ERRATUM

The article, "The Right to Be Heard: Representative Authority as a Requirement in Enforcing Métis Consultation" by Moira Lavoie, which appeared in volume 56 issue 4 of the *Alberta Law Review*, should be corrected as follows:

On page 1213, in the first full paragraph under Part B, the fourth sentence incorrectly stated "the Supreme Court." The sentence has been corrected to read: "Yet, unlike in those cases, the Court seems to have characterized the need for representative authority as a formal part of the legal test for triggering the duty to consult (the *Haida* test)."

The version below was corrected on 18 June 2020.

THE RIGHT TO BE HEARD: REPRESENTATIVE AUTHORITY AS A REQUIREMENT IN ENFORCING MÉTIS CONSULTATION

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The challenges that non-settlement Métis communities continue to face when attempting to enforce the duty to consult are reflected in the 2016 Alberta Court of Queen's Bench Fort Chipewyan *decision. In* Fort Chipewyan*, the Court appeared to require representative authority in order to trigger the duty to consult, effectively adding a new step to the* Haida *test for Aboriginal consultation. This creates a unique burden for non-settlement Métis communities in Alberta, in part because their governance systems are not statutorily recognized in Canadian statute. Nevertheless, a representative authority requirement, if interpreted purposively and in accordance with Indigenous principles of good governance, is justified by the Honour of the Crown. The Métis Nation of Ontario's approach to consultation governance provides suggestions for governance reforms that could be undertaken by Alberta Métis to more effectively enforce the duty to consult.*

TABLE OF CONTENTS

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I. INTRODUCTION

Two years after the Supreme Court of Canada unanimously affirmed the existence of Métis Aboriginal[1] rights in *R. v. Powley*,[2] the Institute on Governance (IOG) released a report that attempted to address emerging issues in Métis governance: "Exploring Options for Métis Governance in the 21st Century."[3] Its authors, Métis lawyer Jason Madden and IOG researchers Jake Wilson and John Graham, predicted with "near certainty that the coming years will herald major advancements with respect to the Métis agenda."[4] In many ways, they were right. The Supreme Court has since released several more significant decisions dealing with Métis rights and jurisdiction.[5] Scholarship on Métis issues has flourished, and the gap in the literature on Métis governance matters identified in the IOG Report has begun to narrow.[6] Provincial and federal governments, in part at the urging of the courts, have become more willing to engage with Métis communities.[7]

Yet 12 years later, Métis communities continue to face significant challenges in enforcing their rights. One emerging challenge was reflected in the 2016 Alberta Court of Queen's Bench decision in *Fort Chipewyan Métis Nation of Alberta Local #125 v. Alberta*.[8] In *Fort Chipewyan*, the Court upheld a decision by Alberta's Aboriginal Consultation Office not to consult a Métis organization on the basis that it had failed to establish proper representative authority to speak for the rights-asserting Métis community on consultation matters.

I argue that non-Settlement Alberta Métis organizations[9] seeking to enforce the duty to consult must demonstrate proper representative authority to do so, consistent with the honour of the Crown and Indigenous principles of good governance. In the first part of my article, I discuss the legal sources for the concept of representative authority in Aboriginal consultation, before arguing that the Court in *Fort Chipewyan* appears to have required representative authority as part of the test for triggering the duty to consult. In the second part of my article, I begin by arguing that Métis organizations face unique challenges in establishing representative authority, grounded in part in the fact that their governance systems are not statutorily recognized in Canada. Having acknowledged these challenges, I then argue that representative authority is nonetheless consistent with the honour of the

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1 This article adopts the term "Aboriginal" when referring to constitutional rights protected under section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, consistent with the terminology contained in that provision. Otherwise, the terms "Indigenous" or "Métis" are used to refer to the peoples who hold these rights, or the organizations who assert those rights on their behalf.

2 2003 SCC 43 [*Powley*].

3 Jason Madden, John Graham & Jake Wilson, "Exploring Options for Métis Governance in the 21st Century" (Institute On Governance, September 2005) [IOG Report].

4 *Ibid* at 1.

5 See e.g. *Manitoba Métis Federation v Canada (AG)*, 2013 SCC 14 [*Manitoba Métis Federation*]; *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12.

6 I discuss several examples of this scholarship in Part III.C, below.

7 See e.g. Thomas Isaac, "A Matter of National and Constitutional Import: Report of the Minister's Special Representative on Reconciliation with Métis: Section 35 Métis Rights and the *Manitoba Métis Federation* Decision" (Government of Canada, 2016), online: <https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AI/STAGING/texte-text/report_reconciliation_1471371154433_eng.pdf>; Indigenous Relations, "Métis Relations" (Government of Alberta), online: <http://indigenous.alberta.ca/Metis-Relations.cfm>.

8 2016 ABQB 713 [*Fort Chipewyan*].

9 Given the different legislative and cultural history of the Métis Settlements, including the fact that they have a statutorily recognized land base and governance system under the *Métis Settlements Act*, RSA 2000, c M-14, they are outside of the scope of my analysis in this article. My focus is on non-Settlement Métis.

Crown and Indigenous governance principles. Finally, I explore the current governance structures of the Métis Nation of Ontario (MNO) as an example of how Métis governance can be organized in a way that satisfies the representative authority requirements of the Alberta Court of Queen's Bench in *Fort Chipewyan*.

II. BACKGROUND

A. VARYING LEGAL SOURCES FOR THE REPRESENTATIVE AUTHORITY REQUIREMENT

"Representative authority" speaks to the legal standing of a representative petitioner or claimant to bring an action before the courts or to participate in administrative hearing processes, such as environmental or other regulatory assessments. It often arises in the context of an incorporated society seeking to enforce the duty to consult, either on its own behalf or on behalf of a purported rights-bearing Indigenous community.[10] In *Behn v. Moulton Contracting Ltd.*, the Supreme Court of Canada recognized that "an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights."[11] The source of the requirement for representative authority in Aboriginal consultation varies from case to case. This requirement can stem from the rules of civil procedure applying to representative proceedings.[12] A court must assess an assertion of a petitioner's representative standing on the basis of the four criteria set out by the Supreme Court in *Western Canadian Shopping Centres Inc. v. Dutton*:

1. The class of plaintiffs must be capable of clear definition;
2. there must be issues of fact or law common to all class members;
3. success for one class member on the common issues, must mean success for all; and
4. the class representative must adequately represent the class … the court should be satisfied … that the proposed representative will vigorously and capably prosecute the interests of the class.[13]

Of the *Western Canadian* criteria, the first criterion has the potential to be the most challenging for claimants who are not *Indian Act* bands, as there are often competing claims by different organizations seeking to speak for the same communities. I will discuss this challenge in greater depth later in my article.

