an alleged failure to comply with the duty to consult. I will apply this framework to the facts of the case, first by showing that a duty to consult was triggered, then by showing that no meaningful consultation took place. Lastly, I will determine the appropriate remedy.

[59] As they raise substantially the same issues, the MSGC's and Fort McKay's applications will be analyzed together. The MSGC also made submissions regarding Canada's duty to negotiate honourably. Given that I can dispose of the case based on the duty to consult, it is not necessary to address these submissions.

A. *Recognition*

[60] The Agreement at issue in this matter is styled a “recognition” agreement. In its submissions, the MNA emphasized this feature of the Agreement and sought to derive certain legal consequences from it. It is therefore useful to clarify the meaning of this concept at the outset of the analysis.

[61] In its broadest legal sense, recognition means ascribing legal consequences to something that one does not create or giving effect to a legal situation that finds its origin in a different legal system. Words such as “pre-existing” or “inherent” are often used to convey this idea.

[62] Two dimensions of recognition are present in the Agreement. First, section 35 rights, most importantly self-government, are said to be inherent, in the sense that they exist independently of their recognition by the Agreement. The Agreement recognizes them and sets out certain modalities of their implementation, but does not create them. Second, Indigenous communities pre-exist legislation that grants them rights or status. In this sense, recognition is the process by which the state chooses the Indigenous communities whose rights it will acknowledge, as well as the identity of the bodies the state will acknowledge as representing them. In both cases, by resorting to the legal technique of recognition, the Agreement is based on the idea that Indigenous communities and their rights find their legitimacy in Indigenous legal orders instead of Canadian law.

[63] Usually, courts recognize rights or legal situations, while the legislative and executive branches of the state create them. Recently, however, Parliament has adopted legislation that recognizes self-government, instead of creating Indigenous governments and delegating discrete powers to them: *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24, at s 18; see also the preamble to the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14. The Agreement at issue in this case uses the same legal technique. In the *Bill C-92 Reference*, at paragraphs 77–78, the Supreme Court noted that the enactment of recognition legislation may provide a solution that is quicker and broader in scope than asking the courts to recognize rights on a piecemeal basis. Proceeding by way of agreement offers similar benefits and formally integrates Indigenous agency in the process.

[64] While recognition is branded as progress, one must not forget that a significant aspect of the process is that the legislative or executive branches of the state choose which Indigenous communities or which rights to recognize. Given current realities, granting or withholding recognition has significant impacts on a community's ability to exercise its rights. Even though a community can theoretically resort to the courts, legislative and executive recognition is "very meaningful on the ground": *Bill C-92 Reference*, at paragraph 60.

[65] There are few legal rules governing recognition of Indigenous peoples by the executive. The lack of a structured framework such as the one proposed by the Royal Commission on Aboriginal Peoples (*Report*, vol 2, recommendation 2.3.27) may give the impression that recognition is largely discretionary, like the recognition of one state by another in international law. In the Indigenous context, however, there may be circumstances in which recognizing rights

to one Indigenous community affects the exercise of another community's section 35 rights. To that extent, decisions concerning recognition are amenable to judicial review in the same manner as other decisions affecting section 35 rights.

B. *Jurisdiction of the Federal Court*

[66] I can now turn to the MNA's objection to this Court's jurisdiction to hear the present applications. Based on *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 SCR 765 [*Mikisew*], the MNA argues that the Agreement is inextricably intertwined with the legislative process, to which the duty to consult does not apply and over which the Court has no jurisdiction.

[67] The Attorney General concedes that this Court has jurisdiction to decide the present applications. In spite of this admission, however, I must satisfy myself that I have jurisdiction: *Deegan v Canada (Attorney General)*, 2019 FC 960 at paragraph 214, [2020] 1 FCR 411, aff'd 2022 FCA 158.

[68] In *Mikisew*, the Supreme Court of Canada held that the duty to consult does not apply to the adoption of legislation. Moreover, the Court stated that steps preliminary to the adoption of legislation, for example, policy development, discussions in Cabinet and the drafting process, would also be immune from the duty to consult: *Mikisew*, at paragraphs 34–40 (Karakatsanis J), 116–121 (Brown J), 160–168 (Rowe J). This immunity is meant to give effect to the separation of powers and the general principle that courts do not interfere with the inner workings of Parliament.

[69] The MNA seeks to bring the present application within this zone of immunity by pointing to the fact that the Agreement contemplates the introduction of implementing legislation, namely, Bill C-53. Hence, the Agreement would constitute a "policy choice" that precedes the enactment of Bill C-53 and that is covered by the *Mikisew* immunity.

[70] In my view, the MNA's submissions overstate the links between the Agreement and Bill C-53. It is true that the Agreement contemplates the introduction of legislation in Parliament. The Agreement, however, is a binding contract that has effect independently of Bill C-53. While the preamble of Bill C-53 references the Agreement, the proposed legislation does not give the Agreement the force of law. Instead, it will give the force of law to treaties that have not yet been negotiated. In addition, as noted above, Bill C-53 recognizes that the Métis Nation within Alberta holds the right to self-government recognized and affirmed by section 35 of the *Constitution Act, 1982*.

[71] The present applications, however, are aimed at components of the Agreement that have effect independently of the proposed legislation. As they will not be integrated in legislation, these components cannot be described as a preliminary phase of the legislative process that this Court is powerless to review. In this regard, it does not assist the MNA to argue that the Agreement is the result of a policy choice. That phrase was used in *Mikisew* to describe the earlier stages of the development of legislation (see, for example, paragraph 117, Brown J). However, this does not mean that anything that can be described as a policy choice is exempted from the duty to consult. In fact, the Supreme Court stated that the duty to consult can apply to "high-level managerial or policy decisions", some of which can certainly be described as "policy

choices": *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at paragraph 87, [2010] 2 SCR 650 [*Rio Tinto*].

[72] The potential effects on the applicants' aboriginal rights that are said to trigger the duty to consult flow mainly from section 6.06 of the Agreement. This provision grants the MNA the exclusive right to represent the Métis Nation within Alberta with respect to (1) its self-government; (2) the duty to consult; and (3) historic claims. Nothing in Bill C-53 deals with items (2) and (3). With respect to item (1), self-government, the Agreement provides for an immediate recognition of certain aspects of self-government, before a treaty is concluded and independently of the enactment of legislation. Thus, section 6.03 of the Agreement states that the Métis Nation within Alberta has the right to self-determination and self-government, and Chapter 8 makes more specific provisions for the implementation of certain areas of jurisdiction that can be described as "internal". These provisions have effect independently of legislation. In other words, they will be valid and binding even if Bill C-53 is never enacted. For this reason, a challenge to the Agreement is not tantamount to a challenge to Bill C-53.

[73] The MNA suggested that invalidating the Agreement would make the adoption of Bill C-53 impossible or would impermissibly interfere with the political debate regarding its adoption. The MNA, however, did not explain why the decision of this Court would prevent Parliament from enacting Bill C-53. While Parliament is free to enact legislation that the executive has contractually committed to introduce, it is also free to do so in the absence of such commitment or if the commitment is ineffective: *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at paragraphs 62–67, [2018] 3 SCR 189 [*Pan-Canadian Securities Reference*]. In

any event, the Court's jurisdiction to hear a matter cannot depend on speculation regarding its potential political impacts.

[74] In oral submissions, the MNA conceded that at least some parts of the Agreement are not connected to Bill C-53. It suggested, however, that the judicial review of these parts could take place only after Bill C-53 becomes law. The MNA did not provide any authority for this proposition and I do not see any.

