SASKATCHEWAN
LAW REVIEW

Métis Aboriginal Rights and the "Core of Indianness"*

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I. INTRODUCTION

The purpose of this article is to articulate a number of propositions that will allow for a principled approach in the analysis of critical questions related to the Métis and Métis Aboriginal rights. The article supports the argument that Métis fall within the federal government's exclusive legislative jurisdiction for "Indians, and Lands reserved for the Indians."[1] In other words, although the Métis are a distinct people with a distinct culture and history, from a constitutional point of view, the Métis are included in the definition of the term "Indians" as used in s. 91(24) of the *Constitution Act, 1867*.[2] This point of view is consistent with a purposive and principled approach at interpreting the meaning of s. 91(24), and is consistent with the manner in which the term "Indians" was used in 1867.[3] The article explores Métis

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1 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91(24), reprinted in R.S.C. 1985, App. II, No. 5.

2 *Ibid.*

3 For a detailed discussion see Clem Chartier, "'Indian': An Analysis of the Term as Used in Section 91(24) of the British North American Act, 1867" (1978-79) 43

Aboriginal rights, the framework of s. 35 of the *Constitution Act, 1982*,[4] and the application of provincial laws to Métis harvesting activities. The article argues that Métis and Métis Aboriginal rights fall within the "core of Indianness" or the heart of s. 91(24) and are immunized from the application of provincial natural resource laws because of the doctrine of inter-jurisdictional immunity.[5] This treatment of Métis Aboriginal rights is consistent with basic constitutional principles and the s. 35 framework being used by the courts in British Columbia and elsewhere.[6]

II. BACKGROUND

In North America and elsewhere, the relationship between the Crown and Indigenous populations, from the outset, has been fraught with controversy and contradictions.[7] The controversy began with the assertion of sovereignty by the European settlers and the use of international law to rationalize the theft of Indigenous lands. This theft is now an accepted part of North American history and culture. For the Métis, because of historical circumstances, the theft came a few years later than it did for the various Indian nations. However, some of the same arguments have been used to defend the actions of the colonizers as they marginalized Métis peoples and Métis rights.

Tidy legal explanations such as the "doctrine of discovery,"[8] the "act of state doctrine,"[9] the concept of "*terra nullius*,"[10] and the

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Sask. L. Rev. 37 and Mark Stevenson, "Section 91(24) and Canada's Legislative Jurisdiction with respect to the Métis" (2002) 1 Indigenous L.J. 237. On the other hand, the recent decision of *R. v. Blais* (2003), 230 D.L.R. (4th) 22, 308 N.R. 371, 2003 SCC 44 seems to imply that the term "Indian" as used in the late nineteenth and early twentieth centuries did not include the Métis. However the meaning of the term "Indians" as used in s. 91(24) was not before the Court and all of the necessary arguments supporting a broader use of the term "Indians," for the purposes of s. 91(24) were not advanced.

4 Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

5 See *e.g. Bell Canada v. Quebec (CSST)*, [1988] 1 S.C.R. 749, 51 D.L.R. (4th) 161.

6 See *e.g. Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193 [*Delgamuukw*]. See also *R. v. Alphonse*, [1993] 5 W.W.R. 401, 48 W.A.C. 161 (B.C.C.A.) [*Alphonse*].

7 Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890* (Vancouver: University of British Columbia Press, 1977).

8 The doctrine of discovery was articulated by Chief Justice Marshall in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) [*Johnson*] and essentially provides that upon 'discovery' the so-called discovering nation acquires the exclusive right, as against all other European powers, to purchase or otherwise acquire Indigenous lands from the Indigenous occupants.

9 The "act of state doctrine" holds that the courts of a nation cannot look behind the manner in which sovereignty was acquired, no matter how illegitimate that acquisition may have been.