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10 See e.g. *Barlow v Canada* (2000), 186 FTR 194 (TD) [*Barlow*]; *Native Council of Nova Scotia v Canada (AG)*, 2002 FCT 6 [*Native Council of Nova Scotia*]; *Federation of Saskatchewan Indians v Canada (AG*), 2002 FCT 1001; *Komoyue Heritage Society v British Columbia (AG)*, 2006 BCSC 1517 [*Komoyue*]; *Te Kiapilanoq v British Columbia*, 2008 BCSC 54 [*Te Kiapilanoq*]; *Campbell v British Columbia (Forest and Range)*, 2011 BCSC 448 [*Campbell*]; *Newfoundland and Labrador v Labrador Métis Nation*, 2007 NLCA 75, leave to appeal to SCC refused, 32468 (29 May 2008) [*Labrador Métis*]; *Enge v Mandeville*, 2013 NWTSC 33 [*Enge*]; *Red Chris Development Company Ltd v Quock*, 2014 BCSC 2399 [*Red Chris*]; *Quinn v Bell Pole*, 2013 BCSC 892 [*Bell Pole*].

11 *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at paras 30–31 [*Behn*], citing *Komoyue*, *ibid.* The Supreme Court found that the appellants in question, individual members of the Fort Nelson First Nation (a recognized band under the *Indian Act*, RSC 1985, c I-5) did not possess representative authority. Specifically, the Supreme Court found there was no allegation in the pleadings that the First Nation had authorized the appellants to contest the legality of logging authorizations issued by the Crown.

12 See e.g. *Wesley v Canada*, 2017 FC 725, aff'd 2018 FCA 41; *Hwlitsum First Nation v Canada (Attorney General)*, 2017 BCSC 475, aff'd 2018 BCCA 276; *Horse Lake First Nation v R*, 2015 FC 1149, aff'd 2016 FCA 238; *Bell Pole*, *supra* note 10; *Kwicksutaineuk/Ah-Kwa-Mish First Nation v Canada (Attorney General)*, 2012 BCCA 193; *RRDC v The Attorney General of Canada*, 2009 YKSC 38.

13 2001 SCC 46 at paras 38–43, 48 [*Western Canadian*].

Representative authority arguments also occasionally arise outside of the rules of civil procedure. In *Labrador Métis*, the Labrador Métis Nation (LMN) successfully argued representative authority as a function of the law of agency.[14] According to the principles of the law of agency, a representative, or agent, may be authorized by a principal to enter into legal agreements on the principal's behalf.[15] At trial in *Labrador Métis*, there was no evidence showing that any of the LMN's members or any other Indigenous person or organization questioned the LMN's authority to act on behalf of the Labrador Métis community. The LMN's memorandum and articles of association clearly stated who its membership was and how they were identified, and appeared to include an overwhelming majority, if not all, of the members of the Labrador Métis community. Finally, the evidence showed that anyone becoming a member of the LMN could be deemed to know that they were authorizing the LMN to enforce the duty to consult on their behalf.[16]

In *Enge*,[17] the legal foundation for representative authority was not discussed, but the Northwest Territories Supreme Court approached the matter in a similar fashion to that of the Newfoundland and Labrador Court of Appeal in *Labrador Métis*.[18] In *Enge*, the North Slave Métis Association (NSMA) alleged a breach of the Northwest Territories government's duty to consult on a wildlife management plan. The territorial government had refused to conduct a preliminary assessment of the NSMA's claim on the basis that Canada had not recognized the group as the representative authority of the North Slave Métis.[19] In previous instances in which the NSMA had sought consultation, Canada expressed the view that the NSMA's "status as an identifiable Aboriginal group was uncertain and needed to be clarified," but at the time of trial had not yet come to a conclusion in this regard.[20] The Court dismissed the argument that the territorial government was bound by Canada's position,[21] and proceeded to find that the NSMA had established representative authority. NSMA's constitution clearly set out the organization's objective of promoting and supporting recognition of the Aboriginal rights of the North Slave Métis. The NSMA's membership criteria were clearly defined in its bylaws, and explicitly excluded members of surrounding First Nations, and no evidence was adduced challenging the NSMA's authority to represent its members.[22]

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14 *Supra* note 10.

15 John D McCamus, *The Law of Contracts*, 2nd ed (Toronto: Irwin Law, 2012) at 310.

16 *Labrador Métis*, *supra* note 10 at paras 46–47. The LMN and its members have since identified as Inuit, and are now collectively known as the NunatuKavummiut, or NunatuKavut Inuit, of Southern Labrador. The NunatuKavummiut demonstrate the often shifting nature of Indigenous identity, and illustrate the problems inherent in judicial or governmental attempts to define Indigenous identity according to rigid tests like those set out in *Powley*, *supra* note 2, or the *Indian Act*, *supra* note 11.

17 *Supra* note 10.

18 *Ibid*, citing *Labrador Métis*, *supra* note 10.

19 *Enge*, *ibid* at para 162.

20 *Ibid* at paras 44–45.

21 *Ibid* at paras 160–65.

22 *Ibid* at paras 40, 44–45. This decision is somewhat misleading in that it does not deal with the political tensions between the NSMA and the Northwest Territories Métis Nation that are at the core of representative authority challenges for Métis in the Great Slave Lake region. No evidence of these competing claims to representative authority was adduced before the Northwest Territories Supreme Court, but these tensions were examined in a separate case by the Federal Court: *Enge v Canada (Indigenous and Northern Affairs)*, 2017 FC 932. In this 2017 case, the NSMA again alleged a breach of the duty to consult. This time, the claim was made against Canada for failing to adequately consult on the drafting of an agreement with the Northwest Territories Métis Nation (NWTMN), which, if finalized, stood to affect the Aboriginal rights asserted by the NSMA. While Canada accepted that it had a duty to consult with "the Métis community of the Northwest Territories" on the draft agreement, including in particular the Métis of the North Slave Region, it argued that this duty was not owed to the NSMA (*ibid* at para 162). While the claimant's action was framed as being about the adequacy of

Overall, the requirement for establishing representative authority in enforcing the duty to consult has historically been grounded in the rules of civil procedure or the law of agency. As I will now discuss, the *Fort Chipewyan* decision appears to add a third source.

B. *FORT CHIPEWYAN* REQUIRED REPRESENTATIVE AUTHORITY UNDER THE DUTY TO CONSULT

In *Fort Chipewyan*, the Alberta Court of Queen's Bench judicially reviewed decisions by the Aboriginal Consultation Office not to consult the Fort Chipewyan Métis Local 125 (the FCM Local) on a proposed oil sands development project. Specifically, the FCM Local had asked the Court to do two things: (1) declare that Alberta was incorrect in deciding that no duty to consult was owed to the FCM Local and that Alberta breached the honour of the Crown in making its decisions, and (2) order that Alberta consult and accommodate the FCM Local regarding the proposed project prior to it being approved or constructed.[23] As in *Labrador Métis*[24] and *Enge*,[25] the government argued that the Indigenous organization, the FCM Local, did not have proper representative standing. Yet, unlike in those cases, the Court seems to have characterized the need for representative authority as a formal part of the legal test for triggering the duty to consult (the *Haida* test).[26] The *Haida* test considers whether the Crown has knowledge (real or constructive) of an actual or credibly asserted Aboriginal right or claim, and is contemplating conduct that could adversely affect this right or claim.[27]