[75] This Court has reviewed agreements-in-principle or other steps taken towards the negotiation of a comprehensive land claims agreement or what is often called a "modern treaty": *Sambaa K'e Dene First Nation v Duncan*, 2012 FC 204 [*Sambaa K'e*]; *Huron-Wendat Nation of Wendake v Canada*, 2014 FC 1154 [*Huron-Wendat*]; *Enge v Canada (Indigenous and Northern Affairs)*, 2017 FC 932 [*Enge*]. Over the last 50 years, the consistent practice has been that such agreements are implemented by legislation. This did not stop this Court from ensuring that the Crown complied with its duty to consult Indigenous groups that were not parties to the negotiation but which would have been affected by the outcome. Likewise, in the *Pan-Canadian Securities Reference*, the Supreme Court reviewed an intergovernmental agreement that formed part of a scheme that included legislation. As in the present case, significant components of the scheme were found in an agreement that had binding force independently of legislation. The Court was not restrained from reviewing the agreement simply because it included draft legislation.

[76] To find that the matter is justiciable, I do not need to decide whether the Minister's power to conclude the Agreement flows from the royal prerogative or the *Department of Crown-Indigenous Relations and Northern Affairs Act*, SC 2019, c 29, s 337. In both cases, the Minister is a federal board, commission or other tribunal within the meaning of section 2 of the *Federal Courts Act*, RSC 1985, c F-7.

[77] In oral submissions, the MNA made the more general point that the recognition of Indigenous groups, communities, rights-holders or governments is by definition not a justiciable matter or, at the very least, that courts should show considerable deference to governments in this regard. I acknowledge that historically, decisions made by Parliament or the executive have played a significant role in deciding which groups are recognized as Indigenous. Nevertheless, insofar as section 35 rights are at stake, courts may intervene in their role as guardians of the Constitution: *Bill C-92 Reference*, at paragraph 60. While recognition may be desirable, it is not immune from judicial review.

[78] In particular, cases such as *Sambaa K'e*, *Huron-Wendat* and *Enge* show that the duty to consult is triggered when the recognition of section 35 rights to one group potentially leads to the infringement of another group's section 35 rights. Most recently, the Alberta Court of Appeal held that decisions made by Alberta regarding a recognition process are justiciable, given that section 35 rights were at stake: *Métis Nation of Alberta Association v Alberta (Indigenous Relations)*, 2024 ABCA 40 at paragraph 39 [*MNA v Alberta*].

C. *The Duty to Consult*

[79] Having established that this Court has jurisdiction, we may now set out the law regarding the duty to consult, which underpins the applicants' case. In a series of cases beginning with *Haida Nation*, the Supreme Court of Canada required governments to consult and accommodate Indigenous peoples when they contemplate actions that may affect those peoples' aboriginal and treaty rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.

[80] The Supreme Court summarized the three elements of the test for finding that a duty to consult exists in *Rio Tinto*, at paragraph 31:

> (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.

[81] With respect to the third element of this test, "a generous, purposive approach . . . is in order," even though "speculative impacts . . . will not suffice": *Rio Tinto*, at paragraph 46. In order to trigger the duty to consult, physical impacts are not required. The duty to consult is not "limited to decisions that have an immediate impact on lands and resources": *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at paragraph 25, [2017] 1 SCR 1069 [*Clyde River*]. Rather, planning decisions that "set the stage for further decisions that will have a *direct* adverse impact" will also attract a duty to consult: *Rio Tinto*, at paragraph 47. *Haida Nation* is a case in point: it involved the transfer of a tree farming licence that did not directly authorize the cutting of trees.

[82] Once a duty to consult is found to exist, its scope depends on an assessment of the strength of the aboriginal or treaty rights claim and the seriousness of the impact of the proposed Crown conduct on those rights: *Haida Nation*, at paragraphs 43–45; *Rio Tinto*, at paragraph 36; *Clyde River*, at paragraph 20.

[83] On judicial review, the existence and scope of the duty to consult are reviewed for correctness; other issues are reviewed for reasonableness: *Haida Nation*, at paragraphs 61–62; *Canada v Long Plain First Nation*, 2015 FCA 177 at paragraphs 83–91 [*Long Plain*]; *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 at paragraphs 26–27, [2020] 3 FCR 3; *'Namgis First Nation v Canada (Fisheries and Oceans)*, 2020 FCA 122 at paragraph 21, [2020] 4 FCR 678; *Roseau River First Nation v Canada (Attorney General)*, 2023 FCA 163 at paragraph 8. In this case, the main issue pertains to the existence of the duty and is reviewed on the standard of correctness. No deference is owed to the decision-maker in this regard. I also need to determine whether Canada complied with its duty. The standard of reasonableness applies to this issue.

D. *Credible Assertion of a Section 35 Right*

[84] The first element of the *Rio Tinto* test is the Crown's knowledge of a credible assertion of a section 35 right. This is not a high threshold: *Rio Tinto*, at paragraph 40.

[85] Canada concedes it has knowledge of the applicants' asserted rights and that the first part of the test is met. As in *Long Plain*, at paragraph 97, and *Mikisew Cree First Nation v Canadian*

Environmental Assessment Agency, 2023 FCA 191 at paragraph 22 [*Mikisew 2023*], this concession is sufficient for the Court to move on to the other parts of the test.

[86] In its submissions, the MNA invites the Court to refrain from deciding whether the applicants have made a credible assertion of aboriginal rights and argues that the applicants' evidence in this regard is insufficient. Nevertheless, it does not take a firm position regarding the existence of the applicants' rights. Nor does it put forward the position that seems to underpin the provisions of its Constitution, quoted earlier, and which was apparently advanced in *MNA v Alberta*, namely that it is the only entity possessing Métis rights in Alberta. Logically, this position would be incompatible with the applicants' credible assertion. Rather, the MNA chiefly argues that if the applicants have section 35 rights, these rights are not affected by the Agreement. Such a position does not allow me to disregard Canada's concession that the applicants have credibly asserted section 35 rights.

[87] In any event, the evidence is sufficient to meet the low threshold of a credible assertion. The MSGC's assertion of section 35 rights is one of the elements that will be considered in its negotiations with Canada. Of course, Canada has not admitted the existence and scope of those rights, but what matters is that the MSGC's claim has been advanced in the context of negotiations: *Rio Tinto*, at paragraph 40. The Isaac Report strongly suggested that the MSGC should be treated independently of the MNA as a holder of section 35 rights. Moreover, Canada's affiant explained in cross-examination that Canada internally assesses a group's claim to aboriginal rights before engaging in negotiations in this respect (Fort McKay's application record at 1744). It would be surprising if Canada had entered into the Framework Agreement

with the MSGC if it were of the view that the latter had not credibly asserted aboriginal rights. Likewise, the Court is entitled to rely on Alberta's recognition of Fort McKay's credible assertion of a section 35 right: see, by way of analogy, *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at paragraph 26, [2004] 3 SCR 550. Again, the issue is not whether Fort McKay's claims will succeed, but whether Canada has knowledge of Fort McKay's credible assertion. I add that in the case at bar, Canada did not question the outcome of Alberta's credible assertion process.

E. *Crown Conduct*

[88] The second element of the *Rio Tinto* test is Crown conduct that may affect section 35 rights. It has been acknowledged that there is overlap between the second and third elements of the test, insofar as the manner in which the Supreme Court describes them suggests that an assessment of the potential impact is relevant at both stages: *George Gordon First Nation v Saskatchewan*, 2022 SKCA 41 at paragraph 98; *Mikisew 2023*, at paragraphs 52–53.

