A PATH TO RECONCILIATION

Report of the Minister's Special Representative regarding Aboriginal Claims and Negotiations in the Southeast Northwest Territories

THOMAS ISAAC

2017

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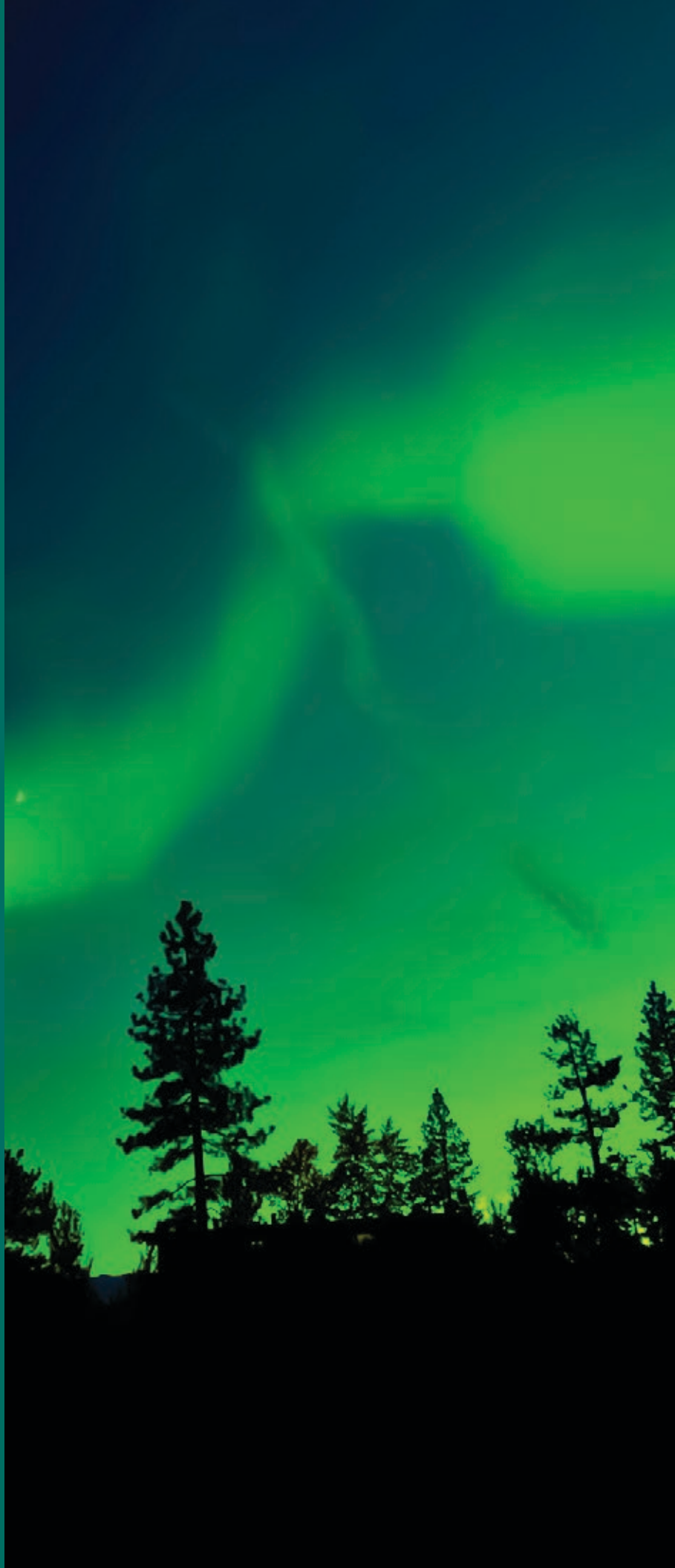

LETTER TO THE MINISTER OF INDIGENOUS AND NORTHERN AFFAIRS AND THE PREMIER OF THE NORTHWEST TERRITORIES

March 3, 2017

The Honourable Carolyn Bennett, M.D., P.C., M.P.
Minister of Indigenous and Northern Affairs

The Honourable Robert McLeod, M.L.A.
Premier of the Northwest Territories

Re: A Path to Reconciliation: Report of the Minister's Special Representative regarding Aboriginal Claims and Negotiations in the Southeast Northwest Territories

Dear Minister Bennett and Premier McLeod:

I am pleased to submit "A Path to Reconciliation: Report of the Minister's Special Representative regarding Aboriginal Claims and Negotiations in the Southeast Northwest Territories."

The Report presents my observations, views and recommendations regarding the settlement of outstanding Aboriginal claims and negotiations in the Southeast Northwest Territories.

Thank you for the opportunity to assist both of your governments regarding this important matter.

Sincerely,

Thomas Isaac

Minister's Special Representative

INTRODUCTION

On June 27, 2016 I was appointed by the Minister of Indigenous and Northern Affairs as the Minister's Special Representative regarding the Southeast Region of the Northwest Territories ("NWT"), reporting to the Minister of Indigenous and Northern Affairs and to the Premier of the Government of the Northwest Territories ("GNWT").

My appointment was in furtherance of both governments' shared initiative to resolve outstanding Section 35 rights and related claims,[1] including existing negotiations and overlapping claims, in the Southeast NWT. I was mandated to examine existing Aboriginal claims and negotiation processes in the Southeast NWT and consider whether amended or alternative approaches would be more effective, with the objective of concluding agreements that support a cohesive land, resources and governance regime while fostering cooperative working relationships among the parties ("Mandate").

In writing this Report, I met with, and received submissions from, numerous Aboriginal groups and governments having interests in the Southeast NWT, along with various representatives and negotiators from the Government of Canada and the GNWT. My active engagement period ran from July to November 2016.

I wish to thank all of the Aboriginal leaders and representatives with whom I met and for providing extensive amounts of insight and information on the current state of negotiations, overlapping claims and other issues relevant to the Mandate. I also thank the various Government of Canada and GNWT officials with whom I met and who spoke candidly about the opportunities and challenges affecting the current state of Aboriginal claims and negotiations in the Southeast NWT.

A consolidated list of recommendations is attached to this Report at Schedule A. A list of the governments and organizations with whom I met, and from whom submissions were received, is attached to this Report at Schedule B.

My general observation and the starting assumption for this Report is that Canada and the GNWT, along with the Aboriginal peoples affected, genuinely wish to pursue the settlement of outstanding claims in the Southeast NWT in a timely, efficient, and honourable manner. Toward this end, there is a need to recalibrate the respective parties' commitment, objectives and actions in relation to settling outstanding claims in the Southeast NWT. In order for progress to be made, it is essential that all parties participate in the process, and do so in good faith, acting reasonably and prudently and take realistic, thoughtful and practical positions in their respective discussions and negotiations.

The observations, views and recommendations set out in this independent Report are mine, in my capacity as the Minister's Special Representative regarding the Southeast NWT and are not necessarily those of Canada or the GNWT. This Report is intended to be without prejudice to any of the governments' or Aboriginal peoples' negotiations-related or legal positions.