The Court in *Fort Chipewyan* set out two requirements for Métis organizations seeking to enforce the duty to consult under the *Haida* test, but whose governance structures are not statutorily recognized by the Crown. First, the organization must provide credible evidence that the organization's members meet the requirements of the *Powley* test for Métis identification.[28] Second, the organization must provide credible evidence of its representative authority to enforce the duty to consult.[29] This article will focus exclusively on the challenges presented by the second criterion, however it bears noting that the first criterion also makes

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consultation, Canada argued that the action was actually a challenge to the legal authority of the NWTMN to enter into an agreement on behalf of the Métis of the Northwest Territories (*ibid* at para 161). Ultimately, the Federal Court held that Canada did owe the NSMA a duty to consult for several reasons, including: (1) "the NSMA is a credible organization that has existed for many years, advocating for the rights of the Métis of the north Slave Region" (*ibid* at para 197); (2) the NWTMN and NSMA clearly represented different constituencies within the area affected by the wildlife management Agreement in Principle, and had different objectives, priorities, and membership criteria from one another (*ibid* at para 196); (3) the Crown cannot "run roughshod" over one group's asserted or proven Aboriginal rights in favour of reaching a treaty or agreement with another group (*ibid* at para 192, citing *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 27 [*Haida*]). The representative authority of the NSMA was also accepted by the Federal Court in *Paul v Canada*, 2002 FCT 615.

23 *Fort Chipewyan*, *supra* note 8 at para 137.

24 *Supra* note 10.

25 *Supra* note 10.

26 Jason Madden, Zachary David & Megan Strachan, "Recent Legal Developments on Métis Consultation in Alberta: A Case Summary of MNA Local #125 v. Alberta," prepared for Pape Salter Teillet LLP (7 March 2017), online: <albertaMetis.com/wp-content/uploads/2017/03/PST-LLP-Summary-MNA-125-Local-v-Alberta-Feb-2017-2.pdf>.

27 *Haida*, *supra* note 22.

28 The *Powley* test, *supra* note 2 at paras 31–33, 45, sets out indicia that must be satisfied by a Métis claimant asserting Aboriginal rights under section 35: self-identification as a member of a Métis community; evidence of an ancestral connection to an historic, rights-bearing Métis community; demonstrated acceptance by a modern Métis community; and continuity between the historic and modern Métis communities.

29 Madden, David & Strachan, *supra* note 26 at 3.

the *Haida* test more onerous for Métis communities seeking consultation, and may give rise to questions about the legitimacy of the *Powley* test as a determinant of who is owed a duty to consult.[30]

Under the second new *Haida* requirement, the Court in *Fort Chipewyan* elaborated that the FCM Local was required to show that the source of its authority and the nature of its representation were "demonstrably determinable."[31] The Court held that, on the evidence, the FCM Local had failed to satisfy this requirement for two main reasons. First, the registered membership of the FCM Local amounted to only one-fifth of the total population of the Fort Chipewyan Métis Community.[32] Second, other organizations, including the provincial Métis Nation of Alberta (MNA), regional MNA councils, and other Locals had, from time to time, purported to represent the Fort Chipewyan Métis Community for consultation purposes.[33]

Although the Court did not explicitly identify these criteria as new components of the *Haida* test, the same evidentiary requirements have not historically been imposed on *Indian Act* bands seeking to enforce the duty to consult. In its reasoning, the Court relied on the following passage from the Alberta Court of Appeal in *L' Hirondelle v. Alberta (Sustainable Resource Development)*: "[T]here is nothing ironic or improper about jealously guarding entrenched constitutional rights, and ensuring that only those truly entitled are allowed to assert those rights. Those who do enjoy such rights are entitled to expect that their rights will not be watered down by the recognition of unentitled claimants."[34] Although the *Fort Chipewyan* decision was not appealed, it is far from uncontroversial in its implications. The requirement for establishing representative authority as a function of the duty to consult raises important questions about how such a requirement must be interpreted in light of the honour of the Crown, particularly given the unique challenges Métis organizations face in establishing representative authority. I begin the next section of my article by exploring these challenges.

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30 For scholarly discussion of this question, see e.g. Kerry Sloan, "Dealing with the 'Community Conundrum': Métis Responses to the Application of *R v Powley* in British Columbia — Litigation, Negotiation, and Practice" (2017) 6:2 Aboriginal Policy Studies 48; Chris Andersen, *Métis: Race, Recognition and the Struggle for Indigenous Peoplehood* (Vancouver: UBC Press, 2014).

31 *Fort Chipewyan*, *supra* note 8 at para 397.

32 *Ibid* at para 411.

33 *Ibid* at para 423. For ease of reference, Appendix A provides a high-level comparison of the evidence adduced to support the petitioners' assertions of representative authority.

34 *Fort Chipewyan*, *ibid* at para 229, citing *L'Hirondelle v Alberta (Sustainable Resource Development)*, 2013 ABCA 12 at para 39 [*L'Hirondelle*].

III. MÉTIS REPRESENTATIVE AUTHORITY

A. *FORT CHIPEWYAN* AND THE UNIQUE CHALLENGES TO MÉTIS REPRESENTATIVE AUTHORITY

Fort Chipewyan shows how the multilateral MNA governance structure may present challenges to establishing representative authority. There are historical and cultural reasons for this governance structure. For instance, many present-day Métis organizations, including the MNA, were initially formed to provide unified political advocacy on behalf of Métis communities in the face of Crown intransigence.[35] Yet organizations built for political advocacy may not be built for effective governance in the twenty-first century, and some Métis organizations have struggled to make this transition.

The MNA claims to be "the representative voice of approximately 96,000 Métis Albertans."[36] At the community level are democratically elected councils, or "Locals," consisting of a president and vice president. Each Local falls under regional councils or "Regions" made up of regional presidents and vice presidents. There are six regions within the MNA. Together, the regional presidents and vice presidents make up the Provincial Council, which is led by a democratically elected Provincial President.[37] Within the Provincial Council there are seven "ministerial" portfolios, shared among the members of the Provincial Council, including the President.[38] Audrey Poitras has been President of the MNA since 1996,[39] and remains in this position at the time of writing.

Since 2004, the federal government has provided annual project funding to the MNA to maintain a provincial "Métis Identification Registry."[40] The Registry is intended to ensure a standardized approach to identifying *Powley* compliant Métis rights holders in Alberta.[41] The MNA claims to have over 30,000 members across Alberta;[42] approximately 33 percent of the 96,870 Métis peoples living in Alberta according to the 2016 census.[43] Registered MNA members are given "citizenship cards," which the MNA asserts "guarantee [that] the holder of the card is Métis and is eligible for Aboriginal rights under section 35 of *Constitution Act (1982)*."[44] However, the Alberta Court of Appeal has consistently held that MNA membership is not sufficient on its own to establish that a member is a rights holder

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35 For discussion of the political origins of present-day Métis organizations, see e.g. Janique Dubois, "Métis-Provincial-Federal Relations: Building Multilevel Governance from the Bottom Up" in Martin Papillon & André Juneau, eds, *Canada: The State of the Federation 2013, Aboriginal Multilevel Governance* (Kingston: McGill-Queen's University Press, 2015) 189.