10 Indigenous lands were deemed unoccupied lands or "*terra nullius*" by the Europeans and as such, the laws of the discovering nation automatically applied.

concept of "extinguishment"[11] provided a rationale which European settlers used to establish colonies and to displace the numerous Indigenous nations from their land.[12] These legal doctrines also help to perpetuate the myth that one race can assert sovereignty over another by merely planting a flag on foreign soil. The controversy and contradictions around the settlement process have taken its toll on Canadian society at large and have been devastating for Indigenous populations. Terms such as "racism," "hate," and "oppression"[13] have been used to describe the cause and the consequences of the settlement process and its continued justification. One need only read the powerful writings of Taiaiake Alfred and Patricia Montour-Angus to better appreciate the pain and sorrow that have been a part of the controversy around the settlement process. The Métis have not been immunized from this controversy.

The contradictions are best exemplified by the peculiar consequences flowing from the Crown's assertion of sovereignty over, and responsibility for, Indigenous peoples. In so doing, the Crown became entangled in an unusual paradox. By way of the doctrine of discovery and the assertion of sovereignty, the imperial Crown claimed the exclusive right to buy and sell Indigenous lands. The effect of this was diminished Indigenous sovereignty because Indigenous nations could only alienate their lands by way of "surrender"[14] to the Crown. The discovering nation consequently

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The lands were deemed empty because the Indigenous inhabitants were not thought of as being civilized and therefore not capable of having laws. See *Cooper v. Stuart* (1899), 14 App. Cas. 286, 5 T.L.R. 387. See also, Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Saskatoon: University of Saskatchewan Native Law Centre, 1983) at 3-7.

11 Extinguishment is a process by which the state was allowed to, either unilaterally or by agreement, eliminate the existence of Indigenous rights and title. In Canada, since the recognition and affirmation of Aboriginal rights and title in s. 35 of the *Constitution Act, 1982*, the entire question of extinguishment, by agreement or otherwise is now unclear. It is clear that the provincial Crown cannot extinguish rights. It is also clear that the federal Crown cannot extinguish rights unilaterally. There are questions around whether rights can be extinguished by agreement.

12 See generally *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) [*Worcester*] and *Johnson*, *supra* note 8.

13 Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills, Ont.: Oxford University Press, 1999) at 34, 95.

14 Land surrenders involve the manner in which the Crown acquires rights and title to Indigenous lands. In some cases the surrenders are intended to be absolute, and in other cases they are conditional. The process of land surrenders was embodied in the *Royal Proclamation*, George R., Proclamation, 7 October 1763 (3 Geo. III), reprinted in R.S.C. 1985, App. II, No. 1, which calls for a public process, and in essence, informed consent. The modern day *Indian Act*, R.S.C. 1985, c. I-5, has embodied these concepts in the surrender provisions. Land surrenders are also a part of the treaty process.

developed a trade monopoly over such lands to the exclusion of all other foreign nations. The Indigenous nations became peculiarly vulnerable to the exercise of Crown discretion respecting such lands.[15]

The Crown also assumed greater responsibilities and potential liabilities flowing from its relationship with Indigenous nations, because the Crown placed itself between Indigenous peoples and their lands and required that all dealing with such lands be at the pleasure of the Crown. This peculiar vulnerability and the inalienable nature of Indigenous lands has become a hallmark in the modern Crown-Indigenous relationship and is the source of the fiduciary obligations related to the exercise of Crown discretion over such lands.[16] Aspects of this fiduciary relationship, and the corresponding duties, have become incorporated into s. 35 of the *Constitution Act, 1982* and make up a part of the Canadian constitutional framework.

The assertion of Crown sovereignty had other consequences. Indigenous sovereignty was further diminished by the Crown's assertion of jurisdiction over all aspects of Indigenous life. The Crown placed itself between Indigenous peoples and the full expression of Indigenous governance.[17] The modern day *Indian Act*[18] has come to embody the expression of Crown sovereignty over the status Indian population and the diminished nature of Indigenous jurisdiction over matters of land and governance. This diminished sovereignty and peculiar vulnerability was articulated as early as 1763 in the *Royal Proclamation*[19] and captured, to some extent, in the treaty making process.[20] This diminished sovereignty was also articulated in the following way by the Supreme Court of the United States in *Cherokee Nation v. State of Georgia*:[21]

> Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right, to

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15 Mark L. Stevenson & Albert Peeling, "Probing the Parameters of Canada's Crown-Aboriginal Fiduciary Relationship" in Law Commission of Canada and Association of Iroquois and Allied Nations, eds., *In Whom We Trust: A Forum on Fiduciary Relationships: Proceedings of a Conference Held June 18, 2002* (Toronto: Irwin Law, 2002) 7 at 23 [Stevenson & Peeling].