1 Throughout this Report the term "Aboriginal" is used instead of the term "Indigenous." Given that this Report and the Mandate are focused on the settlement of outstanding Aboriginal claims and are inextricably tied to Section 35, *Constitution Act, 1982*, the Report uses the term "Aboriginal" which is the term used in Section 35 and the case law relating thereto from the Supreme Court of Canada.

PRESENT SITUATION

The current state of outstanding Aboriginal claims and negotiations in the Southeast NWT is dynamic and challenging. The breadth and scope of the Aboriginal claims and negotiations at issue, the extensive nature of the overlapping claims, and the overarching shadow of the unratified 1990 Dene/Métis Agreement all stand as challenges to the successful resolution of claims in the Southeast NWT.

Many of the people with whom I spoke expressed pessimism about the potential for the timely and reasonable resolution of outstanding claims in the area. Concerns were expressed that the slow pace of progress to date on these issues may lead to further division among the numerous Aboriginal groups having interests in the Southeast NWT. Persistent and difficult issues exist and stand in the way of the timely settlement of claims in the Southeast NWT.

The Southeast NWT is subject to a plethora of different and competing claims by Aboriginal peoples. Presently the Northwest Territories Treaty 8 Tribal Council, representing four Akaitcho Dene First Nations (Deninu K'ue Dene First Nation, Lutsel K'e Dene First Nation, Yellowknives Dene First Nation – Dettah, and Yellowknives First Nation – Ndilo) (together the "Akaitcho Dene"), is negotiating an agreement to address their outstanding rights and claims in the Southeast NWT. A negotiation main table exists and the parties (Akaitcho Dene, Canada, and the GNWT) meet regularly towards reaching a mutually acceptable agreement.

The Northwest Territory Métis Nation ("NWTMN") representing the Fort Resolution Métis Council, the Fort Smith Métis Council, and the Hay River Métis Government Council signed an agreement-in-principle with Canada and the GNWT on July 31, 2015 ("NWTMN AIP") and asserts rights over essentially the same area as the Akaitcho Dene. The NWTMN, Canada and the GNWT are presently negotiating toward the settlement of a final agreement.

The North Slave Métis Alliance asserts Section 35 Métis rights in and around Great Slave Lake, including north of Great Slave Lake and are not a party to the NWTMN/Canada/GNWT negotiations.

The K'atl'odeeche First Nation expressed concerns regarding the breadth and scope of the NWTMN negotiations, particularly west of the Buffalo River.

The Athabasca Denesuline (representing the Fond du Lac, Black Lake and Hatchet Lake First Nations in northern Saskatchewan) assert rights in the Southeast NWT, and for which they are presently negotiating an out of court settlement agreement with Canada (the GNWT is currently not participating).

The Ghotelnene K'odtineh Dene (representing the Sayisi Dene and Northlands Denesuline First Nations in northern Manitoba) also assert rights in the Southeast NWT, and for which they are presently negotiating an out of court settlement with Canada and the GNWT.

There are also numerous pieces of litigation ongoing or in abeyance involving a multitude of interests challenging the NWTMN AIP and assertions of Aboriginal and treaty rights in the Southeast NWT.[2]

2 For example, these include: (a) Federal Court Action T-339-12 - *Deninu K'ue Dene First Nation, Lutsel K'e Dene First Nation, Yellowknives Dene First Nation – Dettah, and Yellowknives Dene First Nation – Ndilo v. A.G. Canada, and Northwest Territory Métis Nation (Intervener) and The Commissioner of the NWT (Intervener)* [challenging validity of the NWTMN/Canada/GNWT AIP]; (b) Federal Court Judicial Review Application T-1427-15 - *William Enge on his own behalf and on behalf of the members of the North Slave Métis Alliance v. Minister of Indian Affairs and Northern Development and Government of the NWT, NWT Métis Nation et al.* [challenging the NWTMN AIP]; (c) Federal Court Action T-3201-91 - *Louis Benoanie et al. v. Her Majesty in Right of Canada et al.* [asserting treaty and Aboriginal rights in Southeast NWT]; (d) Federal Court Judicial Review Application T-653-16 - *Black Lake First Nation, Fond du Lac First Nation and Hatchet Lake First Nation v. A.G. Canada* [claim regarding the interim land

The status quo is not working in the Southeast NWT. Collectively, the claims and issues of the Aboriginal groups noted above represent a dynamic and challenging legal, political and negotiating environment not easily resolved. The current negotiations and related processes applicable in the Southeast NWT appear stagnant and are not resulting in sustainable, lasting solutions that ***all*** of the relevant parties, Aboriginal peoples, GNWT, and Canada, can live with.

It is also clear that starting from scratch and ignoring what progress has been made (e.g. NWTMN AIP) is not practical, may not uphold the honour of the Crown, and is not in the interests of Canada or the GNWT or the Aboriginal peoples involved. Additionally, not acting in a timely manner could trigger further divisions among the Aboriginal groups in the Southeast NWT, which would not be in the public or Aboriginal interest.

However, these issues are not insurmountable. Despite this confluence of competing interests, the Southeast NWT is not unique. There are other parts of Canada where multiple Aboriginal peoples assert rights and interests over the same portion of land: so-called "overlapping claims." One of the most notable and express examples of this is in British Columbia where there are numerous overlapping claims throughout the entire province involving more than 200 First Nations, in addition to the asserted interests of the Métis. Overlapping claims are critically relevant to the current situation in the Southeast NWT. Section 35 contemplates that numerous Aboriginal peoples may hold rights to harvest and hunt on the ***same*** land. Canadian law has developed to accommodate overlapping claims with an understanding that Aboriginal rights are ***not exclusive*** and that Aboriginal and treaty rights to harvest and hunt ***can co-exist*** as among numerous Aboriginal peoples holding and exercising such rights.[3]

In order to understand where we are, we must first consider where we have been and, for the purposes of this Report, this begins with the failure to ratify the 1990 Dene/Métis Agreement and the resulting regional approach utilized throughout most of the NWT.

withdrawal agreement relating to the Southeast NWT]; and (e) *Samuel/Thorassie et al. v. The Queen*, T-703-93 [treaty rights claim, including land entitlement – presently under case management while negotiations proceed].

3 For example, see *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010, at para. 159; *R. v. Marshall; R. v. Bernard*, 2005 SCC 43, at para. 58; *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257, at paras. 48-49, and *Ahousaht Indian Band v. Canada (A.G.)*, 2007 BCSC 1162, at paras. 64 and 69.

UNRATIFIED 1990 DENE/MÉTIS AGREEMENT

Negotiation of a joint Dene/Métis comprehensive claim began in 1981 after Canada had accepted the land claim submissions of the Indian Brotherhood of the Northwest Territories in 1976 and the Métis Association of the Northwest Territories in 1977. The final agreement was initialled by negotiators in April 1990, but the Dene and Métis Assemblies rejected the agreement by not proceeding with its ratification.