36 Métis Nation of Alberta, "About," online: <albertaMetis.com/about/>.

37 *Ibid*.

38 Métis Nation of Alberta, "Ministries," online: <albertaMetis.com/governance/ministries/>.

39 Métis Nation of Alberta, "MNA President Audrey Poitras Recognized for Outstanding Leadership" (9 March 2017), online: <albertaMetis.com/2017/03/mna-president-audrey-poitras-recognized-outstanding-leadership/>.

40 Indigenous and Northern Affairs Canada, "Aboriginal Representative Organizations – Project-based Funding – Previously-selected Projects 2015-16," online: <https://www.aadnc-aandc.gc.ca/eng/1453214709509/1453214872890>.

41 *Powley*, *supra* note 2.

42 Métis Nation of Alberta, "History," online: <albertaMetix.com/about/history>.

43 Statistics Canada, "Aboriginal Peoples: Fact Sheet for Alberta" (14 March 2016), online: <https://www150.statcan.gc.ca/n1/pub/89-656-x/89-656-x2016010-eng.htm>.

44 Métis Nation of Alberta, "Registration and Application Guidelines," online: <albertaMetis.com/registry/registry/>.

under section 35 of the *Constitution Act, 1982*, as the organization is a voluntary society without regulatory authority to determine who is or is not Métis under section 35.[45]

Each MNA Local is a separate legal entity incorporated under the Alberta *Societies Act*.[46] Many Locals, including the FCM Local, maintain their own membership lists. Yet these lists do not necessarily align with the MNA Registry membership requirements. In *Fort Chipewyan*, the Court found the FCM Local's membership criteria to be "vague and not objectively defined," and therefore not determinable according to the *Powley* factors of ancestral connection, self-identification, and community acceptance.[47] The Court also found that the Local, the Region, and the MNA all had conflicting claims to speak on behalf of the same rights-asserting community, which undermined the FCM Local's claim to representative authority.[48]

The Court in *Fort Chipewyan* distinguished between the FCM Local and the rights-asserting community it claimed to represent.[49] Unlike First Nations with *Indian Act* band status, there is no single Canadian statute that recognizes the governance structures of Métis peoples. While Métis organizations may have legal status in the sense that they are legally incorporated societies, as was the case with the FCM Local in *Fort Chipewyan*, the courts have repeatedly held that legal incorporation, without more, does not confer the right to claim or enforce Aboriginal rights.[50] In contrast, *Indian Act* bands are generally presumed by the Crown and the courts to be rights-bearing communities under section 35 of the *Constitution Act, 1982*.[51] Correspondingly, the duly elected Chief and Council of an *Indian Act* band are presumed to have proper representative authority to enforce the duty to consult on behalf of that band.[52] As noted earlier, the courts have established that a corporate entity other than an *Indian Act* band can be authorized to enforce the duty to consult.[53] However, in the First Nation context, such authorization typically comes from *Indian Act* bands.[54] In this sense, the *Indian Act* still plays an indirect role in establishing the representative authority of non-*Indian Act* entities for the purposes of consultation. It also perpetuates the problematic view that Indigenous governance systems must be "rubber stamped" by the settler state in order to be considered legitimate. This article does not endorse this view, but instead seeks to explore why some of the requirements for Indigenous representative authority identified by the courts are justifiable from the perspective of Indigenous governance principles and section 35 of the *Constitution Act, 1982*.

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45 *R v Hirsekorn*, 2010 ABPC 385 at para 151, aff'd 2011 ABQB 682, aff'd 2013 ABCA 242, leave to appeal to SCC refused, 35558 (23 January 2014); *Boucher v Métis Nation of Alberta Association*, 2009 ABCA 5 at para 7. See also *Fort Chipewyan, supra* note 8 at para 401.

46 *Societies Act*, RSA 2000, c S-14.

47 *Fort Chipewyan*, *supra* note 8 at para 358–59, citing *Powley*, *supra* note 2.

48 *Fort Chipewyan*, *ibid* at para 423. It bears noting that the MNA appears to have an internal consultation policy, at least in draft form, but it was not discussed or produced as part of the *Fort Chipewyan* case: Métis Nation of Alberta, "Policy Guidelines Regarding the Duty to Consult and Accommodate Métis Aboriginal Rights and Interests in Alberta" (July 2009), online: <albertaMetis.com/wp-content/uploads/2013/08/MNA+FINAL+CONSULTATION+POLICY.pdf>.

49 *Fort Chipewyan*, *ibid* at para 421.

50 See e.g. *Barlow*, *supra* note 10; *Native Council of Nova Scotia*, *supra* note 10; *Campbell, supra* note 10.

51 *Waquan v Canada (Attorney General)*, 2016 ABQB 191 at para 26, rev'd 2017 ABCA 279 (although the Court of Appeal reversed the lower Court's decision, it did not disrupt the Court's observations on this issue); *Papaschase Indian Band (Descendants of) v Canada (Attorney General)*, 2004 ABQB 655 at paras 166, 170, 176, 181, aff'd 2008 SCC 14 [*Papaschase*]; *Te Kiapilanoq*, *supra* note 10 at para 25.

52 See e.g. *Papaschase, ibid* at para 176.

53 *Behn*, *supra* note 11 at para 30.

54 See e.g. *Red Chris*, *supra* note 10 at para 41.

An overview of the evidence adduced by the organizations in *Labrador Métis*, *Enge*, and *Fort Chipewyan* illustrates the types of evidence likely to support an assertion of representative authority (see Appendix A) in judicial or administrative proceedings. As we can see in this overview, particularly in *Fort Chipewyan*, there are several key evidentiary considerations likely to undermine a Métis organization's claim to representative authority: (1) evidence of competing claims to authority from other organizations, (2) membership criteria that are vague or discretionary, and (3) absence of evidence of authorization from a representative proportion of the rights asserting community.

A final and important challenge illustrated in *Fort Chipewyan* is the fact that prior regulatory or policy engagement of a Métis organization by the Crown will not necessarily determine its authority to enforce the duty to consult. Alberta had engaged with the FCM Local in previous regulatory processes under the *Water Act*[55] and the *Environmental Protection and Enhancement Act*.[56] However, the Court held that these processes were distinct from and therefore irrelevant to consultation on a project regulated by the Alberta Energy Regulator.[57] While recognition of the Fort Chipewyan Métis community under Alberta's *Harvesting Policy* was accepted as providing some support for a credible assertion, it was not found to be determinative in this regard.[58] In any case, as pointed out earlier, the FCM Local was considered to be distinct from the rights-asserting or rights-bearing Fort Chipewyan Métis community. Further, the Court held that the federal government's decision to consult the FCM Local was not determinative of a duty by the provincial Crown to consult the same organization.[59] While the Court adopted the finding in *Labrador Métis* that the Crown can be estopped from refusing to recognize the representative authority of an organization with which it had previously consulted, it found that estoppel had not occurred in this case.[60]

All of these factors combined make it very difficult for Métis communities to enforce the duty to consult, which leads one to ask: can the requirement for representative authority as a function of the duty to consult be justified in light of the significant burden it places on Métis communities seeking to be consulted? I submit that it can, particularly when

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55 RSA 2000, c W-3.