16 See *Guerin v. R.*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321.

17 Stevenson & Peeling, *supra* note 15 at 18-19.

18 *Supra* note 14.

19 *Supra* note 14.

20 It is important to note that many Indigenous peoples believe that the treaty process captures a nation to nation relationship between two sovereign powers. While this is a valid view, it is also clear that the degree of sovereignty by First Nations in the post-contact era has been significantly reduced.

21 30 U.S. (5 Pet.) 1, 8 L. Ed. 25 (1831) [*Cherokee Nation* cited to U.S.].

> the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted, whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases. Meanwhile they are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian.[22]

For the Métis, this diminished sovereignty found its own unique expression. The Métis were not treated the same as Indians, but the diminishment of Métis rights and jurisdiction has been no less remarkable. One need only read the history of the Riel struggle and the various ways in which the Métis were deprived of their land to appreciate the effect of colonialism on the exercise of Métis rights and Métis governance. It could be argued that, in some ways, s. 31 of *The Manitoba Act, 1870*[23] expresses the diminished nature of Métis jurisdiction over their lands and governance. While *The Manitoba Act* provided for the recognition of Métis land rights, it also uses the controversial language of extinguishment.

Since the *Royal Proclamation* of 1763, in order to prevent "great frauds and abuses,"[24] the Crown has attempted to establish some clear parameters in its relationship with Indigenous peoples. While the language of the *Royal Proclamation* lacks the precision and clarity that would be preferable, particularly in relation to the description of the Indigenous territories, some general propositions are readily discernable. Several of these propositions continue to serve as pillars for the modern relationship between Canada, and the Indians, the Inuit and the Métis. Three of the propositions may be characterized as follows: the *Royal Proclamation* acknowledges that Indigenous nations have rights and title to the land and existing forms of governments, however diminished these rights might be; the *Royal Proclamation* articulates the British policy for acquiring land from

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22 *Ibid.* at 17.

23 (U.K.) 33 Vict., c. 3, s. 3, reprinted in R.S.C. 1970, App. II, No. 8 [*The Manitoba Act*]. The relevant portion of s. 31 provides "And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof."

24 *Supra* note 14 at 6.

Indigenous nations and limits the Indigenous nations' ability to sell their lands, stipulating that Indian lands cannot be sold without special leave from the Crown; and, perhaps most importantly, the *Royal Proclamation* sets out a framework for a relationship between the two societies. These same propositions were captured in the language of Chief Justice Marshall in the earlier quote from *Cherokee Nation*.[25]

It is in this context that a peculiar paradox arises. On the one hand, the *Royal Proclamation* seemingly acknowledges the Indigenous nations as "allies and partners" and as an extension of this partnership, Indigenous nations are considered as equals. However, in other parts of the text, there is a more trust-like relationship where one party to the relationship is subject to the discretion of the other. In any event, these three broad propositions have been pervasive throughout the Crown-Indigenous relationship, and have served as the backdrop for both historic and modern treaty negotiations. These same propositions have evolved into: the recognition of rights now embodied by s. 35; the exclusive jurisdiction to deal with Indigenous peoples and their lands, once vested in the imperial Crown and now residing in s. 91(24) of the *Constitution Act, 1867*; and, the trust-like or fiduciary relationship between the Crown and Indigenous peoples, and with respect to Indigenous or Aboriginal rights. These three principles help frame the relationship between the Crown and the Aboriginal peoples of Canada, including the Métis. Two of these principles are reflected in constitutional language by virtue of s. 91(24) of the *Constitution Act, 1867* and s. 35 of the *Constitution Act, 1982*. The third, the fiduciary relationship, while not specifically included in constitutional language, is directly anchored as a constitutional imperative linked to Canada's exclusive legislative jurisdiction pursuant to s. 91(24), the discretion Canada exercises over Indians and Indian lands and the fiduciary duties that emerge pursuant to the s. 35 framework.