For the purposes of this Report, a core element of this non-legally binding and unratified 1990 Dene/Métis Agreement was that, upon its demise, a regional approach was pursued that divided the NWT into five Dene and Métis regions with reasonably clear boundary lines between each. After the failed ratification vote for the 1990 Dene/Métis Agreement, Canada and the GNWT discontinued negotiations on a single claim area (with five divisions) and focused instead on the negotiation of separate regional settlements with the five Dene and Métis regions originally identified in the unratified 1990 agreement.

Ultimately, the Gwich'in and Sahtu Dene and Métis proceeded with negotiations and ratification, which resulted in the Gwich'in Comprehensive Land Claim Agreement being signed in 1992 and the Sahtu Dene and Métis Land Claim Agreement being signed in 1993. The Tlicho Land Claims and Self-Government Agreement was signed in 2003. The Dehcho First Nations, including Métis, are presently negotiating an agreement-in-principle on land, resources and governance.

The unratified 1990 Dene/Métis Agreement resulted in a number of positive outcomes, including the settlement of three outstanding claims on the basis of a regional approach (i.e. three claims for three regions – the Gwich'in, the Sahtu Dene and Métis, and the Tlicho), and a cohesive regulatory, land and resource management regime throughout that part of the NWT. The Smith's Landing First Nation and the Salt River First Nation also have each ratified treaty land entitlement agreements effective in the Southeast NWT.

The joint regional approach, resulting from the failure of the 1990 Dene/Métis Agreement, survived until the late 1990s when the Akaitcho Dene decided to pursue a treaty land entitlement approach to settle their outstanding issues, instead of pursuing their claims jointly with the Métis. As a result, the Métis were not able to participate in the proposed treaty land entitlement process (eventually abandoned by the Akaitcho Dene and replaced with the current process involving the Akaitcho Dene, Canada and the GNWT). The NWTMN pursued its own negotiations with Canada and the GNWT, distinct from the Akaitcho Dene, and resulting in the NWTMN AIP.

This divergence of approaches, compounded by the trans-boundary claims of the Athabasca Denesuline and Ghotelnene K'odtineh Dene, and the claims of the North Slave Métis Alliance, underscore the inherent weakness in relying on a regional approach. The current approaches being utilized by all the parties, to varying degrees, in the Akaitcho Dene and the NWTMN negotiations' tables are premised upon the regional approach used successfully in other parts of the NWT. However, the regional approach, by its very nature and structure, cannot work without general acceptance and application by the relevant Aboriginal groups, something which is expressly missing in the context of the Southeast NWT. The future application and acceptance of a regional approach in the Southeast NWT would require material changes in positions by all of the affected Aboriginal peoples and governments with interests in the Southeast NWT.

Many of the individuals with whom I spoke referred to the unratified 1990 Dene/Métis Agreement and resulting regional approach as the ***basis*** for an agreement in their

particular circumstances (Aboriginal and government representatives alike) with little or no mention of the divergent views that exist in the Southeast NWT and the potential Section 35 rights at stake. There was also little acknowledgement that the failure of the 1990 Dene/Métis Agreement resulted in a ***regional approach in other parts of the NWT premised upon resolved interests*** that is ***incompatible*** with the ***non-regional approach to numerous unresolved overlapping interests required in the Southeast NWT.*** Notwithstanding this obvious fact, it was stated that the so-called "Dene/Métis regional approach" was the ultimate or preferred objective or was used as the point of reference or comparison in terms of measuring success.

Based on my observations and many of those with whom I spoke, the existing negotiations with both the Akaitcho Dene and the NWTMN feel as if they are overly focused on reviving and confirming the 1990 Dene/Métis Agreement, its boundaries and related mandates and not enough on reaching final agreements that make sense in 2017 and reflect the legal, social and political realities of the Southeast NWT. While I heard from a few public government representatives that it would be preferable to have a regional approach like the other regions in the 1990 Dene/Métis Agreement, I saw no evidence, from the Aboriginal peoples and their representatives with whom I spoke, that such an approach is viable or desirable in the foreseeable future.

The most fundamental and consistent concern I heard from the Akaitcho Dene and the NWTMN was the disproportionate focus by Canada and the GNWT on the regional approach flowing from the failed 1990 Dene/Métis Agreement and the rigidity of the current negotiation mandates of Canada and the GNWT that appear premised upon a regional approach and the successes in other parts of the NWT.

Through various submissions, I was provided with a number of reasons as to why agreements signed in the Southeast NWT must be similar to the other existing NWT agreements (specifically the Sahtu Dene and Métis, Gwich'in and Tlicho Agreements), all modelled to varying degrees after the 1990 Dene/Métis Agreement and the resulting regional approach. These arguments included: it would be unfair to those Aboriginal peoples who have already signed agreements to have different agreements signed; these other agreements reflect the vision of how the NWT should be governed; the North is different from the rest of Canada and, therefore, a unique approach is required; and the need for a consistent regulatory and governance approach throughout the NWT.

In response to those reasons, it must be acknowledged that there is value and merit in all parties striving, where reasonable, for consistent and efficient governance and regulatory regimes. However, the notion that all of the agreements need to be similar is not based on any legal requirement or binding agreement (the 1990 Dene/Métis Agreement was not ratified). Imposing other agreements and their respective structures on the Southeast NWT, ***by itself***, comes across as potentially heavy handed, paternalistic and does not, on its face, address the fundamental structural differences that exist in the Southeast NWT that do not exist in the other settled areas of the NWT.

Starting a negotiation on the premise that an agreement with Aboriginal peoples must be similar to another agreement because of some implied agreement in 1990 or because of other settled agreements is not, by itself, a sound basis for engagement and negotiations. On the issue of uniqueness, it is clear that the North, and specifically the NWT, is unique and requires distinct public policy approaches to the issues it faces. However, being unique does not mean being bound by past choices where

such choices will likely not work, such as the present circumstances existing in the Southeast NWT.

Canada's and the GNWT's respective mandates for both the NWTMN and Akaitcho Dene negotiations appear based on the regional approach and mandates used elsewhere in the NWT, to varying degrees. Similarly, the land and financial mandates and offers appear predicated on the quantities and amounts provided for in the 1990 Dene/Métis Agreement. This approach suggests a consistency which has not in practice existed. For example, when pressed, it is clear that the 2003 Tlicho Agreement, in many ways, falls outside the scope of the 1990 Dene/Métis mandate. The historic regional approach used elsewhere in the NWT appears to be used to justify certain negotiating positions in the Southeast NWT.

It was also interesting that, particularly in respect of the Akaitcho Dene and NWTMN negotiations, little mention or focus on Section 35 was raised during the engagement period. To be clear, in no way is it being suggested that Canada or the GNWT are not sensitive to Section 35 and the core role it obviously plays in settling outstanding claims. It was notable, both among Aboriginal and governmental representatives, that the focus was more on the "regional approach" and existing "mandates" with not as much focus on stepping back and looking at their respective negotiations from a broader and more Section 35-centric perspective. This approach would assist in promoting a more flexible and balanced solution for all of the parties concerned.