[89] In the case at bar, the Attorney General concedes that the second part of the test is met. The MNA argues that there is no Crown conduct because the recognition of an Indigenous government would be a policy choice immune from review. This is simply a reiteration of its submissions regarding this Court's jurisdiction, which I have rejected above. I agree with Canada's concession that the second element of the test is met. As in *Buffalo River Dene Nation v Saskatchewan (Energy and Resources)*, 2015 SKCA 31 at paragraphs 37–38, the determinative issue for the third prong of the test is whether the Agreement has a potential effect on the applicants' section 35 rights. Despite the overlap between the second and third prongs of the

Rio Tinto test, I do not understand Canada's concession to extend to this issue, which I will now consider.

F. *Potential Impact*

[90] The Agreement potentially affects the applicants' section 35 rights, because Canada binds itself contractually to recognize the MNA as the sole representative of an Indigenous group that includes the applicants, for the purposes of these rights. Therefore, Canada will no longer be able to entertain the applicants' assertion of their rights independently of the MNA. While the applicants theoretically retain the possibility of asserting their rights before the courts, they are deprived of the benefits of recognition by the executive branch of government. Yet, the Supreme Court has repeatedly stated that reconciliation is more likely to be achieved by negotiation than in the courtroom: see, for example, *Haida Nation*, at paragraph 14; *R v Desautel*, 2021 SCC 17 at paragraphs 87–91. Most recently, in the *Bill C-92 Reference*, at paragraphs 76–77, it showcased the potential of legislative or executive recognition to produce immediate results, without having to wait for protracted litigation to reach a final outcome. Thus, the Agreement deprives the applicants of the most promising avenue towards reconciliation.

[91] The Agreement accomplishes this through a combination of two elements. First, section 6.06 grants the MNA a monopoly on representing the Métis Nation within Alberta with respect to self-government, the duty to consult and collective historic claims in any negotiations or discussions with Canada. Second, the Métis Nation within Alberta is defined in a way that includes the applicants. In the following pages, I will review these two elements, beginning with the latter.

(1) To Whom Does the Monopoly Extend?

[92] The breadth of the monopoly of representation provided by the Agreement hinges upon the definition of the Métis Nation within Alberta. A proper understanding of the scope of this concept is therefore critical to the assessment of the applicants' case. As I explain below, the applicants are caught by this definition when it is read in light of the usual principles of contractual interpretation.

[93] I must say that the manner in which Canada and the MNA addressed this issue was not helpful in ascertaining the intention of the parties to the Agreement. Their most basic position is to say that if the applicants have section 35 rights, the Agreement was designed not to affect them. In this regard, Canada, but not the MNA, conceded that the applicants have credibly asserted section 35 rights. However, until the hearing, Canada and the MNA never directly confronted the issue of who is included in the Métis Nation within Alberta. In oral submissions, the MNA suggested that on a literal reading of the definition, Fort McKay is excluded but the Métis Settlements are partly included. Canada agreed with this submission, despite having earlier argued that no community is included in the Métis Nation within Alberta against its will. In their submissions, Canada and the MNA did not attempt to explain the overall logic of the definition of the Métis Nation within Alberta in the context of the Agreement or to explain its purpose or what the parties intended to achieve.

[94] In the following paragraphs, I first outline the principles of contractual interpretation. I explain how the Agreement builds upon a number of concepts to define the Métis Nation in

Alberta. I then show that, according to the ordinary meaning of the definition, the applicants are included. Lastly, I address Canada's and the MNA's submissions to the contrary.

(a) *Principles of Contractual Interpretation*

[95] Justice Marshall Rothstein of the Supreme Court of Canada summarized the principles of contractual interpretation as follows in *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at paragraphs 47–48, 57, [2014] 2 SCR 633:

> . . . the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" . . . To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning . . .
>
> The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement . . .
>
> While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement . . . The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract.

[96] The jurisprudential concepts aimed at defining Métis communities and individual membership in them constitute one set of surrounding circumstances that are relevant to the interpretation of the definition of Métis Nation within Alberta. As I explained above, the precise scope of these concepts remains contested to this day. The courts have not yet authoritatively

defined what constitutes a rights-holding community and whether it should be defined at the local, regional or provincial level. Nevertheless, *Powley* and its progeny provide a reasonably well-defined conceptual framework. To borrow Justice Rothstein's words, understanding these concepts "deepens our understanding" of what the parties to the Agreement sought to achieve. This framework helps to understand the internal logic of the Agreement or, as Justice Rothstein said, to read it "as a whole".

[97] Another set of surrounding circumstances relates to the goals that the MNA was pursuing by broadening the definition of the Métis Nation within Alberta. The relevant evidence includes the provisions of the MNA Constitution quoted above as well as positions that the MNA put forward in other judicial proceedings. The MNA argues that this evidence should not be considered. It resorts to the common trick of declaring the interpretation it puts forward to be clear, with the result that the surrounding circumstances would become irrelevant. Far from being clear, the MNA's interpretation is strained and inaccurate. In any event, I am able to construe the definition of Métis Nation within Alberta without relying on this set of surrounding circumstances. I will consider them briefly at the end of this section as a confirmation of the interpretation I reach on other grounds.

(b) *The Building Blocks of the Definition of the Métis Nation within Alberta*

[98] With these caveats in mind, we can now turn to the structure of the definition of the Métis Nation within Alberta, beginning with the concepts used to define individual membership in the Agreement. The first such concept is that of "Métis Nation Citizen," defined as follows:

> "Métis Nation Citizen" means an individual who:

> (a) self-identifies as Métis;
>
> (b) is Distinct from other Aboriginal Peoples;
>
> (c) is of Historic Métis Nation ancestry; and
>
> (d) is accepted by the Métis Nation;

[99] This definition closely parallels the national definition of Métis put forward by the MNC in the early 2000s. The Supreme Court's judgment in *Powley*, at paragraphs 29–34, also highlights three of the four elements of this definition as "indicia of Métis identity for the purpose of claiming Métis rights under s. 35: self-identification, ancestral connection, and community acceptance."

[100] It is not necessary to adhere to the MNA to be a Métis Nation Citizen. The latter is therefore an objective status. The Agreement, however, defines the concept of "Citizen" as a subset of the class of Métis Nation Citizens, by adding the condition that a person be registered with the MNA:

> "Citizen" means an individual:
>
> (a) who is a Métis Nation Citizen, including individuals who are members of Métis Communities in Alberta;
>
> (b) who meets the requirements for citizenship as set out in the Constituting Documents, a Constitution, or a Métis Government Law; and
>
> (c) whose name is included on the Registry;

[101] The Agreement then defines "Métis community" as follows:

> "Métis Community" means a group of Métis with a distinctive collective identity, living together in the same geographic area, and sharing a common way of life that emerged before the time when

> Europeans effectively established political and legal control in a particular region;

[102] This definition reproduces the language used by the Supreme Court in *Powley*, at paragraph 12, to define a Métis community, which was quoted above. Since *Powley*, it has generally been assumed that the holders of Métis aboriginal rights protected by section 35 are these communities. One can logically infer, and the MNA confirmed at the hearing, that the parties' intention was that the definition of Métis community would refer to the holders of Métis section 35 rights. Moreover, this definition does not require that the members of such communities be Citizens, in other words that they be registered with the MNA.