III. SECTION 91(24) AND THE MÉTIS

Section 91(24) of the *Constitution Act, 1867* is at the heart of the relationship between the Crown and Indigenous peoples. It provides Canada with the exclusive legislative jurisdiction for "Indians, and Lands reserved for the Indians."[26] It is pursuant to this section that Canada has the discretion to manage and dispose of Indian lands and Indian monies, and this discretion is at the centre of the special fiduciary relationship between the Crown and Indigenous peoples.[27]

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25 See text accompanying note 22, *supra*.
26 *Supra* note 1.
27 Stevenson & Peeling, *supra* note 15.

The scope of s. 91(24) has been the subject of some debate. Historically, Canada has interpreted the provisions of s. 91(24) in a relatively narrow fashion. The courts have generally considered s. 91(24) as encompassing two subject matters: Indians, and Indian lands, or "Lands reserved for the Indians." Today, there is not much doubt about the breadth of the expression "Lands reserved for the Indians," though the scope of Indian lands was not understood at the outset. Prior to a number of early Privy Council cases,[28] it was thought that "Lands reserved for the Indians" included only Indian reserves under the *Indian Act*. It is now clear that the expression includes lands reserved in any way for the use and benefit of Indians, including Aboriginal title lands[29] and lands set aside for individual Indians "in severalty" pursuant to treaty provisions.[30] The debate is now around the extent to which such lands are protected under s. 35 and immunized from provincial intrusion.

With respect to the first subject matter, that is "Indians," Canada had interpreted this provision to mean that the federal government has jurisdiction only for status Indians.[31] In other words, Canada had assumed that its legislative jurisdiction was restricted to the administrative categories of Indians created by the *Indian Act*, as opposed to the broader category of "constitutional" Indians that includes the Inuit, the Indians and the Métis. Even more puzzling, the federal government has, as a policy, attempted to make a distinction between on-reserve and off-reserve status Indians, claiming that while it has jurisdiction for status Indians, the provinces have the responsibility for those Indians residing off-reserve. Canada has used the distinction between legislative jurisdiction and responsibility to rationalize an on-reserve and off-reserve allocation of responsibilities. This on-reserve and off-reserve distinction, while creating a tidy division of responsibilities, has no basis in law as a mechanism for allocating legislative jurisdiction between Canada and the provinces.

In any event, it is the inclusion of the Métis within the definition of the term "Indians" as used in s. 91(24) that causes Canada the most angst. In the 1939 Supreme Court of Canada reference now referred to as *Reference Re Term "Indians,"*[32] the Court clarified that Canada's constitutional jurisdiction includes the Inuit. Canada has

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28 See especially *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), [1889] 14 A.C.D. 46, 10 C.R.A.C. 13 (P.C.).

29 *Delgamuukw, supra* note 6.

30 *Chingee v. British Columbia (A.G.)* (2002), [2003] 8 B.C.L.R. (4th) 149, 2002 BCSC 1568, 1 C.N.L.R. 24.

31 The term "status Indian" refers to those Indians who are registered under the federal *Indian Act, supra* note 14.

32 (1938), [1939] S.C.R. 104, (*sub nom. Re Eskimos*) 2 D.L.R. 417 [cited to S.C.R.].

continued to take the view that it does not have jurisdiction over the Métis. However, *Reference Re Term "Indians"* provided an analytical framework for determining the scope of the term "Indians," as it is used in s. 91(24) of the *Constitution Act, 1867*. Pursuant to this analytical framework, it would appear that the Métis are constitutional Indians and within the exclusive legislative authority of Parliament. This is because the term "Indians" used in s. 91(24) is intended to be understood in its generic sense, equivalent to the term "Aborigines." The meaning to be ascribed to the term "Indians" is the meaning as it was used contemporaneous to Confederation. It is not to be interpreted in its narrow sense, and not limited to the administrative category of Indians defined by the *Indian Act*. The inclusion of the Métis as one of the three Aboriginal peoples of Canada in s. 35 of the *Constitution Act, 1982* further supports this conclusion.

