# JUDICIAL RESTRAINT IN *GIFT LAKE MÉTIS SETTLEMENT* TO PRESERVE THE *METIS SETTLEMENTS ACT*

Michelle Liu & Jenna B Smith*

## Contents

1. Introduction ..... 484

2. Case Summary ..... 486

A) Background and Issues ..... 486

B) Impugned Statute and Sections 91 and 92 of the *Constitution Act, 1867* ..... 487

C) Court of Queen's Bench Decision ..... 488

D) Court of Appeal Decision ..... 489

3. Critical Assessment ..... 490

A) 'Purpose and effect' in section 15 analysis differs from 'Pith and Substance' ..... 490

B) Double Bind Arising from *MSA* and Federal Legislation on Health Benefits for Status Indians ..... 492

C) Courts Could Have Acknowledged a Right to be Consistently Identified as Métis ..... 494

4. Conclusion and Further Thinking ..... 495

## 1. Introduction

The Court of Appeal of Alberta's decision in *Gift Lake Métis Settlement v Alberta (Minister of Aboriginal Relations)*[1] is "a recent instance where a court worked hard to preserve the validity of provincial legislation deemed highly beneficial to Métis."[2] Both the Court of Queen's

* The authors are uninvited settlers living and working on traditional Algonquin territory and present this work through a settler/non-Indigenous lens. The authors pay respect to Indigenous Peoples and acknowledge that the term "Indian" is outdated and offensive despite its legal significance under the Indian Act, RSC 1985, c I-5, referenced in this commentary. This commentary also consistently uses the spelling of "Métis" (with an 'accent aigu') except when presenting quotes or referring to legislation that use "Metis," such as the Metis Settlements Act. The authors are grateful to Professor Yin Yuan Chen for the guidance and feedback he provided as part of his delivery of the Constitutional Law II course at the University of Ottawa and beyond. The authors are also grateful for the helpful comments and suggestions from anonymous reviewers.

1 2019 ABCA 134 [*Gift Lake* CA].

2 Kerry Welkins, "So You Want to Implement UNDRIP…" (2021) 53:4 UBC L Rev 1237 at 1287–88, n 230.

Bench[3] and the Court of Appeal[4] ("the *Gift Lake* Courts") conducted their federalism analyses with a view to preserving the *Metis Settlements Act*.[5] Both decisions demonstrated judicial restraint[6] in favour of preserving the *MSA* provisions.

Extensive literature exists on concerns of judicial activism and the potential for providing unelected judges with too much discretion, including some literature that suggests judicial restraint as a solution.[7] While judicial activism may present challenges, judicial restraint creates the potential for legislatures to act without judicial scrutiny and may negatively impact vulnerable groups.[8] Critiques of courts exercising judicial restraint mainly centre on the perception that a restrained court cannot fulfill the responsibilities with which the public has entrusted them.[9] This commentary discusses the judicial restraint of the *Gift Lake* Courts in preserving the *MSA*.

On appeal was the Court of Queen's Bench decision[10] that sections 75, 90, and 91 of the *MSA* do not violate the division of powers set out in the *Constitution Act, 1867*[11] and that the doctrine of interjurisdictional immunity does not apply to the Métis appellants. Under the impugned provisions, a Métis settlement member loses their membership in the settlement when they register as a status Indian under the *Indian Act*.[12] The Court of Appeal upheld the characterization by the Court of Queen's Bench that the impugned provisions are in pith and substance about property and civil rights[13] and, therefore, within the jurisdiction of the province under section 92(13) of the *Constitution Act, 1867*.[14] The Court

---

3 *Gift Lake Métis Settlement v Alberta (Aboriginal Relations)*, 2018 ABQB 58 [*Gift Lake* QB].

4 *Gift Lake* CA, *supra* note 1.

5 RSA 2000, c M-14 [*MSA*].

6 Judicial restraint has been defined as "generous interpretations of the scope of […] provincial and federal legislative jurisdiction" in Bruce Ryder, "The End of Umpire? Federalism and Judicial Restraint" (2006) 34:1 *Supreme Court L Rev: Osgoode's Annual Constitutional Cases Conference* 345 at 345.