56 RSA 2000, c E-12.

57 *Fort Chipewyan*, *supra* note 8 at para 141.

58 *Ibid* at paras 227, 365, citing *L'Hirondelle*, *supra* note 34.

59 *Fort Chipewyan*, *supra* note 8 at para 334.

60 *Ibid* at paras 412–20. Critics might argue that this issue was wrongly decided, given the decision in *Labrador Métis*. The decision in *R v Kelley*, 2007 ABQB 41 [*Kelley*], though not referenced in *Fort Chipewyan*, also bears some consideration. In *Kelley*, the Alberta Court of Queen's Bench affirmed that section 35 and the honour of the Crown give rise to a constitutional imperative on governments to consult on and accommodate Aboriginal rights. The Court found that the Interim Métis Harvesting Agreement (IMHA) concluded between the Government of Alberta and the MNA, constituted a negotiated, province-wide accommodation of Métis harvesting rights, notwithstanding the fact that these rights had not been proven in court. While the Court ultimately found the IMHA to be unenforceable under the provisions of the *Wildlife Act*, RSA 2000, c W-10, this could be corrected through government authorization of the IMHA's harvesting exemptions under section 104(1)(c) of the *Wildlife Act*. Further, the Court dismissed Alberta's argument that the IMHA did not protect Métis harvesters, such as the defendant, from prosecution under the *Wildlife Act*. The Court found that it would be "extremely egregious" (*ibid* at para 82) for the defendant to be convicted for activities explicitly authorized under the negotiated IMHA, given that the unenforceability of the IMHA was due to an error on the part of the Government of Alberta. In addition to the legal considerations arising from *Labrador Métis* and *Kelley*, there are also policy considerations at play. If Métis organizations cannot rely on negotiated agreements or prior government engagement to assert their representative authority in enforcing the duty to consult, the incentive to enter into such agreements or participate in such engagement is arguably diminished. Instead, the stronger incentive is to litigate rights claims in court.

considered in light of the honour of the Crown, and from the perspective of Indigenous governance principles.

B. RECONCILING REPRESENTATIVE AUTHORITY WITH THE HONOUR OF THE CROWN

It is well-established that the duty to consult flows from the honour of the Crown, which is always at stake in the Crown's dealings with Indigenous peoples.[61] The honour of the Crown requires the government to "act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question."[62] The honour of the Crown is an evolving concept in Canadian jurisprudence, and its application to Métis peoples in particular remains unclear. However, although it has not been expressly stated by the courts, it is reasonable to see the duty to consult Métis peoples as originating in the honour of the Crown, by virtue of section 35, just as it does for First Nations peoples.[63]

If the government must act "honourably," it follows that the honour of the Crown at least requires the government to make a diligent effort to ensure that it is consulting with the appropriate representative of a rights-asserting collective or community. This is consistent with the historic, nation-to-nation nature of the Crown's relationship with Indigenous peoples. The government should not engage with individuals or factions within a rights-bearing collective, but with the collective as a whole. This is also consistent with the Crown's future relationship with Indigenous communities whose interests may be impacted by current Crown consultation. Engagement with an unauthorized representative risks misrepresentation of the collective interests, which could result in permanent harm to those interests. Further, the responsibility to uphold the honour of the Crown cannot be delegated.[64] Pursuant to this principle, I submit that the Crown cannot simply rely on a bald assertion of representative authority in determining who speaks for a rights-asserting collective. Ultimately, the responsibility for ensuring that the duty to consult is honourably discharged rests solely with the Crown.[65]

A survey of case law on the duty to consult shows the practical significance of the future implications of Crown consultation with a particular representative body. For instance, where representative authority has been established, the Crown is not necessarily required to consult with dissenting members of a rights-asserting community.[66] As noted earlier in discussion of the *Labrador Métis* case, the Crown may also be bound to consult with a particular organization as a function of representative estoppel.[67]

However, the honour of the Crown arguably dictates that the Crown cannot evade its duties by dishonourably denying an Indigenous claimant's legal standing. The duty to consult

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61 *Haida*, *supra* note 22 at para 45.

62 *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 24.

63 Thomas Isaac, *Aboriginal Law: Commentary and Analysis* (Saskatoon: Purich, 2012) at 347.

64 *Haida*, *supra* note 22 at para 53. See also *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 56; *Athabasca Regional Government v Canada (AG)*, 2010 FC 948 at para 216.

65 *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 22.

66 *Little Salmon/Carmacks First Nation v Yukon (Minister of Energy, Mines and Resources)*, 2008 YKCA 13 at para 116, aff'd 2010 SCC 53.

67 *Fort Chipewyan*, *supra* note 8 at para 385; *Labrador Métis*, *supra* note 10 at para 48.

must be discharged in a way that is sensitive to the particular context in which it arises.[68] Further, the honour of the Crown requires a broad, purposive approach to implementing the duty to consult, taking into account Indigenous perspectives.[69] This would suggest that a theory of representative authority grounded in the honour of the Crown would support looking to Indigenous perspectives on good governance practices to determine who has the authority to speak on behalf of a rights-asserting collective. I explore these perspectives in the next section of my article.

C. INDIGENOUS GOVERNANCE PRINCIPLES SUPPORT REPRESENTATIVE AUTHORITY

The history of Métis governance and identity is inextricably linked with the political struggle for Métis nationhood, and the true nature of this historical struggle is increasingly a matter of debate. In his 2013 article "From Entity to Identity to Nation," Métis scholar Darren O'Toole summarizes the tensions between "first wave" scholarship describing the emergence of a broad Métis national consciousness through the Battle of Seven Oaks and "second wave" scholarship grounding Métis collective identity in genealogy and race.[70] Although the *Powley* test is not explicitly discussed in O'Toole's article, it certainly seems to be associated with the second school of thought. Métis scholar Chris Andersen opposes this conception of Métis nationhood,[71] which he describes as being broadly accepted in Canadian jurisprudence and in the work of the United Nations.[72] I raise the work of O'Toole and Andersen to illustrate some of the challenges inherent in trying to identify historical Métis governance practices. I do not attempt to resolve them here. Yet one clear theme emerges from a comparison of these works: we should look to the Métis communities themselves for guidance on what constitutes proper Métis representative authority, not simply the preferences of the courts or the Crown. In light of this, I have drawn from a small, but I hope representative, sample of works written solely or jointly by Indigenous authors, ranging from theoretical works like Andersen's, to the more pragmatic IOG Report.