I was also asked if it would be better if the negotiations were reconstructed to present a more community-based approach or on the basis of larger constituencies, such as perhaps the Akaitcho Dene and the NWTMN once again joining together for common purpose. I do not consider offering advice to Aboriginal peoples on how they pursue their Section 35 rights or how they constitute themselves politically to be within the Mandate or necessarily appropriate. Governments should be focused on what "is" and not on what they would like something "to be." While it would obviously be more convenient if the Akaitcho Dene and the Métis were to negotiate together, they have chosen not to go down that road, which is their right. ***It is neither helpful nor constructive to the process of reconciliation to focus on an approach that is of little interest to the Aboriginal peoples concerned, and that does not reflect the reality and converging interests currently existing in the Southeast NWT.***

It is also noteworthy that in 1990, while the Dene/Métis Agreement was being negotiated, the Supreme Court of Canada issued its first significant decision on the meaning of Section 35 in *R. v. Sparrow*. Since then, the Supreme Court of Canada has rendered almost 60 decisions on the meaning of Section 35, including the development of, and guidance on, legal principles associated with treaty interpretation, reconciliation, and the overarching principle of the honour of the Crown.[4] The point is that much has changed since the 1990 Dene/Métis Agreement and mandates and objectives flowing from that time-period should be reconsidered in light of the rapidly changing legal and political environment.

4 For example, see *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (general overview and understanding of Section 35 and its purpose); *R. v. Badger*, [1996] 1 S.C.R. 771 (historic treaty interpretation and Section 35); *R. v. Van der Peet*, [1996] 2 S.C.R. 507 (test for establishing Aboriginal rights under Section 35); *R. v. Powley*, [2003] 2 S.C.R. 207 (establishing Métis rights under Section 35); *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R.257 (test for establishing Aboriginal title under Section 35); and importantly *Manitoba Métis Federation Inc. v. Canada (A.G.)*, 2013 SCC 14 and *Haida Nation v. B.C.*, [2004] 3 S.C.R. 511, dealing with the principle of the honour of the Crown and the Crown's duty to consult Aboriginal peoples under Section 35).

Despite the evolution of Section 35 and the overlapping interests which exist in the Southeast NWT, the GNWT's preferred governance and regulatory models, continue to be based in large measure on the regional approach used elsewhere in the NWT where there are no material and unresolved conflicting interests. Wanting to achieve regional cohesiveness and efficient and consistent land and resource management regimes are laudable public policy objectives. However, the concern is focusing on a regional approach, based in large part on past experiences in other parts of the NWT, such that it unduly restricts the ability to solve the unique issues and challenges at stake in the Southeast NWT. ***A different or flexible approach is required, with proportionately adjusted expectations.***

The current approach, based on the regional model used successfully in other parts of the NWT, is fundamentally flawed and incompatible with the conditions present in the Southeast NWT. Success is possible, but will depend on a strong multi-interest based approach and with Section 35 playing a dominant role. This approach must address the various interests at play and acknowledge, at least implicitly, the evolution of Canadian law relating to Section 35 and existing Aboriginal and treaty rights over the past almost 27 years. In no way is this Report suggesting that Canada or the GNWT has breached Section 35 in their past actions or that they have not acted honourably or in good faith. The Report addresses what needs to be the primary focus moving forward and leaving the past where it belongs.

There is a clear need to move on from what was a potential 1990s-era solution to a solution that recognizes the divergent and at times competing interests that exist in the Southeast NWT. This is not necessarily a failure of the regional approach used successfully elsewhere in the NWT, but rather an acknowledgment of the reality as it exists and that has existed for some time in the Southeast NWT.

OVERLAPPING CLAIMS

Overlapping claims are obviously a significant issue thwarting progress in the Southeast NWT. However, as previously discussed, overlapping claims by themselves are not new in Canada, are contemplated by the case law relating to Section 35, and need not be an impediment to progress. There is no question that more attention and resources should be placed on the issue of overlapping claims in the Southeast NWT. It is in the public interest for both Canada and GNWT to ensure that First Nations and Métis in the Southeast NWT have resources and mechanisms available to them to clarify and hopefully resolve their respective overlapping claims.

Additionally, it is critical that ***all*** parties subject to overlapping claims be responsible for their own actions and work towards reconciliation. For example, during the course of the engagement period a number of examples were provided where some Aboriginal groups refused to participate in discussions or consultation regarding potential claim settlement agreements in the Southeast NWT, thereby obstructing the process of reconciliation. While all Aboriginal groups have every right to refuse to participate in these processes, that refusal cannot be tantamount to vetoing an otherwise fair and reasonable process from advancing toward a final settlement.

Canada and the GNWT should pursue agreements in the Southeast NWT that fulfil the honour of the Crown and the objective of reconciliation without being unduly fettered by obstinate or reluctant participants in the related consultation processes. The Crown must not run roughshod over the interests of Aboriginal groups opposed to, or having concerns with, a particular settlement or agreement. However, in the end, the Crown is obliged to act honourably and this may mean concluding an agreement to address outstanding Section 35 claims of one group in the face of opposition from other Aboriginal peoples. Obviously, such circumstances require thoughtful, careful and balanced consideration.

It is critical, especially in areas where there are a multitude of overlapping claims, that the Crown continue on with the important business of reconciliation, always acting honourably, reasonably, and with balance and fairness. Agreement and reconciliation among Aboriginal peoples on the issue of overlapping claims should be encouraged and fostered, but not at the expense of ultimately concluding fair, reasonable and equitable agreements to achieve the objectives of Section 35. ***Reconciliation also requires Aboriginal peoples to take ownership over their relationships among one another and, to this extent, working on mutually acceptable agreements, as among Aboriginal peoples, is important.***

The practical and legal treatment required to consider and address overlapping claims is another reason why focusing on the unratified 1990 Dene/Métis Agreement and resulting regional approach is unhelpful when looking at the Southeast NWT with its numerous and overlapping claims. The regional approach is premised on the general agreement by the parties on the transfer of large swaths of land with little or no contention. Since the circumstances that presently exist in the Southeast NWT do not allow for such an approach, an approach that is sensitive to the various Aboriginal groups with interests and rights in the area is required.

The Southeast NWT requires an approach that acknowledges competing and overlapping interests among Aboriginal peoples. Consequently, agreements within the Southeast NWT will likely look different than those in other parts of the NWT, and likely include less outright land ownership and have greater emphasis and increased clarity on protecting and implementing Section 35 rights. I note in particular the GNWT's approach on

what it has called “generalized interests” and which may be particularly helpful.[5] I encourage all of the parties involved to consider the GNWT’s proposal in this respect.

It is clear that moving away from an exclusive regional approach used successfully elsewhere in the NWT means that likely, by implication, the areas of exclusive land held by any one Aboriginal group in the Southeast NWT will be proportionately smaller than in other areas of the NWT that were not subject to materially conflicting or competing claims. This is a reality that Aboriginal peoples with interests in the Southeast NWT should recognize, absent an agreement among them.