7 See e.g. Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*, revised edition (Toronto: Irwin Law, 2016) at 114.

8 Sanjeev Anand, "The Truth About Canadian Judicial Activism" (2011) 15:2 Const Forum Const at 87; See also *ibid* at 280.

9 Dan Priel, ""'That Is Not How the Common Law Works': Paths to Tort Liability for Harassment'" (2020–21) 52:1 Ottawa L Rev 87 at 131.

10 *Gift Lake* QB, *supra* note 3.

11 *Constitution Act, 1867* (UK), 30 & 31 Vict c 3, reprinted in RSC 1985, Appendix II, No 5.

12 RSC 1985, c I-5.

13 *Gift Lake* CA, *supra* note 1 at para 2.

14 *Supra* note 11.

of Appeal also upheld the Court of Queen's Bench finding that the impugned provisions did not trench or impair the core of section 91(24) of the *Constitution Act, 1867*[15] and that the doctrine of interjurisdictional immunity, therefore, does not apply.[16] The *Gift Lake* Courts relied on *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*,[17] a decision in which the Supreme Court of Canada exercised judicial restraint in favour of preserving the validity of the *MSA*.[18]

This commentary summarizes the Court of Queen's Bench and Court of Appeal decisions in *Gift Lake*. To demonstrate the *Gift Lake* Courts' judicial restraint, this commentary critically assesses the decisions' (1) adoption of the purpose and effect from *Cunningham* as the 'pith and substance' in a division of powers matter, (2) disregard for the *MSA's* interference with federal jurisdiction on health benefits for Indians, and (3) lack of consideration for a consistent definition of "Métis" as a potential section 35 right.

## 2. Case Summary

### A) Background and Issues

Norman Laderoute, Dean Cunningham, and Edith Cunningham ("appellants") identify as Métis and have longstanding connections to the Gift Lake Métis Settlement community in northern Alberta.[19] The three Métis appellants registered as status Indians under the *Indian Act* in 2009, 2006, and 1996, respectively, to access federal health benefits otherwise not available to them or their relatives.[20] In 2015, all three appellants received a letter from Alberta Aboriginal Relations advising them that their voluntary registration as status Indians terminated their Métis Settlement membership under section 90 of the *MSA*.[21] The loss of their

---

15 *Ibid*.

16 *Gift Lake* CA, *supra* note 1 at para 2.

17 2011 SCC 37 [*Cunningham*].

18 The Supreme Court exercised judicial restraint in deciding the validity of a legislation at one point in time does not bind other courts to judicial restraint in deciding the validity of the same legislation at a later time. For example, the Supreme Court exercised judicial restraint in dismissing Morgentaler's challenge of section 251 of the *Criminal Code,* RSC 1970, c C-34 in 1976 but went on to find the same provision unconstitutional in 1988 (after the entrenchment of the *Charter*). See *Morgentaler v R* (1975), [1976] 1 SCR 616, 53 DLR (3d) 161 and *R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385.

19 *Gift Lake* QB, *supra* note 3 at paras 16–19.

20 *Ibid*.

21 *Ibid*.

Métis Settlement membership prevents the appellants from holding and passing down Métis title to their land on the Gift Lake Métis Settlement.[22]

The first ground of appeal was whether the trial judge erred in finding sections 75, 90, and 91 of the *MSA* to be in pith and substance about property and civil rights in the province and therefore *intra vires* the jurisdiction of the Alberta government.[23] The second ground of appeal was whether the trial judge erred in deciding not to apply the doctrine of interjurisdictional immunity.[24] The same issues—the pith and substance of the impugned provisions and whether interjurisdictional immunity applied—were before the Court of Queen's Bench.[25]

### B) Impugned Statute and Sections 91 and 92 of the *Constitution Act, 1867*

Sections 75, 90, and 91 of the *MSA* were at issue in this case. The Government of Alberta passed the *MSA* following the 1989 *Alberta-Metis Settlements Accord*.[26] Eight Métis communities—including the Gift Lake Métis Settlement—now occupy lands to which the Métis Settlements General Council received fee simple title under the *Accord*. The Court of Appeal decision provides the following summary of the impugned provisions of the *MSA*:

> Section 75 of the *MSA* provides that persons registered as Indians or Inuit may not apply for membership in a Métis settlement, unless certain conditions are met and membership is authorized by a settlement bylaw. Section 90 of the *MSA* confirms that voluntary registration under the Indian Act terminates membership in a Métis settlement unless a General Council Policy provides otherwise. Section 91 provides that a settlement member who loses membership under these provisions loses any interest in the settlement land but may continue to reside on a Métis settlement unless expelled.[27]

The *Gift Lake* Courts also referred to sections 91(24) and 92(13) of the *Constitution Act, 1867*[28] given that the issues centred on the division of powers and interjurisdictional immunity. Section 91(24) provides the federal government with legislative jurisdiction over "Indians, and

---

22 *Ibid.*

23 *Gift Lake* CA, *supra* note 1 at para 17.

