MÉTIS NATIONAL COUNCIL
Office of the President

May 2016

# Supreme Court of Canada Affirms Canada has a Constitutional and Jurisdictional Responsibility to deal with the Métis Nation

In a landmark ruling on April 14, 2016, the Supreme Court of Canada (SCC) recognized and affirmed that the federal government's duties and responsibilities apply to all three of Canada's Indigenous Peoples including the Métis.

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In reaching its decision, Justice Abella speaking for a unanimous court stated: "The history of Canada's relationship with its Indigenous peoples, inequities are increasingly revealed and remedies urgently sought... This case represents another chapter in the pursuit of reconciliation and redress in that relationship." The judgment clearly "recognized that Métis and non-status Indians have no one to hold accountable for the inadequate status quo". The court concluded that Canada has a constitutional and jurisdictional responsibility for Métis under s. 91(24) of the *Constitution Act, 1867*.

Without dictating what the Government has to do, this historic decision nonetheless places a clear obligation upon the federal government to negotiate with the elected government of the Métis Nation. The court ruled against the Crown that the ruling would have no practical utility noting that "Delineating and assigning constitutional authority between the federal and provincial governments will have enormous practical utility for these two groups who have, until now, found themselves having to rely more on noblesse oblige than on what is obliged by the Constitution". The court reaffirmed the federal government's duty by identifying a trilogy of cases that "already recognize a context-specific duty to negotiate when Aboriginal rights are engaged".

"This decision ends the federal government's long standing discrimination and non-recognition of the Métis people and the elected body that represents the Métis Nation – the Métis National Council," stated President Clément Chartier of the Métis National Council (MNC). While the finding does not mean the federal government must legislate for Métis, the court went on to say that "it has the undeniable salutatory benefit of ending the jurisdictional tug-of-war in which these groups were left wondering about where to turn for policy redress".

"It is clear in the decision the SCC recognizes both levels of government have responsibilities to deal with the Métis Nation. This decision also proves the federal government is constitutionally vested with an overriding constitutional obligation vis-a-vis the Métis Nation."

In determining that Métis were included in 91 (24) the court recognized the crucial role the Métis Nation played in opening up western and northern Canada, the court stated: "It would have been impossible for Canada to accomplish its expansionist agenda if "Indians" under 91 (24) did not include Métis. The threat they posed to Canada's expansion was real. On many occasions Métis "blocked surveyors from doing their work" and "prevented Canada's expansion in the region" when they were unhappy with the Canadian Government".

The main message this decision gives the federal government is it can no longer point to the provinces to address the deep seated social and economic issues of the Métis Nation. The federal government must now step up to the plate and negotiate in good faith with the Métis Nation and its elected, representative body – the Métis National Council.

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"Make no mistake," said President Chartier, "this decision confirms what the Métis Nation has been saying for decades – Canada has a constitutional and jurisdictional responsibility to the Métis Nation. My Board of Governors and I are prepared to continue on this path of reconciliation with Canada towards a mutually respectful nation-to-nation relationship."

In his closing remarks President Chartier noted "As the Court stated, 'This case represents another chapter in the pursuit of reconciliation and redress in that relationship'. We now await to hear from the Minster and her Special Ministerial Representative (Tom Issac) on the path forward for the Métis Nation."

PAPE SALTER TEILLET LLP BARRISTERS AND SOLICITORS

# "Another Chapter in the Pursuit of Reconciliation and Redress…"

# A Summary of *Daniels v. Canada* at the Supreme Court of Canada

## About This Document

This is a summary of the Supreme Court of Canada's decision in *Daniels v. Canada*, 2016 SCC 12 ("*Daniels*"). It has been prepared for the Métis National Council ("MNC") and its Governing Members. It is not legal advice and should not be relied on as such. It does not necessarily represent the views of the MNC or its Governing Members.

## Who Was Involved in the Case?

The representative plaintiffs were well-known Métis leader Harry Daniels (now deceased), Gabriel Daniels (Métis), Leah Gardner (a non-status Indian from Ontario), Terry Joudrey (a Mi'kmaq from Nova Scotia) and the Congress of Aboriginal Peoples (the "Plaintiffs"). The case was filed against the federal government as represented by the Minister of Indian Affairs and Northern Development (the "Respondent" or "Canada").

At the Supreme Court of Canada, the MNC, Métis Settlements General Council and Gift Lake Métis Settlement intervened on behalf of the Métis Nation. Groups such as the Assembly of First Nations and Chiefs of Ontario amongst others intervened on behalf of First Nations and non-status Indian groups. Alberta and Saskatchewan also intervened.