I am mindful that the Athabasca Denesuline and Ghotelnene K’odtineh Dene trans-boundary claims are moving forward. Concern regarding these agreements was expressed by a number of parties and discussed further below. Ultimately, it is essential for the Crown to act honourably with all outstanding Section 35 interests in a fair and balanced manner and in the face of competing interests.

RECOMMENDATION NO. 1

It is recommended that Canada and the GNWT work together to provide a clear and stable regime which addresses the issue of overlapping claims and fosters and encourages all affected Aboriginal peoples to work together to mutually resolve outstanding overlapping claims and grievances in the Southeast NWT. Canada and the GNWT should also be clear with all participants that, in the absence of mutually agreed upon solutions, both governments may finalize agreements despite obstruction or unreasonable actions or positions by other Aboriginal peoples with interests in the Southeast NWT.

It is further recommended that Aboriginal groups with Section 35 interests in the Southeast NWT be encouraged to develop their own mechanisms and processes to resolve overlapping claims disputes ***as among them***. Where agreeable, Canada and the GNWT should consider providing resources to support such mechanisms and processes, including processes that utilize independent facilitators or decision-makers to assist the relevant parties in resolving their disputes.

5 My understanding of this approach is that it focuses on balanced resource wealth allocation and sharing from a broader territorial/regional context and one that is not dependent on “owning” a particular parcel of land. This approach allows for a multitude of interests to benefit from economic and resource development without having to be dependent upon owning the parcel(s) of land at issue or being developed.

EXPLORATORY DISCUSSIONS AND SECTION 35 – A WAY FORWARD

It is clear that the status quo must change if Canada and the GNWT genuinely want to settle agreements with the Akaitcho Dene, the NWTMN, and others, in the foreseeable future. Given the potential and current economic development in the Southeast NWT and given the nature of the outstanding Section 35-related claims in the area, it is in the public interest to pursue stability, certainty and predictability through negotiations with Aboriginal peoples with interests in the area in a timely manner.

Canada and the GNWT should embrace more flexible but principled approaches to the issues at stake and negotiations underway in the Southeast NWT. Both governments, along with the Aboriginal peoples concerned, should be mindful of the ultimate objective of Section 35: reconciliation. "Reconciliation is more than just platitudes and recognition. Reconciliation flows from the constitutionally protected rights of Aboriginal peoples and is inextricably tied to the honour of the Crown. Reconciliation must be grounded on practical actions."[6]

The progress that has occurred to date in the Southeast NWT does not need be abandoned. Rather, the focus of Canada and the GNWT, and also to varying degrees the Aboriginal peoples involved, should be recalibrated to allow for a more flexible dialogue with Aboriginal peoples, particularly at present with the Akaitcho Dene and the NWTMN, and not be restricted by existing mandates. Such a focus will allow for a full and honest dialogue among the parties to determine whether agreements are possible in the near future.

Canada and the GNWT do not need to abandon the objectives of regional land and resource management regimes and governance in the Southeast NWT. Such models can be helpful in terms of promoting good governance and efficiency. However, these objectives must not be pursued so zealously that they ignore the fundamental purposes behind the negotiations: the reconciliation of Aboriginal claims and interests with broader societal and northern interests. Reconciliation requires a reasonable degree of flexibility by all parties.

Entering into exploratory discussions with the Akaitcho Dene and the NWTMN that are not restricted by the governments' current mandates may assist the parties in determining whether an agreement is possible in the near future. Such discussions should be without prejudice to any of the parties involved so as to promote honest and full dialogue on all issues. This will be discussed in further detail below under the discussions on the Akaitcho Dene and NWTMN respectively.

Future discussions, negotiations and any further re-examination of existing mandates in the Southeast NWT should focus on certain core principles ("Core Principles") including:

- Reconciliation with, and among, Aboriginal peoples is a fundamental objective of Section 35 and a fundamental objective of the Crown in addressing outstanding Section 35 claims and negotiations in the Southeast NWT.
- It is in the public interest that outstanding Aboriginal claims and negotiations in the Southeast NWT be addressed and settled through agreements and modern treaties, as appropriate and in a timely manner.
- All parties involved in negotiations in the Southeast NWT should be flexible and not unreasonably rigid in their positions and should recognize that any agreements ultimately negotiated must be practical, further the goal of reconciliation, respect other Section 35 interests or rights potentially affected, and be reasonably effective in light of existing governance,

6 Thomas Isaac, *Aboriginal Law*, 5th Ed., (Toronto: Thomson Reuters, 2016), 5.

regulatory and land and resource management regimes and competing societal interests.

- Unless all of the parties involved agree, the 1990 unratified Dene/Métis Agreement should ***not*** be the focal or reference point or basis for mandates and negotiations relating to the settlement of Section 35-related claims in the Southeast NWT.
- Negotiations in the Southeast NWT relating to asserted or established Section 35 rights or interests should be viewed, first and foremost, by Canada, the GNWT and the Aboriginal peoples involved through the lens of Section 35, including its objective of reconciliation and the principle of the honour of the Crown.
- Section 35-related negotiations in the Southeast NWT should be mindful of the regulatory, governance and land and resource management regimes already in place in other parts of the NWT.
- All those whose rights and interests may be affected, Aboriginal and non-Aboriginal alike, by Section 35-related negotiations and agreements in the Southeast NWT should be treated fairly, transparently and equitably, in accordance with Canadian law.
- Section 35 rights need not be exclusive and can co-exist with other Section 35 rights and non-Section 35 interests, subject to applicable Canadian law. To this end, overlapping Aboriginal interests and rights in the Southeast NWT need to be considered and respected by ***all*** participants in the negotiation process, including Canada, the GNWT and applicable Aboriginal peoples.
- All parties should be encouraged in their respective negotiations to allow for exploratory discussions, on a without prejudice basis, that are not restricted by their respective existing mandates, with the objective of having timely, honest, good faith and productive dialogue to achieve agreement(s).

These Core Principles should be considered by Canada, the GNWT and, to the extent applicable, the Aboriginal peoples involved in negotiations in the Southeast NWT in order to move forward on the path to reconciliation.

RECOMMENDATION NO. 2

It is recommended that Canada and the GNWT and, to the extent applicable, the Aboriginal peoples involved, adopt and be guided by the Core Principles, as defined, in their future discussions and negotiations in the Southeast NWT, and in particular, with respect to the Akaitcho Dene and NWTMN negotiations.

AKAITCHO DENE

I met with the Akaitcho Dene in September 2016 and sat as an observer at the main table discussions with Canada, GNWT and the Akaitcho Dene. I also had a number of extensive discussions with the Akaitcho Dene's Chief Negotiator and with their legal counsel. I note the Akaitcho Dene's specific reference to what they refer to as the Treaty of 1900 (others refer to it as an adhesion to Treaty 8) (the "Treaty"), its importance to them as Aboriginal peoples and the role the Treaty needs to play in any final settlement.