There are, of course, the voices that argue the Métis are a provincial responsibility, the loudest being the voice of Canada. Recently, in *R. v. Blais*,[33] the Supreme Court of Canada seemed to be saying that the term "Indians," as used in the late nineteenth and early twentieth centuries, did not include the Métis. It must be emphasized that this case only dealt with the meaning of the term "Indians" as used in the Natural Resources Transfer Agreement,[34] and that arguments were not put forward relating to the meaning of the term "Indians" in s. 91(24) of the *Constitution Act, 1867*. In particular, the Court did not fully explore the volumes of evidence in the *Report from the Select Committee on the Hudson's Bay Company*,[35] and other Select Committee Reports, which support the conclusion that the Métis are "Indians" for the purposes of s. 91(24).[36] As stated in *Reference Re Term "Indians"* with respect to the significance of the Select Committee Report, "this Report was the principal source of information as regards the aborigines in those territories until some years after Confederation."[37]

IV. RECOGNITION OF MÉTIS SECTION 35 RIGHTS

For a number of years the debate has raged over the existence of Métis Aboriginal rights. The argument against the existence of Métis

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33 *Supra* note 3.

34 *Constitution Act, 1930* (U.K.), 20 & 21 George V, c. 26, reprinted in R.S.C. 1985, App. II, No. 26 Sch. I at para. 13.

35 U.K., H.C., "Report from the Select Committee on the Hudson's Bay Company," c. 224.260 (Sess. 2) in *Sessional Papers*, vol. 15 (1857) 1 (Chair: The Right Hon. Henry Labouchere).

36 For a detailed analysis of the Select Committee Reports see articles by Chartier, *supra* note 3, and Stevenson, *supra* note 3.

37 *Supra* note 32 at 109.

Aboriginal rights is that Aboriginal rights are those rights of Aboriginal peoples that were exercised prior to contact. At the time the Europeans arrived, the Métis did not exist either as individuals or as a people and therefore they cannot have Aboriginal rights protected by s. 35. The theory is appealing because of its simplicity, but it is wrong thinking and wrong in law. It is wrong thinking because it denies the Métis their Aboriginality and ignores much of Canadian history, which documents both the struggle for and recognition of the rights of the Métis as a distinct people. It is wrong in law because it applies the wrong test. The s. 35 analytical framework should not and cannot be applied mechanically to Métis. The test for Métis rights must be given different considerations than tests that apply to the Indian nations because their history and culture is different and the Métis have a distinct constitutional status.[38] Métis Aboriginal rights are linked to, but not dependent on, their Indian forebears. While being mindful of the link between the Métis and their forebears, Métis rights are sourced in a distinct Métis culture that emerged in the post-contact era. It is the recognition of this duality, or the unique status of Métis and Métis Aboriginal rights, that underlies the protection of Métis rights as distinct from Indian or Inuit rights in s. 35. Stated otherwise, the purpose of s. 35 is:

> to recognize and affirm the rights of Métis held by virtue of their direct relationship to this country's original inhabitants and by virtue of the continuity between their customs and traditions and those of their Métis predecessors.[39]

Over the last several years, there has been an increasing amount of litigation respecting the rights of the Métis. At every turn, the Crown has been there, not as fiduciary, but as inquisitor and prosecutor. It is as though the Crown never intended to keep the promises made in 1982 with the recognition and affirmation of Métis constitutional rights. Canada's intentions with respect to s. 35 can be measured by the number of times that the federal government intervenes in s. 35 cases against those who dare to exercise their rights. For Métis, the s. 35 promise has been honoured only in its breach. However, whether by virtue of their Indianness, or by virtue of their Métis status, individual Métis have had some success in the courts. Those few successes have now culminated in the historic decision of the Supreme Court of Canada in *R. v. Powley*[40] which affirmed the

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38 *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 at para. 67.

39 *R. v. Powley* (2003), 230 D.L.R. (4th) 1, 308 N.R. 201, 2003 SCC 43 at para. 29 [*Powley*].

40 *Ibid.*

existence of Métis Aboriginal rights by rejecting a slavish application of the s. 35 analytical framework. But *Powley* is not the end of it; rather, it is only the beginning, and the implications for provincial natural resource regulatory frameworks, particularly wildlife regimes, are significant and inescapable. A proper interpretation of Métis rights will place such rights within the "core of Indianness" that is immunized from the application of provincial laws.