[103] We can now consider the definition of Métis Nation within Alberta, which reads as follows:

> "Métis Nation within Alberta" means the Métis collectivity that:
>
> (a) is comprised of:
>
> i. Métis Nation Citizens who are Citizens; and
>
> ii. Métis Communities in Alberta whose members are Citizens and individuals entitled to become Citizens based on their connection to these Métis Communities living in Alberta and elsewhere;
>
> (b) has chosen to act exclusively through the Métis Government in order to exercise, advance, and address Métis Rights, interests, and claims, and make decisions according to its own laws, policies, customs, and traditions; and
>
> (c) based on (a) and (b):
>
> i. is one of the successors of the Historic Métis Nation that together with other Métis collectivities make up the Métis Nation;

> ii. represents Métis Communities in Alberta that possess Métis Rights, interests, and claims;
>
> iii. holds the right to self-determination recognized in the Declaration; and
>
> iv. possesses Métis Rights that are derived from the Métis Nation and Métis Communities in Alberta, including the inherent right of self-government recognized and affirmed by section 35 of the Constitution Act, 1982;

[104] Parenthetically, I observe that a French version of the Agreement was tabled in Parliament when Bill C-53 was introduced. The definition of Métis Nation within Alberta found in the French version differs in significant respects from the English version, to the point that one suspects that the version sent to translation was not final. As the French version expressly states that the English version has priority, however, I rely only on the latter in my analysis.

[105] What is striking in this definition is that the composition of the Métis Nation within Alberta is hybrid — it includes individuals and communities. In this respect, it differs from the 2019 Métis Government Recognition and Self-Government Agreement, in which the Métis Nation within Alberta is defined as a collectivity "comprised of the Members of the MNA". The parties have not explained the shift to a hybrid definition in the 2023 Agreement. Nevertheless, it is obvious that a group solely composed of individuals would not include section 35 rights-holders, because the latter are communities, not individuals. It is reasonable to assume that the addition of communities to the definition was intended to bring together rights-holding communities and to solidify the status of the Métis Nation within Alberta as a derivative holder of section 35 rights, as made clear in paragraph (c) of the definition.

[106] Another striking feature of the definition is the different manner in which individuals and communities are treated regarding adhesion. With respect to individuals, the Métis Nation within Alberta comprises "Métis Nation Citizens who are Citizens". A Métis Nation Citizen may choose to register with the MNA, and thus become a Citizen, and may chose to relinquish registration. Thus, individual membership in the Métis Nation within Alberta is based on individual choice. Only those persons who have chosen to register with the MNA are included.

[107] With respect to communities, however, inclusion in the Métis Nation within Alberta does not depend on any act of adhesion on the part of the community. Rather, inclusion depends on the nature of a community's membership. A community is included if its "members are Citizens and individuals entitled to become Citizens". This would be so even if the community, acting through its representative bodies, has expressly stated that it does not want to join the MNA nor be included in the Métis Nation within Alberta.

(c) *The Applicants are Included in the Métis Nation Within Alberta*

[108] With this in mind, I can now assess whether the Métis Nation within Alberta includes the applicants. I will first proceed on the basis that the applicants are Métis communities as defined in the Agreement. Canada conceded that the applicants credibly asserted aboriginal rights. It flows logically that there is a credible case that they constitute rights-holding communities, that is, Métis communities as defined in the Agreement.

[109] Assuming the applicants are Métis communities, they are included in the Métis Nation within Alberta if their "members are Citizens and individuals entitled to become Citizens",

pursuant to paragraph (a)(ii) of the definition. I am persuaded by Fort McKay's submission that in this phrase, "and" must mean "or", as in *Seck v Canada (Attorney General)*, 2012 FCA 314 at paragraph 47, [2014] 2 FCR 167. If this premise is adopted, a community comprised exclusively of Citizens is included in the Métis Nation within Alberta, and so is a community comprised exclusively of persons entitled to become Citizens but who have chosen not to register with the MNA. This interpretation avoids the absurdity of excluding communities comprised exclusively of Citizens. It also avoids the result, which I find to be equally absurd, of excluding a community comprised entirely of non-Citizens but including it as soon as one of its members registers with the MNA.

[110] The MNA argues that the definition of the word "or", in section 2.02(c) of the Agreement, somehow precludes this interpretation. I fail to follow the MNA's logic. While the Agreement defines "or", it does not define "and". Here, the context strongly suggests that "and" was used in a way that means one, the other or both. The lack of a definition does not constitute a hurdle to this interpretation.

[111] As a result, a community is included in the Métis Nation within Alberta if its members are Citizens, persons entitled to become Citizens or a mix of both.

[112] There is no dispute that until recently, the members of Fort McKay were, for the most part, members of the MNA. They all relinquished their membership in the MNA in 2018. Absent more precise evidence, I infer from this that the members of Fort McKay are entitled to become

Citizens. Therefore, Fort McKay is a community described in paragraph (a)(ii) of the definition and it is included in the Métis Nation within Alberta.

[113] The parties agree that a large proportion of the members of the Métis Settlements are also members of the MNA. This is indeed the reason why the parties to the Agreement have thought it appropriate to allow for dual membership, in section 8.08. Therefore, the Settlements' membership includes Citizens and, in all likelihood, a number of persons entitled to become Citizens. Therefore, the Métis Settlements are communities described in paragraph (a)(ii) of the definition and they are included in the Métis Nation within Alberta. This would be true even if the word "and" were used in a conjunctive sense in paragraph (a)(ii).

[114] So far, I have assumed that the applicants are rights-holding communities, consistent with Canada's concession that they have credibly asserted section 35 rights. *A fortiori*, the applicants would be subsumed in the Métis Nation within Alberta if the parties to the Agreement proceeded on the opposite assumption. If rights-holding communities were to be defined at the regional level, for example the five regions delineated in the MNA Constitution, then the applicants would be encompassed within one of these regional communities. They would not fall under the Agreement's definition of "Métis communities". Moreover, their members who are Citizens (in the case of the Settlements) would be included individually in the Métis Nation within Alberta, pursuant to paragraph (a)(i) of the definition. Their members who are entitled to become Citizens would be indirectly included, because they would be encompassed in the regional rights-holding communities pursuant to paragraph (a)(ii) of the definition. In the result, the applicants would be

deprived of the authority to represent their members vis-à-vis Canada with respect to section 35 rights.

(d) *Paragraph (b) of the Definition Does not Exclude the Applicants*

[115] Canada submits that paragraph (b) of the definition limits the scope of the Métis Nation within Alberta to those communities who have chosen to be represented by the MNA. I am unable to subscribe to this interpretation.

[116] First, it cannot be reconciled with the grammatical meaning of the definition. The subject of the verb "has chosen to act exclusively" is the "collectivity" mentioned in the chapeau of the provision, namely, the Métis Nation within Alberta. In this context, the "collectivity" includes and subsumes the "Métis communities" mentioned in sub-paragraph (a)(ii). These communities are not the ones making the choice mentioned in paragraph (b). As I explained above, nothing in the wording of the definition suggests that communities can choose whether to join the Métis Nation within Alberta or not. Only individuals are allowed to make such a choice.

[117] Second, the definition of Métis Nation within Alberta combines definitional, factual and conclusory statements. The definitional part is essentially found in paragraph (a). In contrast, paragraph (b) makes a statement of fact regarding a choice that the collectivity defined in paragraph (a) is supposed to have made. Then, paragraph (c) states a number of legal conclusions regarding the nature or the rights of this collectivity. Given this overall logic, paragraph (b) cannot plausibly be said to add further qualifications to the definition laid out in paragraph (a).

[118] Third, the Agreement provides no objective mechanism for ascertaining which communities have chosen to be represented by the MNA or to become part of the Métis Nation within Alberta. In contrast, the identity of the individual members of the Métis Nation within Alberta can be readily ascertained by looking at the MNA registry.