The concerns I heard from the Akaitcho Dene focused primarily on the respective mandates of Canada and the GNWT and the preoccupation of both governments with adhering to the general structure of the 1990 Dene/Métis Agreement and resulting regional approach. The mandates and visions of both public governments were described as being "restrictive," "inadequate" and "not responsive" to their goals. The Akaitcho Dene also expressed frustration that, in their view, they had not yet received a full and material response from either Canada or the GNWT, regarding their proposed Draft Akaitcho Agreement (dated March 2010). The Akaitcho Dene expressed that Canada and particularly the GNWT, want the Akaitcho Dene to be "like everyone else" in the Mackenzie Valley regarding land, resource management and governance matters. The Akaitcho Dene were clear that they do not wish to be restricted by the 1990 Dene/Métis Agreement model and resulting regional approach.

Canada and the GNWT will likely need to revisit their respective mandates applicable to the Akaitcho Dene negotiations and expressly, move on from positioning that has the 1990 Dene/Métis Agreement as a basis. Canada's mandate for the Akaitcho Dene negotiations dates back to 2001. Canada, the GNWT and the Akaitcho Dene should be focused on reaching a reasonable and honourable settlement in a timely manner and resulting in a cohesive land, resources and governance regime compatible with the rest of the NWT.

To achieve this, and as previously discussed more generally above, Canada and the GNWT should engage in exploratory discussions on a without prejudice basis with the Akaitcho Dene, subject to agreement with the Akaitcho Dene. Such exploratory discussions should not be fettered by existing mandates and should be focused on attempting to find potential common ground for a settlement.

The Akaitcho Dene expressed concerns regarding the level of funding they are able to access and that Canada will not discuss certain matters associated with lands and resources because of the Akaitcho Dene's litigation relating to the NWTMN AIP. If the Akaitcho Dene negotiations are to make progress, then additional funding should be allocated to the main table negotiations and any potential exploratory discussions to ensure all parties have the appropriate resources for success.

On the issue of the litigation, it is important for litigants to be able to protect their litigation privilege and strategy by not engaging in negotiations or discussions that could be used against them or otherwise prejudice their respective interests or legal positions. If the Akaitcho Dene negotiations and/or exploratory discussions are to proceed towards a resolution, all issues of relevance must be able to be discussed among the parties without fear of such discussions being used against the other party(ies) in litigation. Canada, the GNWT and the Akaitcho Dene should explore options to set aside their differences regarding the effects of litigation on their negotiations, including abeyance agreements if appropriate. Without prejudice exploratory discussions may be a helpful mechanism in this respect. If a solution to how to discuss matters of importance presently being litigated cannot

be found, it is difficult to see how an agreement can be reached, given the limits on the scope of the negotiations.

As with the NWTMN, the Akaitcho Dene expressed a strong desire for resources for each of them to focus on an enumeration exercise and what was referred to as an "outreach exercise" to inform and engage people in the Southeast NWT about what claims' settlements would mean to them. Such an exercise could potentially foster better relations between the Akaitcho Dene and the NWTMN. I encourage Canada and the GNWT to give serious consideration to such an exercise which, if properly planned and implemented, can only assist in achieving reconciliation and good governance in the Southeast NWT.

The Akaitcho Dene also made submissions regarding the need for more flexible governance models, including the unique circumstances of Lutsel K'e Dene First Nation (almost exclusively Dene population). At the main table discussion I observed, the GNWT representative acknowledged that Lutsel K'e Dene First Nation is unique and that a more flexible approach to governance is possible.

There is a perception that the Akaitcho Dene main table is stagnant and that the practice of deferring more challenging issues to later discussions has made it difficult to observe or measure progress.

The Settlement Proposal dated July 18, 2016 tabled by the Akaitcho Dene to Canada and the GNWT could be a useful starting point for meaningful discussions towards concluding an agreement-in-principle.

Given that the NWTMN negotiations have reached the agreement-in-principle stage and are now focused on reaching a final agreement, and given the state of the overlapping claims (particularly between the Akaitcho Dene and the NWTMN), it is in the best interests of all affected parties, ***including the NWTMN***, that progress be made at the Akaitcho Dene main table. Canada and the GNWT should do everything reasonably possible, in agreement with the Akaitcho Dene, to refocus energies on these negotiations and hopefully reach an agreement-in-principle in a timely manner. As one of the Akaitcho Dene representatives stated to me: "We want to be able to thrive in our homeland. We don't want handouts." The respective Aboriginal groups should remain focused on ***their*** issues and allow the enumeration and respective ratification processes to sort out who will be bound by any agreements ultimately concluded.

Based on my discussions with the Akaitcho Dene, Canada and the GNWT, success is possible with the Akaitcho Dene negotiations under the right conditions. Given the submissions I received and the observations I have made, the parties should, in short order, attempt to establish a workplan that would see movement toward an agreement-in-principle within 18-24 months. Such a workplan should have clear timeframes and address the substantive and material issues facing the parties including land, governance, resource management and enumeration and related outreach program.

Also, exploratory discussions, on a without prejudice basis, should be adopted by the parties to cut through some of the blockages that have developed at the negotiation table, with express focus on the difficult issues that have been put aside at the main table negotiations. Representatives for Canada and the GNWT should be empowered to have frank, unfettered dialogue on matters with a view to trying to develop workable and mutually agreeable solutions for consideration by their respective principals.

The Akaitcho Dene main table negotiations could also benefit from the use of an independent facilitator to ensure that all three parties meet the timeframes and commitments set out in the mutually accepted workplan

and to assist the parties in clearly communicating with each other.

Any third-party facilitator should be independent, report to all three parties, and have ***direct access to the principals*** for all three parties to ensure timely communication and direction.

The role of an independent third-party facilitator would not be as a negotiator but to facilitate clear and open dialogue among the parties in a without prejudice environment. The objective would be to hold all parties accountable. The third-party facilitator would be appointed on agreement of all three parties, funded by Canada and the GNWT, and operate under a terms of reference agreeable to all three parties consistent with the workplan. Finally, it is critical that all three parties be ***equal*** participants in developing and agreeing to the workplan. Without mutual buy-in to the approach by all three parties, the chances for success in a timely manner are minimal.

The development of a mutually agreed upon workplan and the establishment of exploratory discussions on a without prejudice basis should not be fettered by existing mandates, and along with the earlier recommendations relating to the Core Principles (Recommendation No. 2) and overlapping claims (Recommendation No. 1), should be undertaken ***concurrently*** so as not to cause further delay to what has been a long and frustrating process for all parties involved. The parties will also need to consider how to address the outstanding litigation and whether an abeyance agreement is appropriate.

If the parties cannot reach an agreement on a mutually acceptable workplan that has the potential to result in a meaningful agreement-in-principle, then the parties should discuss the extent to which further negotiations, at least in the short term, are helpful or productive and a good use of public monies.

RECOMMENDATION NO. 3

It is recommended that Canada, the GNWT and the Akaitcho Dene engage in exploratory discussions on a without prejudice basis and develop a workplan that would see meaningful movement toward an agreement-in-principle within 18-24 months, with such workplan setting out clear timeframes, schedules, deliverables, the provision of appropriate resources to the Akaitcho Dene and addressing the ***substantive*** issues facing the parties, including land, governance, resource management and enumeration.