In their 2012 paper for the Ontario Federation of Indian Friendship Centres, scholar Lawrence J. Barkwell and Métis Elder Anne Carrière Acco emphasize the historically democratic structure of prairie Métis governance, in which social control begins at the family level and is transferred up to the community or national level as required. They emphasize the importance of procedural fairness and collective regulation when the community must act in a concerted manner on a particular issue.[73] Barkwell and Métis scholar Larry Chartrand

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68 Dwight Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich, 2014) at 88–89.

69 *Manitoba Métis Federation*, *supra* note 5 at para 73.

70 Darren O'Toole, "From Entity to Identity to Nation: The Ethnogenesis of *Wiisakodewininiwag* (Bois-Brûlé) Reconsidered" in Christopher Adams, Gregg Dahl & Ian Peach, eds, *Métis in Canada: History, Identity, Law & Politics* (Edmonton: University of Alberta Press, 2013) 143.

71 Chris Andersen, "The Métis Nation: A People, a Shared History" in Chris Andersen, *Métis: Race, Recognition and the Struggle for Indigenous Peoplehood* (Vancouver: University of British Columbia Press, 2014) 91.

72 *Ibid* at 103–104.

73 Lawrence J Barkwell, Anne Carrière Acco & Amanda Rozyk, "The Origins of Métis Governance and Customary Law With a Discussion of Métis Legal Traditions," prepared for the Federation of Indian Friendship Centres (June 2012) at 13–14, 16, online: <www.metismuseum.ca/media/db/07232>, citing Royal Commission on Aboriginal Peoples, vol 2, *Restructuring the Relationship* (Ottawa: Canada Communication Group, 1996) at 128 [RCAP Report]. See also Fred J Shore & Lawrence J Barkwell, eds, *Past Reflects the Present: The Métis Elders' Conference* (Winnipeg: Manitoba Métis Federation, 1997) at 213.

have also both spoken to the importance of community participation and direct democracy in Métis governance.[74]

These themes of democratic accountability and effective multilateral governance are visible in the "universal" principles of good governance identified by Madden et al. in their 2005 IOG Report, including "legitimacy and voice" and "accountability."[75] These IOG principles are intentionally based on good governance principles identified by the United Nations Development Program (UNDP), which similarly focus on the theme of leadership accountability, transparency, and responsiveness to their membership.[76] The IOG authors also observe that their principles are consistent with the "key aspects of Aboriginal traditions of governance" set out in the final report of the Royal Commission on Aboriginal Peoples (RCAP).[77] Again, these aspects appear consistent with Métis governance norms discussed earlier, including "leadership and accountability," and ensuring meaningful participation by women, elders, and the broader community in decision-making with the objective of reaching a community consensus.[78] Finally, Haudenosaunee scholar Taiaiake Alfred identifies several "characteristics … of a strong indigenous nation," such as "participatory and consensus-based government" and "wholeness with diversity."[79] Again, these characteristics seem broadly consistent with Métis governance norms, including the norm of democratic accountability.[80] For ease of reference, the full list of IOG, UNDP, RCAP, and Alfred principles are set out and compared in a table at Appendix B.

At the very least, this scholarship suggests that the concept of representative authority is not inherently at odds with Indigenous conceptions of good governance. Of course, the risk of identifying discrete lists of good governance principles is that they will be used as strict "checklists" against Indigenous communities who do not perfectly conform to them. The IOG Report anticipates this problem and its authors emphasize that their principles "represent

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74 Lawrence J Barkwell, "Early Law and Social Control Among the Métis," in Samuel W Corrigan & Lawrence J Barkwell, eds, *The Struggle for Recognition: Canadian Justice and the Métis Nation* (Winnipeg: Pemmican, 1991) 7; Larry Chartrand, "The Definition of Métis Peoples in Section 35(2) of the *Constitution Act, 1982*" 67:1 Sask L Rev 209. See also Dubois, *supra* note 35.

75 IOG Report, *supra* note 3 at 1. The full list of principles is: (1) legitimacy and voice, (2) fairness, (3) accountability, (4) performance, and (5) direction.

76 *Ibid* at 7–9. The nine UNDP principles are: (1) participation, (2) consensus orientation, (3) strategic vision, (4) responsiveness, (5) effectiveness and efficiency, (6) accountability, (7) transparency, (8) equity, and (9) the rule of law (United Nations Development Programme, *Towards Human Resilience: Sustaining MDG Progress in an Age of Economic Uncertainty* (2011), online: <www.undp.org/content/undp/en/home/librarypage/poverty-reduction/inclusive_development/towards_human_resilience sustainingmdgprogressinanageofeconomicun.html>. As discussed above, Chris Andersen (among others) takes issue with the way in which the UN has typically approached matters of Indigenous collective identity. I nonetheless agree with the IOG Report authors that the work of the UN merits consideration within the context of Indigenous governance. The UN remains a significant source of international human rights norms, and its work is increasingly grounded in Indigenous perspectives. For instance, the *United Nations Declaration on the Rights of Indigenous Peoples* reflects the UN's recognition of the collective nature of many Indigenous governance norms.

77 IOG Report, *ibid* at 10.

78 *Ibid* at 10, citing RCAP Report, *supra* note 73 at 116. The full list of RCAP aspects of Indigenous traditions of governance is as follows: (1) the centrality of the land, (2) individual autonomy and responsibility, (3) the rule of law, (4) the role of women, (5) the role of elders, (6) the role of the family and the clan, (7) leadership and accountability, and (8) consensus in decision-making.

79 Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills, Ont: Oxford University Press, 1999) at 82. The full list of characteristics is as follows: (1) wholeness with diversity, (2) shared culture, (3) communication, (4) respect and trust, (5) group maintenance, (6) participatory and consensus-based government, (7) youth empowerment, and (8) strong links to the outside world.

80 *Ibid*.

an ideal that no society has fully attained or realized."[81] To this end, I do not advocate that the courts adopt a list of good governance principles that Métis petitioners must satisfy in order to establish representative authority. It is also important to point out that the courts seem to have no problem recognizing the representative authority of *Indian Act* band councils that often fall short of meeting these governance ideals. We should not demand perfect governance from Métis communities before they can be consulted. However, there is a clear link between the governance ideals set out in these principles and the concept of representative authority.

The above, admittedly brief,[82] examination of Indigenous scholarship and research on governance only underscores the problem with taking an *Indian Act*-based approach to representative authority in Indigenous consultation. The distorting effects of colonial-imposed governance systems are discussed by Dene scholar Glen Coulthard in his book *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*.[83] Coulthard emphasizes the problem of colonized Indigenous communities coming to accept, and even identify with, limited "misrecognition" of their rights and identity granted through colonial state structures. As a result, Coulthard argues, true Indigenous self-government requires a "critical individual and collective *self*-recognition on the part of Indigenous societies."[84] Alfred similarly argues that decolonization of First Nation governance structures requires Indigenous communities themselves to resist the normalization of colonially imposed governance norms.[85] These are difficult, controversial statements. To the extent that they may be accurate, Coulthard and Alfred's arguments underscore how Métis communities, free from the confines of the *Indian Act*, are uniquely positioned to take ownership of their own governance structures. To this end, in the final section of my article, I will briefly explore the progress made by the MNO in advancing its governance goals and how it might be a model for Métis governance reforms in Alberta.