[119] Fourth, nothing in the Agreement suggests that the parties contemplated that rights-holding Métis communities could exist outside the Agreement. Rather, the underlying logic is apparently that communities are included regardless of choice, either collective or individual. Under sub-paragraph (a)(ii), the test for inclusion is the eligibility of a community's members for Citizenship, an objective fact that does not depend on a community's decision to join the MNA or not.

(e) *The "Dual Constituency" Theory*

[120] At the hearing, the MNA added the following nuance with respect to communities comprised of both Citizens and persons entitled to become Citizens, like the Métis Settlements. It argued that such communities are included in the Métis Nation within Alberta, but only with respect to the "constituency" comprised of their members who chose to become Citizens. Such communities would still represent their non-Citizen members (a different "constituency") with respect to the exercise of their section 35 rights.

[121] I do not find any basis for the MNA's "dual constituency" interpretation. The wording of the Agreement provides no support for it. The concept of "constituency" is not defined anywhere. While it is true that section 19.5 of the MNA's Constitution and section 15.05 of the

Agreement contemplate that the MSGC and the Métis Settlements will retain their rights and powers, this acknowledgement is limited to rights and powers flowing from Alberta legislation and does not encompass section 35 rights, which are at the crux of the present case. They do not contemplate dual representation with respect to section 35 rights.

[122] Moreover, the idea that a community holding section 35 rights can be split for purposes of representation is unknown to Canadian law. Given the collective nature of section 35 rights, it is difficult to understand how this would work in practice. If an Indigenous community is a single rights-holder, it cannot be represented by two separate entities for the purposes of asserting these rights. While I am aware of the coexistence of traditional governments and *Indian Act* councils in certain First Nations communities, it is difficult to understand how both can simultaneously be recognized as the representative of the community for section 35 purposes, unless they reach an agreement to that effect.

[123] The MNA relies on *Enge*, in which the Court used the concept of constituency, but the purpose for which the term was used is significantly different. *Enge* mainly involved an issue of territorial overlap and historical circumstances peculiar to the Northwest Territories. Both groups involved adhered to the idea that there was only one Métis community throughout the Northwest Territories. The word constituency was used to describe each group's membership. In practice, however, they negotiated separately with respect to different territories. While there was some degree of overlap between their membership criteria, one did not assert a representation monopoly over the other's members.

[124] Most importantly, the MNA's dual constituency theory undermines its basic submission that the Agreement does not affect the applicants' rights, because it admits that the MNA would exclusively represent at least a portion of the Settlements' members. It is also incompatible with Canada's submission that the Métis Nation within Alberta includes only communities that have chosen to join it. If a large majority of Settlement members fall under the MNA's representation mandate because they joined the MNA, little is left to the Settlements or the MSGC in terms of representation. The capacity of the MSGC or the Settlements to represent their members for the purposes of section 35 rights would be severely hampered.

(f) *Surrounding Circumstances*

[125] For the foregoing reasons, I find that the applicants are included in the Métis Nation within Alberta as defined in the Agreement. I have reached this conclusion without relying on evidence of the aims the MNA was pursuing by expanding the definition of Métis Nation within Alberta. The evidence shows that in all likelihood, the MNA's goal was to include all communities comprised of Métis Nation Citizens, whether their members decide to join the MNA or not. This tends to confirm the interpretation adopted above.

[126] Evidence of this intention is first found in the provisions of the MNA's Constitution quoted above. In these provisions, the MNA asserts that the Métis Nation within Alberta comprises "all Métis who live within Alberta," as well as "the Métis communities" of its territories. It also insists on the indivisibility of the Métis Nation within Alberta and asserts that the Settlements are an integral part of it. The MNA's intention also appears from the position it took in other contexts. In *Hirsekorn*, it argued that rights-holding Métis communities must be

defined at the regional level, if not on a Prairie-wide basis. In *MNA v Alberta*, at paragraph 16, the Alberta Court of Appeal summarized the MNA's position in its discussions with Alberta as follows:

> The MNA took the position that consultation should be on a regional basis, with the MNA acting as the authorized representative for each of a number of large regions. But certain MNA local councils objected to this approach, advocating for more localized consultation and representation. Other Métis organizations not affiliated with the MNA also advocated for local consultation and representation. The MNA argued these groups did "not legitimately represent Métis rights-holders and regional rights-bearing Métis communities".

[127] This would explain why the MNA appears uncomfortable with Canada's concession that the applicants have credibly asserted section 35 rights. It also tends to contradict any suggestion that the Agreement was designed to preserve the applicants' right to represent their members for section 35 purposes, whether by carving them out of the Métis Nation within Alberta or otherwise. Rather, it bolsters the interpretation I adopted or even a more radical one, whereby the applicants are subsumed within the MNA's regions and do not constitute separate rights-holding communities.

[128] Nevertheless, the MNA argues that the evidence reviewed above merely describes its aspirations and that Canada did not agree to grant it a representation monopoly. However, it is unlikely that Canada did not carefully review the language of the Agreement. There is no evidence that Canada fundamentally disagreed with the assertions contained in the MNA's Constitution. More specifically, it would be surprising that Canada consented to section 8.08 of the Agreement, which allows dual membership in the MNA and the Settlements, if it were of the view that both entities are section 35 rights-holders. In this regard, Canada's general policy is

embodied in section 8.07, which prohibits simultaneous membership in more than one Indigenous group considered to hold section 35 rights.

[129] Lastly, if Canada and the MNA's intention was to exclude the applicants from the definition of the Métis Nation within Alberta, they have not offered to amend the Agreement to make this explicit. This provides little comfort to the applicants that their section 35 rights are not affected by the Agreement.

(2) Scope of Monopoly

[130] Given that the Métis Nation within Alberta includes the applicants, we can now assess how the Agreement affects their section 35 rights. This impact results from the monopoly granted to the MNA in section 6.06 of the Agreement, which reads as follows:

> 6.06 The Métis Government is exclusively mandated to represent, advance, and deal with the Métis Rights, interests, and claims of the Métis Nation within Alberta, based on the authorization it receives from its Citizens and Métis Communities in Alberta, including:
>
> (a) implementing and exercising the Métis Nation within Alberta's inherent right to self-determination, including the right of self-government;
>
> (b) engaging in consultation with Canada and, where appropriate, accommodation, where Canada's conduct has the potential to impact Métis Rights adversely, consistent with the Consultation Agreement or as the Crown's duty to consult and accommodate may require; and
>
> (c) addressing any outstanding collective claims of the Métis Nation within Alberta against Canada, including:
>
> i. claims related to the Métis Scrip System; or

> ii. other claims that have been identified in the Framework Agreement or that may be identified in the future by the Parties.

[131] In turn, "Métis Rights" are defined as follows in section 1.01:

> "Métis Rights" means the constitutionally protected rights of the Métis Nation within Alberta, which includes Métis Communities in Alberta, as recognized and affirmed by section 35 of the *Constitution Act, 1982*;

[132] Moreover, a "Métis Community," as explained above, is defined in terms that closely parallel the language used by the Supreme Court in *Powley* to define rights-holding Métis groups. As a result, insofar as Canada is involved, section 6.06 has the effect of concentrating all section 35 rights of the Métis Nation within Alberta, which includes the applicants, in the hands of the MNA. This is confirmed by section 6.09, which reads:

> 6.09 The Métis Nation within Alberta acts exclusively through the Métis Government, including its Governance Structures and Institutions, in exercising its rights, including Métis rights, Jurisdiction, Authority, and privileges and in carrying out its duties, functions and obligations.