V. MÉTIS RIGHTS AND THE "CORE OF INDIANNESS"

Unlike the United States,[41] in Canada, Indian reserves are not federal enclaves.[42] The general rule in Canada is that provincial laws of general application apply to Indians, either of their own force, or invigorated as federal laws, both on and off Indian reserve lands.[43] As will be discussed later, the interpretation of this general rule is not as straightforward as it would appear. In any case, there is no exclusive federal enclave on Indian reserves. However, there is a "core of Indianness" that falls within the exclusive legislative jurisdiction of the federal government. This core is immunized from the application of provincial laws, notwithstanding the general nature of such laws.

The concept of the "core of Indianness" remains a bit of a mystery in the field of Indian and Aboriginal law. It has not been well articulated and is usually applied on a case-by-case basis where the courts feel that provincial legislation has gone too far and where some protection from provincial laws ought to be afforded. The "core of Indianness" generally describes that aspect of Indians and Indian lands, including s. 35 rights, which is protected from provincial jurisdiction because it goes to the very heart of Aboriginality or the meaning of being Indian. In addition, much of what is referred to as "the core of Indianness" is affected by the fiduciary relationship between the Crown and Indigenous peoples, and corresponding fiduciary duties.

The "core of Indianness" that is immunized from the application of provincial laws is more encompassing than the concepts of "status Indians" and "Indian reserve lands." This core is informed by, if not framed by, s. 91(24) of the *Constitution Act, 1867*, s. 35 of the *Constitution Act, 1982*, and the fiduciary relationship between the

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41 See American case law exploring the doctrine of Tribal Sovereignty and the federal plenary powers, beginning with *Johnson*, *supra* note 8, *Cherokee Nation*, *supra* note 21, and *Worcester*, *supra* note 12.

42 Here, it is important to note that, while Indian reserves are not exclusive federal enclaves, there is nothing preventing the federal government from fully occupying the field and creating a federal enclave through its own legislative efforts, provided that such legislation has valid Indian policy objectives.

43 *Dick v. The Queen*, [1985] 2 S.C.R. 309, 23 D.L.R. (4th) 33.

Crown and Indigenous peoples. The subject matter of the "core of Indianness," or those matters that are immunized from provincial jurisdiction, includes the rights recognized by s. 35, that is, Aboriginal and treaty rights. The fiduciary relationship arises because of the exclusive legislative jurisdiction over the subject matter, the discretion exercised by the Crown in right of Canada with respect to the subject matter, and the constitutional protection of Aboriginal and treaty rights. The "core of Indianness" includes Métis Aboriginal rights.

The debate around the application of provincial laws to Métis exercising Aboriginal rights requires a discussion of s. 88 of the *Indian Act*.[44] Section 88 referentially incorporates provincial laws of general application which would not normally apply to status Indians because of Canada's exclusive legislative jurisdiction for Indians and lands reserved for the Indians. This referential incorporation has the effect of making such laws apply to Indians as federal laws.[45] In other words, without s. 88, certain provincial natural resource laws would not apply to status Indians harvesting natural resources pursuant to Aboriginal or treaty rights. More importantly, as s. 88 is a part of the *Indian Act*, that section does not apply to the Métis. The result is that valid provincial natural resource laws that touch upon "the core of Indianness," and Métis Aboriginal rights as a part of that core, are read down by virtue of the doctrine of inter-jurisdictional immunity, and are consequently inapplicable.

The above analysis is not remarkable. It is simply a reflection of well established constitutional principles. In *Alphonse*,[46] where the British Columbia Court of Appeal discussed the application of the *British Columbia Wildlife Act*,[47] the Court stated:

> Section 27(1)(c) affects the core of Indianness for status Indians, non-status Indians and Métis alike, because for all of them it affects or may affect the exercise of their aboriginal rights. Accordingly, it reaches into the exclusive federal

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44 Section 88 states:

> Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulations or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under the Act.

Supra note 14.

45 *Ibid.*

46 *Supra* note 6.