D. THE MÉTIS NATION OF ONTARIO: AN EXAMPLE OF MÉTIS REPRESENTATIVE AUTHORITY

The Alberta Court of Queen's Bench in *Fort Chipewyan* identified three evidentiary shortfalls that undermined the FCM Local's claim to representative authority: (1) lack of evidence of competing claims to authority from other organizations, (2) membership criteria that are vague or discretionary, and (3) absence of evidence of authorization from a representative proportion of the rights-asserting community.[86] The MNO offers an example of how these challenges might be addressed in a way that is consistent with the Indigenous governance principles discussed above, and that reassures the government that it is consulting with the right group, consistent with the honour of the Crown.

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81 IOG Report, *supra* note 3 at 8.

82 Scholarship on Métis governance remains regrettably minimal. An additional work of interest on this topic is Kelly L Saunders' essay about Métis self-governance: "No Other Weapon: Métis Political Organization and Governance in Canada" in Christopher Adams, Greg Dahl & Ian Peach, eds, *Métis in Canada: History, Identity, Law & Politics* (Edmonton: University of Alberta Press, 2013) 339. Thank you to the anonymous reviewer who brought this essay to my attention.

83 Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014).

84 *Ibid* at 48 [emphasis in original].

85 Alfred, *supra* note 79 at 28, 83.

86 *Supra* note 8.

The MNO, like the MNA, is an affiliate of the Métis National Council. It has the same general governance structure as the MNA, comprised of Locals (called "Chartered Community Councils"),[87] Regions, and a provincial-level Provisional Council.[88] However, within this structure, the MNO has established clear responsibility for coordinating consultation. Each Region has its own consultation protocol, developed with that Region's Locals.[89] At the provincial level, there is a consultation unit that operates at arm's length from the politically elected provincial council. The consultation unit receives and directs consultation requests from industry and government according to the consultation protocols. The MNO's authority to enforce the duty to consult is based in its Statement of Prime Purpose, which explicitly declares the MNO to be the "representative body" of the Métis peoples of Ontario for a set of defined objectives, including "to ensure that Métis can exercise their Aboriginal and Treaty rights and freedoms."[90] Unlike the conflict between the MNA and the Locals in Alberta, there do not appear to be any major challenges from other Métis organizations to the MNO's claim to representative authority. The MNO membership criteria are objectively clear: an applicant for membership in the MNO must sign a declaration self-identifying as Métis, and must provide documentary proof of their genealogical connection to a historic Métis ancestor.[91] These criteria are rigorously enforced. Failure to meet the specific evidentiary requirements set out in the MNO membership criteria will result in denial of the applicant's membership application.[92] Further, MNO Community Councils must maintain membership lists that directly align with MNO membership requirements.[93] This contrasts with the case in Alberta, where there is no guarantee that MNA Local membership lists align with one another or with MNA membership requirements.

The MNO approach to consultation management does not appear to have been challenged in court, and there do not appear to be any serious competing claims to its status as the primary representative agency for Métis consultation in Ontario. This approach was endorsed by the Government of Ontario as part of the MNO-Ontario Bilateral Process,[94] through which the MNO receives core funding to support its consultation activities.[95] The MNO also has a bilateral Consultation Agreement with the Government of Canada, which similarly endorses the MNO's consultation approach.[96] In addition to demonstrating the political will of the provincial and federal governments to work with the MNO in carrying out consultation, this

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87 Métis Nation of Ontario, "Chartered Community Councils," online: <www.metisnation.org/community-councils/>.

88 Métis Nation of Ontario, "The Provisional Council of the Métis Nation of Ontario," online: <www.metisnation.org/governance/governing-structure/pcmno/>.

89 Métis Nation of Ontario, "Duty to Consult," online: <www.metisnation.org/programs/lands-resources-consultations/duty-to-consult/>.

90 Métis Nation of Ontario, "Prime Statement of Purpose," online: <www.metisnation.org/governance/statement-of-prime-purpose/>.

91 Métis Nation of Ontario, "Registry Policy (August 2015 Version)," online: <www.metisnation.org/media/621672/mno%20registry%20policy%20with%202015%20amendments%20final.pdf>.

92 *Ibid*.

93 Métis Nation of Ontario, "MNO Community Charter Agreement," cl 3.2, online: <www.metisnation.org/media/283015/kenora%20Métis%20council%20community%20charter%20march%202011.pdf>.

94 Métis Nation of Ontario, "Bilateral Process," online: <www.metisnation.org/programs/intergovernmental-relations/bilateral-process/>.

95 Government of Ontario, "New Relationship Fund," online: <https://www.ontario.ca/page/new-relationship-fund>.

96 Métis Nation of Ontario, "Consultation Agreement Between the Métis Nation of Ontario and the Government of Canada, As Represented By the Minister of Indian Affairs and Northern Development" (31 July 2015), online: <www.metisnation.org/media/652755/mno-canada-consultation-agreement-july-2015.pdf>.

also suggests that both Crowns might be estopped from denying the MNO's representative authority to enforce consultation. In short, the MNO's representative authority to enforce the duty to consult on behalf of Ontario Métis peoples seems clear. The effectiveness of its governance structure is seen not only in terms of its bureaucratic efficiency, but also in terms of its apparent incorporation into the narrative of Métis nationhood in Ontario, and its acceptance by the provincial and federal Crowns.

There are historic factors that have contributed to the MNO's success, and which have been notably absent for the MNA and MNA Locals. The MNO's Prime Statement of Purpose was developed and adopted immediately upon the founding of the organization in 1993, meaning this clear statement of authority has been in place throughout the MNO's existence. As I will discuss below, the MNA has only recently attempted to adopt a similar statement of authority. It also bears noting that the defendants in the seminal *Powley* case were members of the MNO, and they were represented throughout the case by founding MNO member and accomplished lawyer Jean Teillet. The *Powley* case, and ultimately the *Powley* Supreme Court of Canada decision, undoubtedly served as a rallying point around which the MNO could reinforce its position as the legitimate voice for Métis rights in Ontario. Alberta Métis have not had the same legal or political pressures to rally around a single representative organization. Periodic changes in the position of Provincial Council President also appear to have helped to keep the MNO executive accountable, preventing alienation of the local Councils and members. In contrast, the MNA has had the same President for over 20 years. While this fact alone does not guarantee a lack of accountability or alienation of MNA Locals and their members, it certainly increases the risk of these challenges arising. Further, successive MNO presidents have proven an ability to enforce the objectives of the MNO's members, and obtain major concessions from both the provincial and federal governments on various matters.[97]

The MNO provides one example of how Métis governance might be implemented in a way that addresses concerns about accountability, consistency, and effectiveness. It should not be mistaken for a one-size-fits-all template for Métis representative authority.[98] Métis governance should be permitted to develop in a way that reflects the unique regional and political realities of Métis communities in different parts of the country.