(a) *Impact on Recognition*

[133] The impact of these provisions on the applicants' rights is most obvious and far from speculative: Canada has granted someone else the exclusive right to "represent, advance, and deal with" their constitutionally-protected rights. If Canada keeps its contractual commitment to the MNA, it will be bound to ignore the applicants' claims, even though it tells this Court that these claims are credible. Thus, the applicants will be deprived of the benefits of recognition by

the executive branch of government. This becomes even clearer if we consider the two aspects of recognition described above, at paragraphs [60]–[65].

[134] Recognition first means the government's choice of which Indigenous groups it will deal with, and whose rights it will recognize. In this regard, the impact of the Agreement is obvious, as it recognizes the MNA to the exclusion of the applicants. Recognition, in this sense, is most important. At the individual level, Hannah Arendt's famous assertion that citizenship is the right to have rights has often been quoted: see, for instance, *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 191, [2019] 4 SCR 653. The same is true of recognition at the collective level—it is the right to have collective rights.

[135] In this connection, the recognition that section 6.06 grants the MNA and withholds from the applicants is key to the practical enjoyment of a broad array of rights that section 35 affords to Indigenous peoples. In its written submissions, the MNA described the Agreement as effecting "the MNA's momentous recognition". It would be strange if the denial of such recognition to the applicants were less momentous. In addition, Alberta's credible assertion process, which affords a form of recognition for specific purposes, highlights the intrinsic importance of recognition.

[136] Although the context is somewhat different, *Enge* provides a relevant analogy. In that case, Canada negotiated an agreement-in-principle for a comprehensive land claims agreement (or "modern treaty") with one group asserting section 35 Métis rights in the Northwest Territories. A second group asserted section 35 rights over a separate area. There was some overlap between the two groups' membership. The agreement-in-principle with the first group

defined its beneficiaries in a manner that included members of the second group. Moreover, it purported to extinguish some of the beneficiaries' aboriginal rights. In other words, the agreement-in-principle subsumed the second group in the first group against its will, even though Canada conceded that the second credibly asserted aboriginal rights. In other words, it recognized the first group to the exclusion of the second. The Court found that this triggered the duty to consult the second group.

[137] In the present case, the applicants' rights are not explicitly extinguished, but the applicants are subsumed in the Métis Nation within Alberta against their will, which bars them from asserting their rights in their interactions with Canada. This is a significant impact on their rights, which triggers the duty to consult.

[138] Another dimension of recognition is relevant to the inquiry. As explained above, recognition of an Indigenous group's rights by the executive branch of government dispenses the group from the need to make full proof of its rights in court. Executive recognition provides tangible benefits more quickly and more easily than litigation. As the Supreme Court stated in the *Bill C-92 Reference*, at paragraph 60, recognition is "very meaningful on the ground". Recognition is the privileged avenue towards reconciliation. Indeed, securing recognition by the executive branch of government is one of the major goals the MNA pursued in negotiating the Agreement and its predecessors.

[139] While the MNA argues that the Agreement does not prevent the applicants from asserting their rights in court, this fails to capture the benefits the Agreement bestows on the MNA by

recognizing it as the exclusive representative of the Métis Nation within Alberta for the purpose of negotiations with the federal government. The reality is that the monopoly that section 6.06 of the Agreement grants to the MNA effectively shuts the applicants out from the preferred venue for reconciliation. For example, it is difficult to understand how Canada will continue negotiating with the MSGC with respect to the latter's asserted section 35 rights pursuant to the Framework Agreement concluded in 2018. Such negotiations would be contrary to section 6.06 of the Agreement, because only the MNA would have the mandate to deal with these rights.

(b) *Impact on Specific Rights*

[140] The impacts on the applicants' rights are also apparent with respect to at least two of the three specific categories of section 35 rights mentioned in section 6.06.

[141] First, with respect to self-government, Canada forbids itself from recognizing an independent right to self-government to any entity that would be subsumed under the Métis Nation within Alberta, other than the MNA. As mentioned above, the applicants would be effectively prevented from asserting a right to self-government in their discussions with Canada. With respect to the MSGC, this is difficult to reconcile with section 2.1.2 of its Framework Agreement with Canada, which was quoted above. To this, the MNA replies that the Agreement only deals with what it calls its "internal self-government." I am unable to agree that this means that the applicants will not be affected. "Internal self-government" may be an accurate description of the areas of jurisdiction that are recognized by Chapter 8 of the Agreement, pending the conclusion of a treaty. However, section 6.06 is not limited to the areas of

jurisdiction described in Chapter 8. Section 6.06 gives the MNA a monopoly over all section 35 rights, not only "internal matters."

[142] Second, with respect to the duty to consult, section 6.06 amounts to a commitment that Canada will not consult anyone other than the MNA when it contemplates conduct that has potential impacts on the section 35 rights of the Métis Nation within Alberta. As the applicants are subsumed under the latter collectivity, this means that they will not be consulted separately from the MNA, even though Canada recognizes that they have a credible assertion of section 35 rights. Although the context is different, the resulting exclusion from the duty to consult is what led this Court to intervene in *Dene Tha' First Nation v Canada (Minister of Environment)*, 2006 FC 1354, aff'd sub nom *Canada (Environment) v Imperial Oil Resources Ventures Ltd*, 2008 FCA 20.

[143] The parties have provided little evidence regarding the third example of rights mentioned in section 6.06, "outstanding collective claims". I am therefore unable to find that the applicants' section 35 rights would be affected in respect of this specific category of claims.

(c) *Speculative Impact?*

[144] Canada and the MNA assert that the impacts alleged by the applicants on the exercise of their section 35 rights do not trigger a duty to consult because they are speculative. They maintain that any actual impact would result from subsequent events or government decisions. For example, they argue that any impact on the duty to consult remains speculative until a

proponent comes forward with a specific project. Therefore, only future decisions would attract a duty to consult; entering into the Agreement would not.

[145] I am unable to agree. Given its preventive character, the duty to consult is triggered by "strategic, higher-level decisions" that have a downstream impact on future, more specific decisions: *Rio Tinto*, at paragraph 44. In *Haida Nation*, for example, the decision at issue was the approval of the transfer of a tree farming license. That decision did not authorize the cutting of any tree. While purely speculative impacts do not trigger the duty to consult, the impacts of "strategic, higher-level decisions" are not always speculative.

[146] Cases such as *Sambaa K'e*, *Huron-Wendat* and *Enge* illustrate the distinction between impacts arising from higher-level decisions and speculative impacts. The decisions challenged in these cases were related to the negotiation of land claims agreements. They did not have immediate physical impacts on the exercise of section 35 rights and it was likely that such impacts would occur only after subsequent decisions were made. Nevertheless, the Court found that the challenged decisions had the potential of foreclosing certain aspects of the exercise of the applicants' rights. For example, in *Sambaa K'e*, at paragraph 182, Justice Anne Mactavish, then a member of this Court, found that "the contemplated Crown action here potentially puts current claims by and the rights of the [applicants] in jeopardy". This is equally, if not more true in the present case. The Agreement jeopardizes the applicants' asserted section 35 rights by giving the MNA the exclusive mandate to deal with them. This impact results from the wording of the Agreement, which is immediately legally effective; it is not speculative.

[147] The MNA's submission amounts to saying that decisions regarding recognition can never have impacts that trigger a duty to consult. Again, given the importance of recognition for the exercise of section 35 rights, it cannot be said that the impacts of a denial of recognition are remote or speculative. If that were true, it would be difficult to understand why the MNA devoted significant resources to challenges to various decisions related to Alberta's recognition process, for example in *MNA v Alberta*.