## What Did the Plaintiffs Ask For?

The Plaintiffs asked for three judicial declarations:

1. that Métis and non-status Indians are in s. 91(24) of the *Constitution Act, 1867;*
2. that the federal Crown owes a fiduciary duty to Métis and non-status Indians; and
3. that Métis and non-status Indians have the right to be consulted and negotiated with, in good faith, by the federal government on a collective basis through representatives of their choice.

A declaration is a common court remedy in Aboriginal claims cases. A court declares the law in relation to a dispute between government and Aboriginal peoples. The parties are then expected to change their behavior to be consistent with the law.

## What the Supreme Court Said

### What is Section 91(24) of the *Constitution Act, 1867*?

In 1867, when Canada was created—as a new country—various "jurisdictions" were divided up between Parliament and provincial legislatures. Parliament was assigned "exclusive Legislative Authority" for "Indians, and Land reserved for the Indians" through s. 91(24) of the *Constitution Act, 1867*. This jurisdiction was assigned to Canada to achieve "the broader goals of Confederation," which included expansion into Rupert's Land and the North-Western Territory as well as building a national railway to British Columbia (para. 25).


> "The Métis Nation was … crucial in ushering in western and northern Canada into Confederation and in increasing the wealth of the Canadian nation by opening up the prairies to agriculture and settlement. These developments could not have occurred without Métis intercession and legal presence."
>
> —*Daniels,* para. 16 (citing Professor John Borrows)

Section 91(24) provided Parliament, and, by extension, the federal government, the "authority over *all* Aboriginal peoples" in order to facilitate the "westward expansion of the Dominion" (para. 25). This expansion was advanced through the Canada's treaty making, agreements and alliances with the diverse Aboriginal populations it encountered. These "relationships" with Aboriginal groups allowed the federal government to "protect the railway from attack" and to smooth the way for settlement (para. 25).

The "Indians" in s. 91(24) included *all* of the Aboriginal peoples within Canada in 1867 as well as those to be encountered as the country expanded (para. 46). Notably, in the "western territories," the Aboriginal peoples encountered included various Indian tribes, bands, etc. (i.e., First Nations) as well as the Métis (i.e., the Métis Nation) (para. 16; see also *Manitoba Metis Federation v. Canada*, para. 2). All of these groups—First Nations and Metis—were considered "Indians" within s. 91(24) because they were indigenous to the territory and necessary "partners in Confederation" (para. 37).

In modern times, s. 91(24) continues to be about advancing Parliament's "relationship with all of Canada's Aboriginal peoples," thereby making "reconciliation with *all* of Canada's Aboriginal peoples is Parliament's goal" (paras. 36-37). The Court notes, however, that s. 91(24)'s jurisdiction to advance Canada's "relationships" with all Aboriginal peoples plays a "very different constitutional purpose" than s. 35 (which recognizes and affirms Aboriginal rights and claims and calls for the just settlement of Aboriginal claims) (paras. 37, 49; see also *Haida Nation v. BC*, paras. 20, 25).

## Why Does Inclusion in Section 91(24) Matter to Métis and Non-Status Indians?

The Court held that uncertainty about whether Métis and non-status Indians are in s. 91(24) has left them in a "jurisdictional wasteland with significant and obvious disadvantaging consequences." The Court upheld the Trial Judge's findings that the "political football—buck passing" tactics of governments towards these groups had "produced a large population of collaterally damaged" people (para. 14). While inclusion in s. 91(24) doesn't create a duty on to legislate, the granting of a declaration that these groups are included in s. 91(24) provides them with "certainty and accountability" about "where to turn for policy redress" and has an "undeniable salutary benefit" (paras. 15, 50).

> "With federal and provincial governments refusing to acknowledge jurisdiction over them, Métis and non-status Indians have no one to hold accountable for an inadequate status quo."
>
> — *Daniels,* para. 15

## Why Non-Status Indians Are Included in Section 91(24)

At the hearing of the appeal, Canada conceded that non-status Indians are in s. 91(24). The Court noted that Canada's concession was not determinative, so answering the legal question still had practical utility. **As such, a declaration that non-status Indians are in s. 91(24) was issued (para. 20).** The Court also noted that since *all* Aboriginal peoples are in s. 91(24) (and non-status Indians are included within those peoples) any "definitional ambiguities" about who non-status Indians are did not preclude a judicial determination that they are in s. 91(24) as a starting point (para. 19) with specifics to be "decided on a case-by-basis in the future" (para. 47).