47 R.S.B.C. 1996, c. 488.

> nature of the federal legislative power under s. 91(24) of the *Constitution Act, 1867*. Therefore it does not apply to them of its own Provincial vigour. Only by the operation of s. 88 can s. 27(1)(c) of the *Wildlife Act* be given Federal vigour, and so be made to apply to status Indians under the *Indian Act*. However, it still would not apply to non-status Indians and Métis in the exercise of their aboriginal rights, because they are not considered to be Indians for the purposes of the *Indian Act*. In my opinion, because s. 27(1)(c) of the *Wildlife Act* applies to status Indians and to non-Indians but does not apply to non-status Indians and Métis, it cannot be said to be a law of general application. It *singles out* status Indians for special treatment in comparison to non-status Indians and Métis in relation to the exercise of similar aboriginal rights, and it *discriminates* against status Indians and in favour of non-status Indians and Métis.[48]

Notably, Canada has fiduciary obligations flowing from the general fiduciary relationship between Indigenous peoples and the Crown. These obligations require that Canada act in the best interests of all Aboriginal peoples because of the discretion that may be exercised by Canada over Aboriginal lands and rights, by virtue of Canada's exclusive legislative jurisdiction. Métis people and their rights are not excluded from these fiduciary obligations. While courts have been reluctant to place positive obligations on the fiduciary relationship and its related duties, at a minimum, Canada ought to acknowledge that, as a part of its jurisdiction, it has law-making authority respecting Métis people and that such authority ought to be exercised in a manner consistent with the fiduciary relationship and its corresponding duties.

VI. CONCLUSION

There continues to be a debate over whether the Métis people of Canada would properly fall under Canada's legislative jurisdiction over Indians and lands reserved for Indians. In order to resolve this debate, a clear, consistent and purposive approach must be used to interpret the provisions of s. 91(24). A proper analysis of the scope of s. 91(24) must begin with the analytical framework provided in *Reference Re Term "Indians."* In addition, s. 35 of the *Constitution Act, 1982* provides that the Aboriginal peoples of Canada include the Indians, the Inuit and the Métis.[49] It is only logical that Canada's

48 *Alphonse, supra* note 6 at para. 143 [emphasis in original].
49 *Supra* note 4.

legislative jurisdiction would also include the Métis. It would be a curious result if Canada had legislative jurisdiction over the Indians and the Inuit and the provinces had jurisdiction over the Métis.

As a result of the decision of the Supreme Court of Canada in *Powley*, it is clear that Métis have Aboriginal rights that are protected by s. 35. The earlier tests used by the courts to determine the existence of Aboriginal rights should not be mechanically applied in relation to Métis rights. Any approach to Métis Aboriginal rights must consider the underlying purposes of protecting Métis Aboriginal rights as articulated in *Powley*. As the Court stated in *Powley*:

> The inclusion of the Métis in s. 35 represents Canada's commitment to recognize and value the distinctive Métis cultures, which grew up in areas not yet open to colonization, and which the framers of the Constitution Act, 1982 recognized can only survive if the Métis are protected along with other aboriginal communities. ...Section 35 requires that we recognize and protect those customs and traditions that were historically important features of Métis communities prior to the time of effective European control, and that persist in the present day. This modification is required to account for the unique post-contact emergence of Métis communities, and the post-contact foundation of their aboriginal rights.[50]

This approach to the analysis of Métis rights will breathe life into s. 35, which, until now, has been a broken constitutional promise for the Métis. A less generous interpretation of s. 35 with regard to its application to Métis harvesters would have rendered meaningless the promises made to the Métis in 1982.

In addition, the courts have indicated that Aboriginal rights fall within the core of Indianness or the heart of s. 91(24). Consequently, provincial laws that have the effect of regulating Aboriginal harvesters exercising Aboriginal rights have no application on their own because of the doctrine of inter-jurisdictional immunity. Such laws are invigorated by s. 88 of the *Indian Act*, which referentially incorporates normally inapplicable provincial laws as federal laws. The *Indian Act* does not apply to the Métis; therefore, such provincial laws of general application do not apply to Métis harvesters exercising Aboriginal rights. Any other interpretation of s. 91(24) and the doctrine of inter-jurisdictional immunity would be inconsistent with accepted principles of constitutional interpretation.

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50 *Powley*, *supra* note 39 at paras. 17-18.