[148] To argue that the impacts of the Agreement are speculative, the MNA relies on *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 [*Hupacasath*]. However, there is simply no analogy between the present case and *Hupacasath*. In a nutshell, the applicant in that case argued that the provisions of a bilateral investment treaty with the People's Republic of China would hamper Canada's ability to protect its aboriginal rights. The Court found that there was no evidence of such impacts beyond mere speculative assertions. In contrast, the impacts of the Agreement on the applicants' asserted rights are obvious and significant. They derive from the Agreement itself, not its potential ripple effects.

[149] I also acknowledge that the Agreement at issue in *Enge* purported to extinguish certain rights asserted by the applicant in that case. While there is no explicit extinguishment in this case, the effect on the present applicants is similar, as they will effectively be deprived of the capacity to assert their rights in discussions with Canada.

(3) No Effect on Third Parties?

[150] Canada and the MNA argue that because the applicants are not parties to the Agreement, the latter cannot have the impact described above. For the reasons that follow, I am unable to agree.

(a) *Privity of Contract*

[151] The MNA argues that the Agreement cannot affect the applicants' rights because it is a contract between itself and Canada. As such, it cannot affect the rights of third parties, such as the applicants.

[152] In theory, it is true that privity of contract prevents the applicants from suing on the Agreement. It also stands to reason that the parties to the Agreement cannot extinguish any section 35 rights that the applicants may have.

[153] In practice, however, a contract that grants an exclusive right to a party necessarily affects a third party's assertion of a similar right. For example, a non-competition agreement between an employer and an employee has the practical effect of preventing another employer, who is not a party to the contract, from hiring the employee. As the parties have not made submissions regarding the remedies available for a breach of the exclusivity granted by section 6.06 of the Agreement, I will say nothing further on this topic. Cases such as *Treaty Land Entitlement Committee Inc v Canada (Indigenous and Northern Affairs)*, 2021 FC 329, do not support the MNA's submissions. They show that recognizing one Indigenous group's rights

without consulting another group that is affected may impose considerable burdens on the latter. It is sufficient to say that the applicants are seriously and practically affected by section 6.06 even though they are not parties to the Agreement.

[154] Most importantly, the MNA's submission overlooks the crucial importance of the recognition of section 35 rights by the executive branch of government. In effect, the MNA is saying that the Agreement does not prevent the applicants from attempting to prove their section 35 rights in court. However, section 6.06 of the Agreement prevents Canada from engaging in discussions with the applicants regarding their asserted section 35 rights. In doing so, it deprives the applicants of the possibility of seeking recognition through dialogue with Canada, leaving them with long, costly and uncertain litigation as their only recourse.

(b) *Non-Derogation Clauses*

[155] Canada and the MNA also point to certain non-derogation clauses in the Agreement. They assert that these clauses negate any impact the Agreement might have on the applicants. I am unable to agree.

[156] The first such clause is section 15.02, which reads as follows:

> 15.02 Nothing in this Agreement affects, recognizes, or provides any rights recognized and affirmed by section 35 of the *Constitution Act, 1982* of:
>
> (a) any Indigenous community, collectivity, or people other than the Métis Nation within Alberta; or
>
> (b) any other Indigenous community, collectivity, or people situated within Alberta who are distinct from

> the Métis Nation within Alberta and not represented by the Métis Government.

[157] To benefit from this clause, an Indigenous group must be distinct from the Métis Nation within Alberta. However, as I explained above, the main reason the rights of the applicants are affected is precisely because they are included against their will in the Métis Nation within Alberta. Thus, section 15.02 does not apply to them.

[158] Canada and the MNA also rely on section 15.05, which reads as follows:

> 15.05 Nothing in this Agreement impacts or affects the rights, jurisdiction, powers, or responsibilities of the Metis Settlements General Council or a Metis Settlement, including the ownership of Metis Settlement lands, as recognized in Alberta's *Metis Settlements Act*, the *Metis Settlements Land Protection Act*, and the *Constitution of Alberta Amendment Act*.

[159] This provision, however, only pertains to rights granted by provincial legislation creating the Métis Settlements. It does not mention section 35 rights. This, indeed, is consistent with the MNA President's November 2022 open letter that states that "[n]othing in our Constitution impacts the rights, jurisdiction, or lands of the Metis Settlements as recognized in Alberta's *Metis Settlements Act* and related legislation." Therefore, section 15.05 has no application to the rights asserted by the applicants in this case.

[160] Thus, the Agreement's non-derogation clauses do not constitute a bar to the applicants' case. Once again, it bears emphasizing that the duty to consult focuses on practical realities. In previous cases, this Court found that a duty to consult was triggered by a proposed agreement

that included a non-derogation clause: *Sambaa K'e*, at paragraph 183; *Huron-Wendat*, at paragraphs 102–105. In these cases, the Court could infer from the context that the signature of an agreement in principle would give rise to a situation in which the rights of the applicant were potentially affected, especially where concurrent claims are made regarding the same object. The impact in this case is even more immediate: because the Agreement is legally binding and it grants a monopoly of representation to the MNA, it necessarily withholds the same right from the applicants. Section 15.02 cannot set aside the clear language of section 6.06, especially because it is drafted so as not to afford any protection to communities that are included in the Métis Nation within Alberta against their will.

(4) Choice and Critical Mass

[161] In oral argument, the MNA attempted to link the Agreement with a wider decolonization project in which imposition of government structures from the outside (such as in the *Indian Act*) would give way to the recognition of the governments that Indigenous peoples, such as the Métis, have chosen for themselves. Canada's recognition of these Métis governments by way of agreement would be much preferable to the definition of section 35 rights-holders by the courts. Indeed, choice is a recurring theme in the Agreement, for example when it states that the MNA's 57,700 members are "a critical mass of the Métis population within Alberta" (section 5.01(e)) or that the Métis Nation within Alberta "has chosen to act exclusively through the Métis Government" (definition of Métis Nation within Alberta, quoted above). The MNA argues that the applicants should not be allowed to interfere with this choice.

[162] While superficially appealing, this argument obscures more than it clarifies about the challenges raised by the recognition of Indigenous communities. In fact, it is deployed in a manner that results in the imposition of the MNA's choices on others.

[163] The MNA's assertions regarding choice are largely based on the fact that in recent years, individuals who join the MNA have been asked to subscribe to an "oath" that exclusively mandates the MNA to represent them for the purposes of section 35 rights. There is little evidence of the proportion of MNA members who have subscribed to this oath or the circumstances in which they have done so. Moreover, individuals may join the MNA for a variety of reasons and may or may not agree with the MNA's stance with respect to the applicants' rights.

[164] Even more problematic is the fact that the MNA relies solely on individual choice, despite the fact that section 35 rights-holders are communities and not individuals. As noted above, the Agreement does not set forth any process for Métis communities to join or leave the MNA. The assumption is that communities are included in the Métis Nation within Alberta irrespective of their choice or the choice of their members, because the determinative factor is whether their members are Métis Nation Citizens, an objective status unrelated to one's choice to join the MNA. Even if I were to accept the MNA's contention that the word "and" in paragraph (a)(ii) of the definition is used in a conjunctive sense, communities would be included as soon as one of their members chooses to join the MNA. From the community's perspective, this is the opposite of choice. For the MNA, choice ends up justifying monopoly.

[165] To be sure, the MNA asserts that the Agreement allows Métis individuals to choose to be represented by other organizations. The unstated premise, however, is that such organizations will not be able to assert section 35 rights. As I have shown above, the definition of Métis Nation within Alberta is designed in a way that captures all Métis communities in Alberta who hold section 35 rights. Thus, the choice to organize outside the Agreement is illusory.

[166] It is also ironic that the Agreement seeks to isolate the MNA from the consequences of individual choice. Section 8.06 reads:

> 8.06 For greater certainty, the individual choice of a Métis Nation Citizen with respect to who represents them at a given time does not negate or undermine the recognition, Jurisdiction, or Authority of the Metis Government set out in this Agreement.