24 *Ibid.*

25 *Gift Lake* QB, *supra* note 3 at paras 21–23.

26 *Alberta-Metis Settlements Accord*, 1 July 1989, online (pdf): *Alberta Open Government* <open.alberta.ca> [perma.cc/C867-7P6S] [*Accord*].

27 *Gift Lake* CA, *supra* note 1 at para 19.

28 *Supra* note 11.

Lands reserved for the Indians."[29] Section 92(13) provides provincial governments with legislative jurisdiction over "Property and Civil Rights in the Province."[30]

## C) Court of Queen's Bench Decision

The Court of Appeal's decision to uphold the trial decision in its entirety calls for a summary of the trial decision. At trial in 2018, Justice Debra Yungwirth concluded that the impugned provisions are in pith and substance related to a matter that falls within provincial legislative authority.[31] Justice Yungwirth relied on the purpose and effect of the *MSA* arising from the section 15 *Canadian Charter of Rights and Freedoms*[32] analysis in *Cunningham*: "Alberta's true purpose in enacting the *MSA* was to establish a Métis land base to preserve and enhance Métis identity, culture and self-governance, as distinct from surrounding Indian cultures and from other cultures in the province."[33]

Justice Yungwirth also concluded that the doctrine of interjurisdictional immunity does not apply in the given circumstances.[34] The applicants relied on the core of section 91(24)[35] that *NIL/TU,O Child and Family Services Society v BC Government and Service Employees' Union*[36] identified to submit that "the impugned sections of the *MSA* exclude individuals from their identity as Métis, and that in doing so, the province has legislated in an area that falls within the core of s 91(24)."[37] Justice Yungwirth found that the impugned sections "only act to exclude specific individuals from membership in settlements established under the *MSA* and the benefits that flow from that membership."[38] She found that membership in Métis settlements does not determine whether or not an individual is Métis given that individuals who are not members

---

29 *Ibid*.

30 *Ibid*.

31 *Gift Lake* QB, *supra* note 3 at para 39.

32 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11 [*Charter*].

33 *Gift Lake* QB, *supra* note 3 at para 36, citing *Cunningham*, *supra* note 17 at para 62.

34 *Gift Lake* QB, *supra* note 3 at para 51.

35 *Constitution Act, 1867*, *supra* note 11.

36 *Gift Lake* QB, *supra* note 3 at para 44 citing, 2010 SCC 45 at para 70.

37 *Gift Lake* QB, *supra* note 3 at para 46.

38 *Ibid* at para 47.

of a settlement can still legally be Métis under the *Powley* test.[39] For these reasons, the Court of Queen's Bench dismissed the application.

## D) Court of Appeal Decision

The Court of Appeal upheld Justice Yungwirth's conclusion that the impugned provisions are in pith and substance about property and civil rights within the province.[40] The Court of Appeal rejected the connection between the conclusion from *Daniels v Canada (Indian Affairs and Northern Development)*[41] and the provincial government's inability to legislate regarding the Métis People. The Court of Appeal found that the Supreme Court in *Daniels*[42] declared Métis and non-status Indians to be Indians under section 91(24) to remove these communities from the "jurisdictional wasteland"[43] in which they faced obvious disadvantages and not to "render all provincial legislation pertaining to Métis and non-status Indians […] inherently *ultra vires*."[44] Ultimately, the Court of Appeal agreed with the trial decision's reliance on the purpose and effect of the *MSA* arising from the section 15 analysis in *Cunningham*.[45]