## Why Métis Are Included in Section 91(24)

In order to achieve its expansionist goals, Canada needed to facilitate positive "relationships" with the large and diverse Aboriginal population it encountered. This included dealing with the Métis—as "Indians" under s. 91(24)—both prior to and post Confederation. **As such, the Court issued a declaration that the Métis are included in s. 91(24).** In order to support its conclusion, the Court relied on the following:

- Métis were considered "Indians" for the purposes of pre-Confederation treaties such as the Robinson Treaties of 1850 (para. 24).

- Many post-Confederation statutes considered Métis to be "Indians" (para. 24), including an amendment to the *Indian Act* in 1894 to include "Halfbreeds" in liquor prohibitions (para. 27).

- Canada's jurisdiction needed to be broad enough to include the Métis because they posed a real threat to the country's "expansionist agenda" (paras. 25-26).

- The "Métis Nation was … crucial in ushering western and northern Canada into Confederation … These developments could not have occurred without Métis intercession and legal presence" (para. 26).

- Although applied haphazardly, the federal government's residential school policy encompassed Métis, including establishing a federally funded industrial school at Saint-Paul-des-Métis in Alberta (paras. 28-30).

- In the early 20th Century, the federal government continued to be willing to recognize Métis as "Indians" whenever it was convenient to do so, including through the issuance of Métis scrip and moving Métis in and out of treaties and the *Indian Act* (paras. 31-32).

- In 1980, a federal Cabinet document acknowledged that "Métis people … are presently in the same legal position as other Indians who signed land cession treaties" and those Métis who received scrip are still "Indians" within the meaning of s. 91(24) (para. 33).

The Court held that the term "Indians" in s. 91(24) could be equated to the way we use the term "Aboriginal" today (*i.e.*, it includes all the Aboriginal peoples in s. 35). It also noted that it would be strange for the Métis to be excluded from s. 91(24), while all other Aboriginal peoples enumerated in s. 35 were included (para. 35).

The Court distinguished its decision in *R. v. Blais*, where it held Métis were not included as "Indians" in Manitoba's *Natural Resources Transfer Agreement, 1930*. It noted that *Blais* was about whether Métis where included in a specific constitutional agreement, while this case was about jurisdiction in the Constitution (paras. 44-45).

> "The [1982] constitutional changes, the apologies for historic wrongs, a growing appreciation that Aboriginal and non-Aboriginal people are partners in Confederation, … all indicate that reconciliation with *all* of Canada's Aboriginal peoples is Parliament's goal"
>
> *Daniels*, para. 37

## Métis Inclusion as Section 91(24) "Indians" Does Not Compromise Métis Distinctiveness

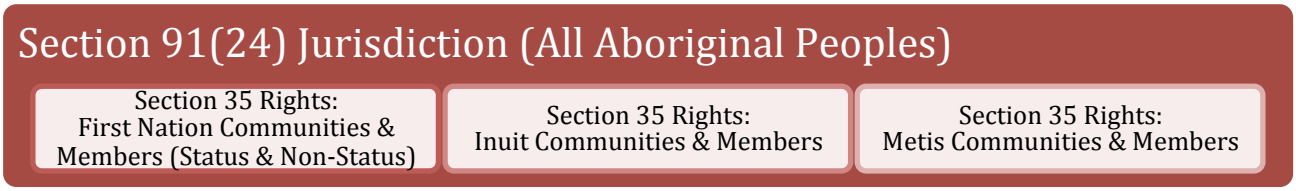
Since the term "Indian" in s. 91(24) includes all Aboriginal peoples recognized in s. 35, the Court emphasized that Métis inclusion in s. 91(24) as "Indians" does not undermine Métis distinctiveness—as a unique Aboriginal people—in any way. The Court highlighted that the Inuit—who also have their own history, language, culture, and separate identities from "Indian tribes" or First Nations—are already recognized as "Indians" in s. 91(24) and their distinctiveness has not been compromised (paras. 39, 41). The Court also emphasized that "[t]here is no doubt that the Métis are a distinct people" and noted it has previously recognized Métis communities in both Alberta and Manitoba as a "culturally distinct Aboriginal people" (paras. 42-43).