[167] As the saying goes, what is good for the goose is good for the gander. Thus, for example, a Settlement member's decision to join the MNA should not "negate or undermine" the Settlement's authority regarding its asserted section 35 rights.

[168] Thus, the MNA's assertions regarding choice do not justify the impacts of the Agreement on the applicants' asserted section 35 rights.

G. *Scope of the Duty to Consult*

[169] Once a duty to consult is triggered, the next step of the analysis is to assess its scope. According to *Haida Nation* and subsequent cases, this scope varies along a spectrum. The MSGC, however, argues that it is not necessary to determine the scope of the duty because there

was no consultation at all. Fort McKay did not make submissions on this issue, although it seeks a declaration that consultation is required at the deep end of the spectrum. Canada argued that the scope of the duty is minimal, because the impacts of the Agreement on the applicants' rights are minimal.

[170] As explain below, I agree that Canada did not consult the applicants. Hence, it is not necessary to assess the scope of the duty. While I appreciate that some guidance may be useful to the parties, it would be unwise to provide a definitive opinion in the absence of fulsome submissions on the issue. I will simply say that the foregoing discussion should have made clear that the impacts on the applicants' rights are more than minimal. By way of comparison, in *Huron-Wendat* and *Enge*, this Court held that the scope of the duty was at least in the middle of the spectrum, if not more.

H. *Fulfilling the Duty*

[171] Canada did not consult the applicants when negotiating the Agreement with the MNA. Canada's affiant, Mr. Schintz, admitted as much in cross-examination. In spite of this, Canada argued that certain communications with the applicants satisfied any duty to consult that it might have. This is simply not a credible assertion. It is unreasonable.

[172] To show that Canada did not meet its duty, I will assume that the scope of the duty lies at the lower end of the spectrum. In *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew 2005*], the Supreme Court described the contents of the duty at the lower end of the spectrum as follows, at paragraph 64:

> The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. The Crown did not discharge this obligation when it unilaterally declared the road realignment would be shifted from the reserve itself to a track along its boundary.

[173] Canada first relies on the letter it sent to the MSGC and Fort McKay on February 10, 2023, two weeks before the Agreement was signed at a public ceremony. This letter stated that the negotiations with the MNA had concluded and that Canada was ready to sign a new agreement. It is disingenuous to suggest that this constituted consultation. Rather, the applicants were placed before the fait accompli. According to Mr. Schintz, the negotiations were substantially concluded in November 2022. It goes without saying that consultation must take place before a decision is taken, not after.

[174] Canada also relies on discussions between Mr. Schintz and the MSGC's president in August 2022. Mr. Schintz then said that negotiations with the MNA were confidential, but that any agreement with the MNA would include "robust non-derogation language". Mr. Schintz had a similar brief exchange with Fort McKay in November 2021.

[175] In these communications, Canada merely stated that the Agreement with the MNA would not impact the applicants' rights, without providing any insight as to how the Agreement worked. As I explained above, this assurance was incorrect. To borrow the Supreme Court's language in

Mikisew 2005, no meaningful information was provided "addressing what the Crown knew to be [the applicants'] interests". As I mentioned above at paragraphs [35], [37] and [41], Canada knew of the applicants' position that the MNA did not represent them. Canada did not "listen carefully" to the applicants' concerns and did not "attempt to minimize adverse impacts", for example by discussing language that would make clear that the applicants' rights were not affected. As the Supreme Court said, Canada cannot "unilaterally declare" that the provisions contained in the Agreement are sufficient to safeguard the applicants' rights. What Canada did simply cannot be called consultation.

I. *Remedies*

[176] Having found that Canada breached its duty to consult the applicants before entering into the Agreement, I must now determine the appropriate remedy.

[177] Both applicants seek a declaration that Canada breached its duty to consult and an order quashing the Agreement and remitting the matter to the Minister for reconsideration. In practice, I understand this to mean that the Agreement must be renegotiated and the applicants must be consulted before a new Agreement is signed. Fort McKay also seeks more specific declarations regarding issues that could require a form of accommodation. Canada and the MNA, on their part, argue that it is not necessary to quash the Agreement and that the Court should simply identify the problematic provisions and order further consultation.

[178] Where a government fails to comply with the duty to consult, the usual remedy is that the impugned decision is quashed. See, for instance, *Mikisew 2005*; *Clyde River*; *Gitxaala Nation v*

Canada, 2016 FCA 187, [2016] 4 FCR 418. It is true that this Court refrained from doing so in *Huron-Wendat* and *Enge* and merely issued declarations. In those cases, however, the challenged decisions were not binding agreements and further negotiations would take place in any event. It was not necessary to quash them to ensure that proper consultation would take place.

[179] In this case, however, the Agreement is binding and already produces the effects described above. It would defeat the preventive purpose of the duty to consult if the Agreement were left standing and its negative impacts continued while an open-ended process sought to remedy the problem. This would be contrary to common sense and to the principle that consultation must take place before a decision is made and not after.

[180] Nevertheless, I will quash only the offending provisions of the Agreement, which are the definition of "Métis Nation within Alberta" and Chapter 6 as a whole. These provisions were the focus of the applicants' demonstration that the Agreement would negatively impact them. In my view, Chapter 6 forms an integrated whole that cannot be divided, even though I have highlighted sections 6.06 and 6.09 in these reasons. The applicants have not argued that the operation of other parts of the Agreement negatively affects them.

[181] As a result, the only practical remedy is to quash the offending provisions of the Agreement and to remit the matter to the Minister for reconsideration. This effectively means that the Minister can renegotiate the offending provisions of the Agreement after having consulted the applicants and, if warranted, after having accommodated their concerns. It is not appropriate to issue more specific orders regarding the manner in which consultation should be

conducted. These reasons provide sufficient guidance to the parties as to which issues need to be addressed.

III. Disposition

[182] For these reasons, the applications for judicial review will be granted. The offending provisions of the Agreement will be quashed and the matter will be remitted to the Minister for reconsideration.

[183] The parties will have an opportunity to make submissions regarding costs.

JUDGMENT in T-589-23 and T-611-23

THIS COURT'S JUDGMENT is that:

1. The applications for judicial review are granted.
2. Chapter 6 and the definition of "Métis Nation within Alberta" in section 1.01 of the *Métis Nation within Alberta Self-Government Recognition and Implementation Agreement*, dated February 24, 2023 are quashed.
3. The matter is remitted to the Minister of Crown-Indigenous Relations for reconsideration.
4. The applicants will serve and file their submissions regarding costs, not to exceed 10 pages in length, no later than 30 days after the date of this judgment.
5. The respondents will serve and file their responding submissions regarding costs, not to exceed 10 pages in length, no later than 15 days after the day the applicants serve their submissions.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-611-23 AND T-589-23
DOCKET:	T-611-23
STYLE OF CAUSE:	METIS SETTLEMENTS GENERAL COUNCIL v THE MINISTER OF CROWN-INDIGENOUS RELATIONS AND THE MÉTIS NATION OF ALBERTA ASSOCIATION
AND DOCKET:	T-589-23
STYLE OF CAUSE:	FORT MCKAY MÉTIS NATION ASSOCIATION v THE MINISTER OF CROWN-INDIGENOUS RELATIONS AND MÉTIS NATION OF ALBERTA ASSOCIATION
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	DECEMBER 13-14, 2023
JUDGMENT AND REASONS:	GRAMMOND J.
DATED:	MARCH 28, 2024

APPEARANCES:

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