The Court of Appeal cited *Tsilhqot'in Nation v British Columbia*[46] in emphasizing the limits of the doctrine of interjurisdictional immunity: "the differing tools, capacities, and expertise of the two levels of government should be encouraged up until the point of actual conflict."[47] The Court of Appeal provides *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*[48] as an example of a decision in which "statutory provisions giving the provincial government a means of protecting aboriginal heritage objects was found not to go to the core of a federal head of power."[49] The appellants also submitted that the impugned provisions of the *MSA* conflict with the *Powley*[50] interpretation of Métis in section 35 of the *Constitution Act, 1982*.[51] On this submission, the Court of

---

39 *Ibid*, citing *R v Powley*, 2003 SCC 43 [*Powley*] in which the Supreme Court of Canada outlined a set of criteria to define what might constitute a Métis right and who is entitled to those rights.

40 *Gift Lake* CA, *supra* note 1 at para 32.

41 2016 SCC 12 [*Daniels*].

42 *Ibid*.

43 *Gift Lake* CA, *supra* note 1 at para 29, citing *Daniels*, *supra* note 41 at para 14.

44 *Gift Lake* CA, *supra* note 1 at para 31, citing *Daniels*, *supra* note 41 at para 51.

45 *Gift Lake* CA, *supra* note 1 at para 24.

46 2014 SCC 44 at paras 148–49 [*Tsilhqot'in*].

47 *Gift Lake* CA, *supra* note 1 at para 37, citing *Tsilhqot'in*, *supra* note 46.

48 2002 SCC 31 [*Kitkatla*].

49 *Gift Lake* CA, *supra* note 1 at para 37, citing *Kitkatla, supra* note 48.

50 *Supra* note 39.

51 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Appeal reiterates the trial decision's acknowledgment that "membership in these settlements is not determinative of whether an individual is Métis […], and individuals who are not members of a settlement can still be Métis under the test developed in *Powley*."[52] For these reasons, the Court of Appeal found that the impugned provisions of the *MSA* do not trench upon or impair the core of section 91(24) of the *Constitution Act, 1867*.[53]

## 3. Critical Assessment

### A) 'Purpose and effect' in section 15 analysis differs from 'Pith and Substance'

The Court of Appeal in *Gift Lake* should have found that the Court of Queen's Bench erred in adopting the purpose and effect of the *MSA* arising from *Cunningham* as the pith and substance of the legislation. The Supreme Court in *Cunningham* accepted "the government's claimed purpose"[54] of the *MSA* as its purpose and effect[55] in analyzing the impugned provisions against section 15(2) of the *Charter*[56] while relying on *R v Kapp*[57], which does not mention pith and substance. *Gift Lake* is a division of powers matter that requires a court to carry out the characterization step under the validity analysis to determine the pith and substance of a legislation.

The Court of Queen's Bench in *Gift Lake* relied on *Cunningham* and did not carry out the characterization step under the validity analysis. Accepting the purpose of a legislation at face value is contrary to Supreme Court jurisprudence[58] on the characterization stage of the validity analysis. Judicial review of legislation in the context of division of powers consists of three inquiries: validity analysis,[59] applicability analysis,[60] and operability analysis.[61] A validity analysis consists of two distinct

---

52 *Gift Lake* CA, *supra* note 1 at para 40.

53 *Supra* note 11.

54 *Supra* note 17 at para 35.

55 *Ibid* at paras 3, 28 where the court accepts the expression of purpose set out in para 19.

56 *Supra* note 32.

57 2008 SCC 41.

58 See *Starr v Houlden*, [1990] 1 SCR 1366, 72 OR (2d) 701 [*Starr*]; *R v Morgentaler*, [1993] 3 SCR 463, 107 DLR (4th) 537 [*Morgentaler* 1993]; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.

59 *Ibid*.

60 See *Bell Canada v Quebec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 SCR 749, 51 DLR (4th) 161; *Canadian Western Bank v Alberta*, 2007 SCC 22; *Quebec (AG) v Canadian Owners and Pilots Association*, 2010 SCC 39.

61 See *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161, 138 DLR (3d) 1; *Bank of Montreal v Hall*, [1990] 1 SCR 121, 65 DLR (4th) 361; *Alberta (AG) v Moloney*, 2015 SCC 51.

steps: characterization and classification.[62] Characterization focuses on identifying the dominant feature—pith and substance—of the law by examining its legislative purpose, legal and practical effects, and extrinsic documents where relevant.[63] The Supreme Court in *R v Morgentaler* clarifies that the practical effect of a legislation is important in determining its dominant feature under the validity analysis.[64] No consideration for practical effect arises in determining the purpose and effect of a legislation in a section 15 analysis—at least not in *Cunningham*.