## Section 35 Rights and Definitional Issues Are Addressed Downstream from Jurisdiction

Since *Daniels* was not about whether Métis or non-status Indian communities possess Aboriginal rights or claims recognized by s. 35, the Court found "there is no need to delineate which mixed-ancestry communities are Métis and which are non-status Indians" at this determination of jurisdiction stage. Essentially, all of these groups are included in s. 91(24) "by virtue of the fact that they are all Aboriginal peoples" (para. 46).

Determining whether "particular individuals or communities" are in s. 91(24) are "fact-driven question[s] to be decided on a case-by-case basis" (para. 47). At the jurisdiction stage, "community acceptance" is not required because the net is widely cast to include *all* Aboriginal peoples, including, "people who may no longer be accepted by their communities because they were separated from them as a result, for example, of government policies such as Indian Residential Schools" (paras. 46-49).

The Court, however, went on to highlight that Métis or non-status Indian inclusion in s. 91(24) is not the same as being recognized as a rights-bearing community or rights-holder for the purpose of s. 35 (para. 49). Section 91(24) serves "a very different constitutional purpose" than s. 35—it casts a wide net and deals with Parliament's "relationships" with *all* Aboriginal peoples. Section 35, on the other hand, protects "historic community-held rights" and calls for the just settlement of rights and claims (paras. 34, 49). In effect, rights and definitional issues are answered *downstream* from jurisdiction. The visual below attempts to illustrate the interplay of ss. 91(24) and 35.




The Court reaffirmed that in the Métis context, the criteria in *R. v. Powley* still must be met in order to establish Métis rights (paras. 48-49). In the non-status Indian community context, *R. v. Van der Peet* likely applies or an individual must show they are a descendant/beneficiary of a treaty or a non-status member of a First Nation.

Specifically, in relation to Métis rights, the *Powley* criteria for establishing a rights-bearing Métis community or identifying rights-holders (*i.e.*, self-identification, ancestral connection to the historic community and community acceptance) still applies (paras. 48-49). *Daniels* does not change these requirements. As the Court previously held,

> It is important to remember that, no matter how a contemporary community defines membership, only those members with a demonstrable ancestral connection to the historic community can claim a s. 35 right. Verifying membership is crucial, since individuals are only entitled to exercise Métis aboriginal rights by virtue of their ancestral connection to and current membership in a Métis community. (*Powley*, para. 34)

This issue is particularly important for those Métis groups who rely on their registration systems for the identification of rights-holders and asserting s. 35 Métis rights for the purposes of Crown consultation, harvesting, *etc*. *Daniels* does not mean that anyone who claims to be "Métis" under s. 91(24) is now a s. 35 Métis rights-holder or could be "accepted" for such a purpose without still meeting the criteria set out in *Powley*.

## Provincial Legislation Including Métis and Non-Status Indians Not Automatically Invalid

The Court held that provincial laws pertaining to Métis and non-status Indians are not inherently beyond the scope of provincial legislatures (para. 51). Provinces can pass laws in relation to provincial areas of jurisdiction, which affect or specifically deal with Métis or non-status Indians, as long as those laws do not impair the core of s. 91(24). The *Métis Settlements Act* (Alberta), *The Métis Act* (Saskatchewan) or *Métis Nation of Ontario Secretariat Act* (Ontario) are all examples of this type of permissible provincial law, wherein provinces have acted in their respective jurisdictional spheres.

## The Crown is in a Fiduciary Relationship with Métis and Non-Status Indians

The Court reaffirmed based on *Delgamuukw v. BC* and *Manitoba Metis Federation Inc. v. Canada* that the Crown is in a fiduciary relationship with all Aboriginal peoples, including Métis and non-status Indians. The Court did not issue a declaration on this issue because it would just be "restating settled law" (para. 53).

> "The relationship between the Métis and the Crown, viewed generally, is fiduciary in nature."
>
> — *Manitoba Métis Federation,* para. 48

## The Duty to Negotiate with Métis and Non-Status Indians

The Court reaffirmed based on *Haida Nation v. BC*, *Tsilhqot'in Nation v. BC* and *Powley* that "a context-specific duty to negotiate" exists "when Aboriginal rights are engaged." This duty is not triggered by mere inclusion in s. 91(24), however; it applies where Métis or non-status Indian communities have credible or established s. 35 rights or claims. Again, the Court did not issue a declaration on this issue because to do so would have been "a restatement of the existing law" (para. 56).

This is a particularly significant development for Métis communities from Ontario westward whose s. 35 rights and/or claims have already been recognized by courts and/or provincial government but who yet find that the federal government does not have any negotiation processes with them and they are excluded from Canada's specific and comprehensive claims policies. Further, this clear statement from the Court that there is a duty to negotiate (related to but distinct from the Crown's duty to consult and accommodate) will be helpful to all Aboriginal peoples.