The MNA has recently shown signs of emulating elements of the MNO model. In August 2016, prior to the *Fort Chipewyan* decision but after the events that led to the litigation, a

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97 See e.g. Indspire, "Tony Belcourt," online: <http://indspire.ca/laureate/tony-belcourt-2/>; Métis Nation of Ontario, "Métis Nation of Ontario President Announces Retirement from Métis Politics" (5 March 2016), online: <www.metisnation.org/news-media/news/mno-president-announces-retirement/>.

98 Another potential example is the Manitoba Métis Federation (MMF). As noted in Jula Hughes & Roy Stewart, "Urban Aboriginal People and the Honour of the Crown — A Discussion Paper" (2015) 66 UNBLJ 263 at 280, the Supreme Court of Canada had "little difficulty" in granting the MMF representative standing in *Manitoba Métis Federation, supra* note 5. I do not cover the MMF in this article, as their most notable success has been their enforcement of the Crown's obligation to allocate land to MMF members, as opposed to enforcing the duty to consult.

majority of MNA members approved the following Oath of Membership, which all new MNA members are now required to affirm:

> I agree to the Metis Nation's Bylaws and Policies, as amended from time to time and voluntarily authorize the Metis Nation to assert and advance collectively-held Metis rights, interests and claims on behalf of myself, my community and the Metis in Alberta, including negotiating and arriving at agreements that advance, determine, recognize and respect Metis rights. In signing this oath, I also recognize that I have the right to end this authorization at any time, by terminating my membership within the Metis Nation.[99]

The MNA is currently engaging with Alberta to develop a consultation policy,[100] pursuant to a ten-year Framework Agreement signed in February 2017,[101] and recently signed an agreement with the federal government to enter into negotiations on matters related to Métis self-government.[102] While it remains to be seen whether these changes will result in an alignment between the MNA provincial, regional, and local councils, they certainly provide reason to be hopeful.

IV. CONCLUSION

Fort Chipewyan appears to have set out a new *Haida* test requirement for Métis organizations seeking to enforce the duty to consult: the need to establish their representative authority to speak for the rights-asserting collective. This requirement has proven onerous for the MNA, and might present a challenge to other Métis organizations whose governance structures are not recognized in Canadian statute. Despite these challenges, the need for representative authority is justified according to the honour of the Crown and Indigenous principles of good governance. However, representative authority cannot be invoked dishonourably by the Crown to evade its duty to consult. Further, the honour of the Crown and Indigenous scholarship support a purposive interpretation of the concept of representative authority, which presents an opportunity for recognition of Métis governance structures. The MNO's approach to consultation governance provides suggestions for the steps the MNA could take to persuade the Crown and the courts that its asserted representative authority is valid. In recent years, the MNA has shown signs of attempting to adopt elements of the MNO's approach, and has engaged in substantive discussions with both the provincial and federal governments on the recognition of Alberta Métis rights. However, Métis in Canada should not be required to adopt a single approach to governance in order to be consulted on decisions that may adversely affect their rights. Allowance must be made for regional differences, as well as for healthy political dissent. No government in Canada is completely immune from political opposition or concerns about representation. Métis governance should not be held to an unreasonable standard of democratic

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99 Métis Nation of Alberta, "Métis Nation of Alberta Association Bylaws," Schedule A, online: <albertametis.com/wp-content/uploads/2014/05/Metis-Nation-of-Alberta-Association-Bylaws-October-30-2017-Consolidated-Version.pdf>.

100 Métis Nation of Alberta, "Developing a Métis Consultation Policy: Key Highlights from Meeting with Métis Nation of Alberta and Minister of Indigenous Relations" (6 October 2017), online: <albertametis.com/2017/10/developing-Metis-consultation-policy-key-highlights-meeting-Metis-nation-alberta-minister-indigenous-relations/>.

101 Alberta, Indigenous Relations, "Métis Nation of Alberta – Government of Alberta Framework Agreement" (1 February 2017), online: <indigenous.alberta.ca/documents/MNA_Framework%20Agreement-Jan.31.pdf?0.6410737373387716>.

102 Métis Nation of Alberta, "Memorandum of Understanding on Advancing Reconciliation" (30 January 2017), online: <albertametis.com/wp-content/uploads/2017/01/MOU-Between-MNA-and-Canada.pdf>.

accountability or political unanimity. The challenges that ultimately led to the Court's decision not to recognize the representative authority of the FCM Local in *Fort Chipewyan* are not insurmountable, and the MNA appears to be taking reasonable steps to address them. There is therefore reason to be hopeful that representative authority will no longer be a barrier to enforcing Métis consultation in Alberta.

APPENDIX A:
COMPARISON OF EVIDENCE PROVIDED IN *FORT CHIPEWYAN*, *LABRADOR MÉTIS*, AND *ENGE*

	Fort Chipewyan	*Labrador Métis*	*Enge*
Outcome	Representative authority **not** established.	Representative authority established.	Representative authority established.
Type of evidence	The organization claiming authority was the Fort Chipewyan Métis Local (FCM Local). The evidence consisted of the testimony of three FCM Local members with claimed ties to the purported rights-bearing community.	The organization claiming authority was the Labrador Métis Nation (LMN). The evidence consisted of LMN's memorandum, articles of association, and preamble to those articles.	The organization claiming authority was the North Slave Métis Alliance (NSMA). The evidence consisted of NSMA's constitution.
Content of evidence	The evidence was insufficient to establish the FCM Local's representative authority due to the following factors: • Competing claims between the FCM Local, the MNA, and MNA Region 1 over who could enforce consultation on behalf of the FCM Métis; • Uncertainty by the FCM Local's leadership about how many members the Local had, and how they had been identified; • The seemingly small proportion of the FCM community that were known to be members of the FCM Local; and • The "vague and not objectively defined" FCM Local membership criteria, which were apparently subject to the discretion of the FCM Local President and Vice President.	The evidence clearly stated who the organization's members were and how they were identified. Members of the LMN could be deemed to know that by joining the LMN they authorized the LMN to enforce the duty to consult on their behalf. There was no evidence of any individuals or groups questioning the LMN's authority in this regard.	The evidence stated the organization's objective of promoting and supporting the recognition of its members' Aboriginal rights. On the evidence, there were no apparent challenges to the organization's authority or mandate.

APPENDIX B:
COMPARISON OF GOVERNANCE PRINCIPLES

IOG Principles	**UNDP Principles**	**Alfred principles**	**RCAP principles**
Legitimacy and Voice	Participation Consensus orientation	Wholeness with diversity Shared Culture Youth empowerment Strong links to the outside world	Role of women Role of elders Role of the family and the clan Consensus in decision-making
Direction	Strategic vision	Group maintenance	Centrality of the land
Performance	Responsiveness Effectiveness and efficiency	Communication	Individual autonomy and responsibility Leadership and accountability Rule of law
Accountability	Accountability Transparency	Respect and Trust Participatory and consensus-based government	
Fairness	Equity Rule of law		

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