*Morgentaler* 1993 relies on *Saumur v Quebec (City of)*[65] to define the practical effect of a legislation as consisting of "the actual or predicted results of the legislation's operation and administration."[66] An actual result of the *MSA's* operation is that the Métis appellants who registered as status Indians to access critical federal health benefits ended up losing title to land on a Métis settlement to which they have longstanding connections.[67] This result should have been central to the Court of Queen's Bench's determination of the pith and substance of the impugned provisions given that the result is not incidental[68] but a practical effect. The practical effect in question is comparable to the Nova Scotia *Medical Services Act's* negative impact on Morgentaler's ability to provide service at his clinic,[69] which the Supreme Court in *Morgentaler* 1993 considered when determining the pith and substance of the *Medical Services Act*.[70] The Court of Appeal in *Gift Lake* should have rejected the adoption of the purpose and effect of the *MSA* from *Cunningham* as the legislation's pith and substance.

The type of legal issue is another distinction between the purpose and effect from *Cunningham* and the pith and substance under the validity analysis in a division of powers matter like *Gift Lake*. The Supreme Court in *Starr v Houlden* emphasized that "[i]n undertaking the characterization of a law the Court must consider the legislative scheme, judicial precedent and […] a 'concept of federalism' comprised of the enduring values in the allocation of power between the two levels of government."[71] While possible to argue that the *Gift Lake* Courts were following the "judicial

---

62 See *supra* note 58.

63 *Starr*, *supra* note 58.

64 *Morgentaler* 1993, *supra* note 58 at 487.

65 [1953] 2 SCR 299, [1953] 4 DLR 641 [*Saumur*].

66 *Supra* note 58, citing Saumur, supra note 65 at 326.

67 *Gift Lake* QB, *supra* note 3 at paras 16–19.

68 The result or effect would have been permissible under the paramountcy analysis had it been incidental. See e.g. *Delorme v Canada (AG)*, 2015 ABQB 240.

69 *Morgentaler* 1993, *supra* note 58 at 487.

70 RSNS 1989, c 281, cited in *Morgentaler* 1993, *supra* note 58.

71 *Supra* note 58 at 1389.

precedent" instruction from *Starr*, the emphasis on federalism in the same sentence may indicate some prioritization of the importance of considering the type of legal issue for which a court determines the object of a legislation. The issues in *Cunningham* arise in a *Charter* context.[72] The questions in *Gift Lake* arise in the context of federalism and call for a court to carry out the characterization analysis to determine the legislation's pith and substance. This distinction further points to the *Gift Lake* Courts' potential error in adopting the purpose and effect of the *MSA* as its pith and substance.

Sufficient jurisprudence seems to exist on the steps of the validity analysis,[73] including the need to consider the practical effect of a legislation in determining its pith and substance in the characterization stage. Given that the *Gift Lakes* Courts disregarded the obvious distinctions between the purpose and effect of a legislation in a *Charter* analysis and the pith and substance of a legislation in a division of power analysis may speak to the exercise of judicial restraint in favour of preserving the *MSA* in Alberta.

### B) Double Bind Arising from *MSA* and Federal Legislation on Health Benefits for Status Indians

The *Gift Lake* Courts found that the doctrine of interjurisdictional immunity did not apply under the applicability analysis given that a legislation can define Métis one way while other legislation or jurisprudence can define the same group differently according to *Powley*.[74] As a result, the Court of Appeal upheld the finding that the impugned provincial legislation does not trench upon or impair the federal core under section 91(24).[75] This finding appears to ignore the double bind that the Supreme Court pointed out in *Daniels*:

> [F]inding Métis and non-status Indians to be "Indians" under s. 91(24) […] has the undeniably salutary benefit of ending a jurisdictional tug-of-war in which these groups were left wondering about where to turn for policy redress.[76]

The Court of Appeal found that the membership provisions "do not constrain, restrict or dictate to the federal government what qualifications or criteria it may choose in providing federal benefits to Métis peoples in Alberta or elsewhere under s. 91(24)" without discussion of the double

---

72 *Supra* note 17 at para 3.