## The Implications of *Daniels* for the Métis Nation

Nothing immediately changes for Métis based on the *Daniels* judgment. For example, Métis are not now registered as "status Indians" under the *Indian Act* or eligible to be registered as such. Various federal programs and services available to status Indians and Inuit are not now available to Métis (i.e., non-insured health benefits, post-secondary education funding, etc.). Métis are not now eligible for tax exemptions available to some status Indians.

Going forward, however, it will be incumbent on Canada to move forward on several fronts with the authorized representatives of rights-bearing Métis communities. For example, based on the Crown's duty to negotiate—where there are established or credible Métis rights and claims that implicate federal jurisdiction (*i.e.*, claims against the federal Crown, issues that go to the "core" of s. 91(24) such as Métis identification, self-government, *etc.*)—the ongoing exclusion of Métis from *all* federal negotiation processes cannot be sustained. Clearly, some type of federal negotiation and/or claims process for Métis must be established in order to meet the constitutional duty the Court reaffirmed. If not, rights-bearing Métis communities will likely turn to the courts again—this time for orders in relation to some type of negotiations on their rights.

In addition, the policy rationales for Métis exclusion from a majority of federal programs and benefits (*i.e.*, non-insured health benefits, education supports, *etc.*) that are made available to other s. 91(24) "Indians" (*i.e.*, Inuit, status Indians, *etc.*) will likely need to be reviewed to assess if ongoing exclusion is justifiable. Notably, some of the arguments accepted by the Canadian Human Rights Tribunal with respect to the discrimination faced by First Nation communities in relation to child and family services have parallels to the situation faced by Métis communities.

It is also very likely that Tom Isaac's report (the federally appointed Ministerial Special Representative on Métis s. 35 rights) will inform what Canada does next. Mr. Isaac's report will likely be finalized and made publicly available in the next few months. For details visit: https://www.aadnc-aandc.gc.ca/eng/1433442735272/1433442757318.

## About The Authors

This summary was prepared by Jason Madden, Nuri Frame, Zachary Davis and Megan Strachan of the law firm Pape Salter Teillet LLP. Additional information about the firm is available at www.pstlaw.ca.

Jason, along with Clément Chartier, Q.C., Kathy Hodgson-Smith and Marc LeClair, were legal counsel for the MNC and intervened in *Daniels* at the Supreme Court of Canada.

April 19, 2016

MÉTIS NATIONAL COUNCIL
Office of the President

May 2016

# MNC Board of Governors Responds to *Daniels* Decision

The MNC Board of Governors gathered in Ottawa on April 27, 2016, to assess the outcome of the *Daniels* decision and plan future relations with the Trudeau government. The Supreme Court of Canada decision was seen to be supportive of the nation-to-nation relationship the federal government is seeking to establish with the Métis Nation and will help to clarify that relationship.

The Board looked at various ways of translating the decision into positive change for Métis people. It also assessed how to advance Canada-Métis Nation relations in the areas of federal financing of the Métis Nation governance system, the allocation of $25 million in the recent federal budget for a Métis Nation Economic Development Strategy, Métis Nation participation in the national Health Accord and climate change talks, and collaboration with the Trudeau government in establishing a s. 35 rights reconciliation framework with the Métis Nation. This reconciliation framework will address critical issues such as self-government, land claims, fiscal relations and socio-economic development.

The Board looked at the increased cooperation of MNC with the Assembly of First Nations and the Inuit Tapiriit Kanatami, as the national representatives of the three constitutionally recognized Indigenous peoples jointly seek to capitalize on opportunities with the new government in Ottawa. It also received an update on the national inquiry into Murdered and Missing Aboriginal Women and Girls.