It is recommended that an independent facilitator, reporting to all three parties, be appointed to assist the parties in meeting their commitments and to facilitate timely communication among them, with such facilitator having direct access to the principals of each of the parties.

It is recommended that the development of a mutually agreed upon workplan among Canada, the GNWT and the Akaitcho Dene be prepared concurrently with Recommendations Nos. 1 and 2, so as not to cause further delay, and that the parties consider an abeyance agreement addressing the outstanding litigation.

It is recommended that if the parties cannot reach an agreement on a mutually acceptable workplan that has the potential to result in a meaningful agreement-in-principle, then the parties should discuss the extent to which further negotiations in the short term are helpful or productive to achieving reconciliation with the Akaitcho Dene.

NORTHWEST TERRITORY MÉTIS NATION

I met with the NWTMN, their legal counsel and their advisors a number of times, and attended a main table negotiation session among NWTMN, Canada and GNWT in Vancouver, B.C. in October 2016. Additionally, in November 2016, I met with the Hay River Métis Government Council, the Fort Resolution Métis Council, and the Fort Smith Métis Council in each of their respective communities. I also had discussions with the NWTMN's legal counsel. ***It was clear that, for a final agreement to be achieved, the NWTMN must resolve the material concerns raised about their internal governance structure, a matter that the Fort Smith Métis Council brought up at every meeting I attended.***

With the Akaitcho Dene opting to pursue treaty land entitlement discussions in 1994, and such treaty land entitlement options under Canada's Specific Claim Policy being only available to First Nations who had signed a treaty, the Métis of Southeast NWT who had previously been included as part of the unratified Dene/ Métis Agreement were excluded from the treaty land entitlement negotiations. To remedy this exclusion, Canada and the GNWT decided to negotiate separately with the Métis starting in 1996.

After 20 years of negotiating, Canada, the GNWT and the NWTMN signed an agreement-in-principle on July 31, 2015. Notwithstanding the number of years it took to negotiate the NWTMN AIP and the litigation underway challenging its validity, it is a significant achievement for all parties and provides the basis for Canada and the GNWT to reach a final agreement with the NWTMN.

There was broad concern expressed among Aboriginal groups that the NWTMN was negotiating an agreement with Canada and the GNWT and in relation to the existence and substance of the NWTMN AIP. Any agreement with any Aboriginal peoples in an area with overlapping interests and claims can be seen as a threat to existing or asserted rights and interests of other Aboriginal peoples. The NWTMN AIP is no exception: a myriad of concerns were expressed regarding the basis for negotiating with the NWTMN, overlapping areas of interest, and general concerns that the NWTMN AIP, if finalized, could adversely and materially affect the rights of other Aboriginal peoples.

Fundamentally, the Métis have a right to be able to reach an agreement with Canada and the GNWT. Such an agreement, properly and fairly constructed, lies at the heart of Section 35's ultimate purpose: reconciliation.

I respectfully submit that other Aboriginal peoples having an interest in Southeast NWT should remain focused on ***their*** respective rights and interests and allow the NWTMN to reach an understanding with Canada and the GNWT that does not, at its core, adversely affect the rights of others. Ultimately, a solution to potential conflicting rights will depend on the precise language and undertakings that are set out in any final agreement among Canada, the GNWT and the NWTMN. This is also something that the NWTMN will need to keep in mind as they formulate positions on a potential final agreement. Please see Recommendation No. 5 dealing with the NWTMN AIP.

The NWTMN expressed concerns that the discussions in recent years were under-funded, that there is a need for an extensive enumeration exercise to determine who would be eligible to be a beneficiary of any final agreement involving NWTMN, and that there is a need for the NWTMN to focus on some of their own internal governance issues, including developing a draft constitution for ultimate inclusion or adhesion to a final agreement.

Enumeration and related outreach-type work is in the public interest in the Southeast NWT so as to ascertain

the extent of potential membership not only for the NWTMN, but also for the Akaitcho Dene under any final agreements with them.

Based on my discussions with the various parties involved, there seems to be considerable frustration regarding the pace and progress of the negotiations with the NWTMN. It is critical that all three parties be ***equal*** participants in developing and agreeing to the workplan. Without mutual buy-in to the approach by all three parties, the chances for success in a timely manner are minimal.

Subject to a mutually agreeable workplan, Canada and the GNWT should support the NWTMN in sorting out their governance issues as soon as reasonably possible, given that it is likely an essential element to any final agreement being reached. While Canada and the GNWT can offer support, ***it is ultimately the responsibility of the NWTMN and its members to sort out their internal governance issues***. It is difficult to see how the negotiations can move forward in a productive way with this issue remaining unresolved and continuing to cast a cloud over the present negotiations environment. The work needed for the NWTMN to sort out their internal governance issues should be a priority for all of the parties involved.

The NWTMN also indicated that their ability to access funding for the purposes of the negotiations has been cut-back. To the extent that negotiations are accelerated, so too should funding be allocated to support the reasonable engagement of the NWTMN and its advisors in the negotiation process.

I heard concerns regarding the size of the NWTMN negotiations' team. At the main table meeting I attended, there were community representatives along with the primary negotiation team for the NWTMN, with approximately 15 individuals on average attending most negotiation sessions for the NWTMN. In order for negotiations to be as efficient as possible I would recommend that the NWTMN reconsider both the size and structure of its negotiation team so as to be conducive to achieving a final agreement in an efficient and affordable manner.

I also heard concerns regarding the timeliness of Canada and the GNWT's ability to respond to matters raised at the negotiation table and in respect of consultation relating to the NWTMN AIP. Governments need to consult on all matters that may adversely affect the Aboriginal rights or interests of Aboriginal peoples. First, while it may be frustrating for Aboriginal peoples to have consultation conducted with other Aboriginal peoples, it is a necessary part of the honour of the Crown and the process for achieving fair agreements. Second, although consultation is necessary, the case law is clear that consultation, at the end of the day, cannot prevent governments from making decisions, after due and fair consideration of the issues at hand. Consultation, after being honourably, fairly and appropriately conducted, should not be used as an excuse by governments to avoid making a decision as to whether to proceed on any particular action or agreement.

Assuming Canada and the GNWT want to reach a final agreement with the NWTMN in a timely manner, the existing negotiation process needs to be reinvigorated with all three parties at the table being able ***to hold each other accountable*** for ensuring deliverables are met on time and that discussions progress in a reasonable and efficient manner.

Canada and GNWT should ensure that their respective negotiation teams, support mechanisms and mandates are all conducive to ensuring timely and efficient feedback on issues raised at the negotiation table. Failure by any one party to react or respond within a reasonable period of time should not prevent the parties from moving

forward with discussions. Timely government engagement and feedback at the negotiation table is ***essential*** to efficient and productive negotiations and ***is in the best interests of all the parties.***

I also received extensive submissions from the NWTMN on how they have and continue to exercise traditional harvesting rights north of Great Slave Lake, but outside of the area currently being negotiated which is based on the unratified 1990 Dene/Métis Agreement. When the issue of the Métis hunting north of Great Slave Lake was raised with other Aboriginal peoples with whom I met, I did not receive any material contradiction to what the Métis asserted: that they have hunted, and continue to hunt, north of Great Slave Lake, outside of the current area being negotiated based on the 1990 Dene/Métis Agreement, and that this hunting is based on the NWTMN's assertion that they possess Section 35 rights to do so, similar to the position advanced by North Slave Métis Alliance. Additionally, it is significant to note that the GNWT currently consults with the NWTMN and the North Slave Métis Alliance regarding certain harvesting matters north of Great Slave Lake.