73 See *supra* note 58.

74 *Gift Lake* CA, *supra* note 1 at para 40.

75 *Ibid* at para 41.

76 *Daniels*, *supra* note 41 at para 15.

bind.[77] The doctrine of interjurisdictional immunity presumes that the law at issue is valid and focuses on the law's *effects* when considering whether the law has impaired core federal power.[78] The Court of Appeal did not fully consider the effects of the *MSA* and the double bind that may occur as a result of the *MSA*, further exemplifying the Court's potential judicial restraint. For instance, Métis individuals like the appellants in *Gift Lake* have to register as status Indians to access federal health benefits that would otherwise not be available to them.[79] Métis settlement members who register as status Indians to access federal health benefits lose their Métis settlement membership under section 90 of the *MSA*.[80] Métis settlement members who wish to retain their settlement membership and title to land on the settlement cannot access federal health benefits available only to status Indians.[81] The solution appears clear: the federal government should alter the criteria for receiving these benefits such that Métis are eligible without having to register as status Indians—especially following the declaration in *Daniels* that Métis are Indians under section 91(24).[82]

If the federal government's intention is indeed to provide enhanced health benefits to Indians, the federal government would have to alter the criteria for receiving these health benefits in order to provide these benefits to Indians who wish to retain their Métis settlement membership and land. In this light, the provincial legislation *does* "constrain, restrict or dictate to the federal government what qualifications or criteria it may choose in providing federal benefits to Métis."[83] Indeed, this sounds like the kind of "actual conflict" that the Supreme Court in *Tsilhqot'in* described as potential justification for considering the doctrine of interjurisdictional immunity.[84] The *Gift Lake* Courts did not broach this line of reasoning despite both Courts receiving submissions relying on *Daniels* makes evident the judicial restraint in favour of preserving the *MSA*. Judicial restraint is also apparent in the Court of Appeal's discussion of interjurisdictional immunity and its concern for the doctrine's use in Canadian law. The Court of Appeal stated that the application of interjurisdictional immunity requires restraint and that "making valid legislation inapplicable to certain matters is counter to the current Canada approach to cooperative, flexible federalism."[85]

---

77 *Gift Lake* CA, *supra* note 1 at para 40.

78 *Quebec (AG) v Canadian Owners and Pilots Association*, 2010 SCC 39 at para 57.

79 *Gift Lake* QB, *supra* note 3 at paras 16–19.

80 *Supra* note 5.

81 *Gift Lake* QB, *supra* note 3 at paras 16–19.

82 *Supra* note 41 at para 10.

83 *Gift Lake* CA, *supra* note 1 at para 40.

84 *Supra* note 46 at paras 148–149.

85 *Gift Lake* CA, *supra* note 1 at para 36.

Although some circumstances warrant these concerns,[86] the phrasing by the Court of Appeal seems to indicate judicial restraint to avoid upsetting a current approach regardless of the harmful and marginalizing effects this approach may have.

### C) Courts Could Have Acknowledged a Right to be Consistently Identified as Métis

Clarity and consistency surrounding an Indigenous People's identity across federal and provincial legislation could feasibly be a section 35 right per *R v Van der Peet*[87] and step 1 of the *Sparrow* Test.[88] This potential right satisfies several criteria under the Distinctive Culture Test[89] set out in *Van der Peet*, including being of central significance to an Indigenous group. Being consistently identified as Métis is likely an important practice, custom, or tradition from a Métis perspective, thus also satisfying the 'existing right' step in the *Sparrow* Test. The importance of identity is also noted in Article 33.1 of the *United Nations Declaration on the Rights of Indigenous Peoples*: "Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions."[90]

Instead of acknowledging this potential right to be consistently identified, the *Gift Lake* Courts accepted that an individual who is not Métis in the context of a settlement membership can still be Métis under a common law test. This effect in the context of cultural and ethnic identification appears analogous to the kind of precisionist distinction that Justice Ian Binnie's obiter in *Will-Kare Paving & Contracting Ltd v Canada*[91] cautioned against in the tax context: "The millions of taxpayers who are not lawyers cannot be expected to reach for *Benjamin's Sale of Goods* to research the difference between a contract for the sale of goods and a contract for work and materials and to apply these distinctions in the assessment of their own income tax liability."[92] Thus, if taxpayers are exempt from understanding the aforementioned distinctions in assessing their income tax liability, how can courts reasonably expect Métis people—or most people, for that matter—to understand the distinction between

---

86 See C*anadian Western Bank v Alberta*, 2007 SCC 22 at paras 42–47 for a discussion of issues surrounding the use of interjurisdictional immunity for some division of powers questions.