MÉTIS NATIONAL COUNCIL
Office of the President

May 2016

# First Nations, Métis Nation and Inuit Leaders Chart New Waters

*L-R: ITK President Natan Obed, MNC President Clément Chartier, AFN National Chief Perry Bellegarde*

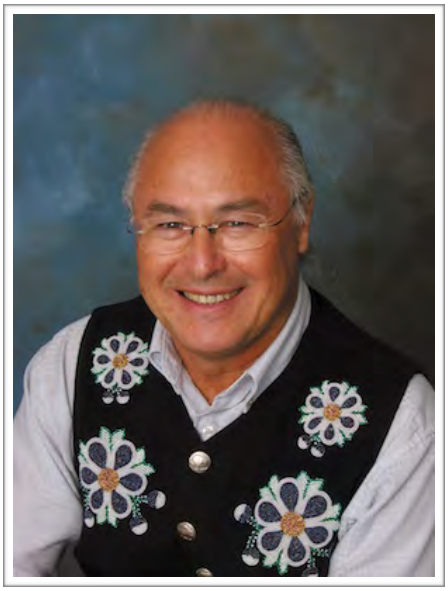
MNC President Chartier met with AFN National Chief Perry Bellegarde and ITK President Natan Obed on April 28, 2016, to map out broad areas of cooperation for the First Nations, the Métis Nation, and the Inuit as they seek to establish their respective nation-to-nation relationships with Canada and the Trudeau government.

"The three Indigenous peoples, while being very distinct in historical and cultural terms, have a common interest in pursuing a new future with Canada," said President Chartier. "It is very important that we work together as much as possible in this quest and I appreciate greatly the spirit of good will and mutual benefit that guides my ongoing discussions with National Chief Bellegarde and President Obed'."

MÉTIS NATIONAL COUNCIL
Office of the President

May 2016

# Message from the President



With the Supreme Court of Canada's ruling in the *Daniels* case on April 14th, a shift has occurred in the legal relationship between the federal government and the Métis Nation, one which has been sought for the past several decades.

The affirmation by the Supreme Court that the Métis are included in the term "Indians" in the 24th head of federal power in the *Constitution Act, 1867* being "Indians and the lands reserved for the Indians" will surely usher in a new era of Métis Nation – federal government relations. While the new Liberal government has already committed to a nation-to-nation relationship with the Métis Nation, we also believe that it must be on a government-to-government basis, using a distinctions-based approach in Crown-Aboriginal peoples relationships and rights accommodation.

The ruling of the Supreme Court included all persons of Aboriginal ancestry who identify as Métis or non-Status Indian but the Court made it clear that inclusion of Métis in 91(24) does not mean that all such persons are included in the term "Métis" in s.35(2) of the *Constitution Act, 1982*.

In order to possess s.35(1) Aboriginal rights, such as hunting and fishing rights, or the right of self-government, persons identifying as Métis must still meet the test that the Supreme Court set out in the *Powley* 2003 decision. Clearly, citizens of the Métis Nation, who fall within the definition of Métis established in 2002 by the Métis National Council, the governing institution of the Métis Nation, and which was mirrored a year later by the Supreme Court in *Powley,* are included in both s.91(24) and s.35.

There are no further legal obstacles or impediments that can be utilized by the federal government against the Métis Nation as we push forward in the reconciliation process under s.35, including federal legislation providing the necessary legal recognition and accommodation of Métis Nation self-government.

It is now incumbent on the Métis Nation leadership to clearly articulate its existence as a people and the geographic extent of its traditional homeland. This can be done by the adoption of a Métis Nation Constitution which will clearly set the Métis Nation apart from other Aboriginal peoples who may fit within s. 91(24).

# Métis National Council

## Office of the President

# May 2016

## UPCOMING EVENTS

| | | |
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| • United Nations Permanent Forum on Indigenous Issues | May 9-20 | New York City |
| • Aboriginal Affairs Working Group Meeting (AAWG) | June 9-10 | Yellowknife, NWT |
| • MNC Constitution Convention | June 16 | Winnipeg, MB |
| • MNC General Assembly | June 17-18 | Winnipeg, MB |
| • Seven Oaks Bicentennial Celebrations & Commemoration | June 19 | Winnipeg, MB |
| • CSA Meeting | June 22 | Vancouver, BC |
| • Board of Governors Meeting | June 22 | Ottawa, ON |
| • PBLI Conference on Daniels | June 23-24 | Ottawa, ON |
| • Back to Batoche Days | July 15-17 | Batoche, SK |
| • Council of the Federation Meeting (COF) | July 19-22 | Whitehorse, YK |
| • MNA AGA | Aug 5-7 | Smoky Lake, AB |
| • MNO AGA | Aug 27-29 | North Bay, ON |
| • ASETS Conference | Nov 22-24 | Vancouver, BC |


**Office of the President**
**Métis National Council**
**#4 - 340 MacLaren Street**
**Ottawa, ON K2P 0M6**

**(800) 928-6330**
**www.metisnation.ca**
**info@metisnation.ca**

FACEBOOK TWITTER