87 [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*].

88 *R v Sparrow,* [1990] 1 SCR 1075, 70 DLR (4th) 385.

89 *Van der Peet*, *supra* note 87 at para 48.

90 Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/ RES/61/295, 46 ILM 1013 (2007).

91 2000 SCC 36 at para 39.

92 *Ibid*.

"Métis" under the *MSA* and "Métis" under the *Powley* test? Overall, the *Gift Lake* Courts could have taken a more active approach to acknowledge a section 35 right to be consistently identified in order to create cohesion across different legislation and to avoid unnecessary challenges that have occurred for Métis peoples under the *MSA*.

The Government of Alberta's negotiations with the Métis People of Alberta to develop the membership parameters at issue[93] may not mean that no further consultation was necessary to resolve Métis people's expectations in identifying themselves. Gift Lake Métis Settlement and the Métis Settlement General Council were intervenors in this case and supported the survival of the *MSA*, but support for the survival of the *MSA* as a whole does not necessarily equal support for its adverse effects on some members. The Court of Appeal concluded that "the remedy is not in striking down the *MSA* but rather in a negotiated solution or amendments to legislation to permit deregistration."[94] Permitting deregistration as status Indians may allow the appellants to regain their Métis settlement memberships, but deregistration would still strip the appellants of the federal health benefits that led them to register as status Indians in the first place. Suggesting this trade-off approach displays that the Court of Appeal exercised judicial restraint in favour of preserving the *MSA*.

## 4. Conclusion and Further Thinking

The *Gift Lake* Courts found that the impugned provisions are in pith and substance related to property and civil rights and that they did not trench or impair the core of section 91(24) of the *Constitution Act, 1867*.[95] The *Gift Lake* Courts relied on *Cunningham*, a decision in which the Supreme Court condoned a trade-off approach to Aboriginal rights and exercised judicial restraint in favour of preserving the validity of the *MSA*:

> While the loss of the right to participate in the governance of the Métis community with which they had been associated on a long-term basis was a severe consequence, this was offset by the fact that by registering as Indians under the Indian Act, the claimants had chosen to receive other rights and benefits.[96]

This commentary contends that the *Gift Lake* Courts also exercised judicial restraint in favour of preserving the *MSA*. The commentary suggests that judicial restraint is evident in the *Gift Lake* Courts' (1) adoption of the purpose and effect from *Cunningham* as the 'pith and substance'

---

93 *Gift Lake* CA, *supra* note 1 at para 12.

94 *Ibid* at para 43.

95 *Supra* note 11.

96 *Cunningham*, *supra* note 17 at para 28.

in a division of powers matter, (2) disregard for the *MSA's* interference with federal jurisdiction on health benefits for Indians, and (3) lack of consideration for a potential section 35 right to be consistently identified as "Métis."

Ruling in favour of the appellants' loss of access to critical federal health benefits demonstrates a missed opportunity for the *Gift Lake* Courts to compel both the federal and provincial government to consider Calls to Action #18 and #20 from the Truth and Reconciliation Commission of Canada:

> 18. We call upon the federal, provincial, territorial, and Aboriginal governments to acknowledge that the current state of Aboriginal health in Canada is a direct result of previous Canadian government policies, including residential schools, and to recognize and implement the health-care rights of Aboriginal people as identified in international law, constitutional law, and under the Treaties.
>
> […]
>
> 20. […] we call upon the federal government to recognize, respect, and address the distinct health needs of the Métis, Inuit, and off-reserve Aboriginal peoples.[97]

The *Gift Lake* Courts seem to have missed an opportunity to exercise judicial activism to nudge the federal and provincial government in the direction of reconciliation.

---

97 Truth and Reconciliation Commission of Canada: Calls to Action (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at 2–3, online (pdf): <publications.gc.ca> [perma.cc/RZS9-622P].