Notwithstanding the Métis assertions of Section 35-related harvesting activities north of Great Slave Lake, and notwithstanding that the GNWT presently consults with Métis regarding harvesting matters north of Great Slave Lake, both Canada and the GNWT refuse to negotiate harvesting rights for the NWTMN north of Great Slave Lake.

No persuasive submissions were made that harvesting rights for the NWTMN north of Great Slave Lake should not be on the table for discussion as part of the final agreement negotiations. The NWTMN were clear that they did not believe that an agreement with Canada and the GNWT was possible without their harvesting rights north of Great Slave Lake being addressed in a final agreement.

Canada and the GNWT should be open to discussing the NWTMN's harvesting interests north of Great Slave Lake and give serious consideration to addressing such interests in any final agreement.

Like the Akaitcho Dene negotiations, the NWTMN/Canada/GNWT negotiations may also benefit from exploratory discussions on a without prejudice basis. Such discussions would assist the parties to have unfettered and honest dialogue on matters with a view to trying to develop workable and mutually agreeable solutions for consideration by their respective principals.

The parties should also consider whether a third-party facilitator would be helpful during discussions dealing with particularly sensitive or contentious issues. Any third-party facilitator should be independent, report to all three parties, and have ***direct access to the principals*** for all three parties to ensure timely communication and direction. The role of a third-party facilitator would not be to act as a negotiator but to facilitate clear and open dialogue among the parties in a without prejudice environment. The objective would be to hold all parties accountable for their respective commitments and obligations. The third-party facilitator would be appointed on agreement of all three parties, funded by Canada and the GNWT, and operate under a terms of reference agreeable to all three parties consistent with the workplan

RECOMMENDATION NO. 4

It is recommended that Canada, the GNWT and the NWTMN engage in exploratory discussions on a without prejudice basis and develop a workplan that would see meaningful movement toward a final agreement within 18-24 months, with such workplan setting out clear timeframes, schedules, deliverables, the provision of appropriate resources to the NWTMN and addressing the ***substantive*** issues facing the parties, including land, governance, resource management and enumeration.

It is recommended that an independent facilitator, reporting to all three parties, be considered by the parties, particularly with respect to more contentious or sensitive issues, to assist them in meeting their commitments and to facilitate timely communication among them, with such facilitator having direct access to the principals of each of the parties.

It is recommended that the development of a mutually agreed upon workplan among Canada, the GNWT and the NWTMN be prepared concurrently with the activities recommended in Recommendations Nos. 1 and 2, so as not to cause further delay.

It is recommended that if the parties cannot reach an agreement on a mutually acceptable workplan that has the potential to result in a meaningful final agreement, then the parties should discuss the extent to which further negotiations in the short term are helpful or productive to achieving a final agreement.

It is recommended that Canada and the GNWT should be open to discussing in good faith the NWTMN's harvesting interests north of Great Slave Lake as part of their negotiations with the NWTMN and give serious consideration to addressing such interests in any final agreement.

NORTH SLAVE MÉTIS ALLIANCE

I met with the North Slave Métis Alliance ("NSMA") in September and November 2016. The NSMA articulated a Section 35 rights approach that is aligned with the views set out earlier in this Report relating to a Section 35-centric approach more generally for the Southeast NWT. The NSMA also stated clearly that while they respect the Dene aspects of their heritage – they are Métis and want to be treated not as an adjunct to Dene but rather as a distinct Section 35 rights-bearing Métis peoples – Métis *qua* Métis. I also note that the North Slave Métis Alliance stated that they exercise harvesting activities, and are consulted on harvesting matters, north of Great Slave Lake by the GNWT.

It is important that in any settlement being contemplated in Southeast NWT that the interests of the NSMA's Métis members be considered and respected. In particular, note Recommendation No. 5 dealing with the NWTMN AIP. As it would be productive and helpful for the NSMA and the NWTMN to work more closely together given the common element of their respective mandates, I encourage Canada and the GNWT to support and facilitate such cooperation, as appropriate.

Finally, I note that the NWTMN AIP contemplates that the provisions of the final agreement are intended to affect any Aboriginal or treaty rights of those "eligible to be enrolled" under it.[7] The eligibility is based on a broad definition of a potential beneficiary thereunder, and on its face could include members of the North Slave Métis Alliance, thereby affecting any of their Aboriginal or treaty rights even though they are not represented by the NWTMN. This approach seems predicated on the approach that the NWTMN AIP is intended to deal with Métis rights on an exclusive basis within the Southeast NWT and could potentially include those who are not Métis and not on an Akaitcho Dene band list. While this approach works in an area where there is little doubt or disagreement about who holds what rights and where, this approach is neither helpful nor conducive to speedy resolution in an area with many converging interests, such as the Southeast NWT.

Canada and the GNWT, along with the NWTMN, should reconsider their positions on Section 2.5.1(b) of the NWTMN AIP, and in particular the use the words "eligible to be" set out in the last clause therein and contemplate amending such language to ensure that the NSMA's interests are not expressly included. This underscores the importance of undertaking a thorough and thoughtful enumeration program for the NWTMN and the Akaitcho Dene based on objective criteria and in a timely manner. Additionally, Canada and the GNWT should consider additional language for the NWTMN final agreement to contemplate a potential future opt-in by the North Slave Métis Alliance and its membership.

It is unfortunate that the NWTMN and the North Slave Métis Alliance are not presently working together regarding the NWTMN/Canada/GNWT negotiations. Given Recommendation No. 4 relating to harvesting rights north of Great Slave Lake, and assuming that Canada and the GNWT are favourable to Recommendation No. 4 in this respect, it is my hope that the NWTMN and the North Slave Métis Alliance find enough common ground to work together toward a final agreement. This would be in the best interests of all parties. I encourage Canada and the GNWT to foster better relations between the NWTMN and the North Slave Métis Alliance, including by making resources and/or processes available to each of them to engage in mutual dialogue with clear objectives, as may be appropriate.

7 See Section 2.5.1(b), NWTMN AIP.

RECOMMENDATION NO. 5

It is recommended that Canada and the GNWT: (a) reconsider their positions on Section 2.5.1(b) of the NWTMN AIP, and in particular the use the words “eligible to be” set out in the last clause therein, so as not to have any final agreement with the NWTMN automatically affect any Aboriginal and treaty rights of the North Slave Métis Alliance and its members; (b) examine language for any final agreement with the NWTMN that would permit the North Slave Métis Alliance and its members to opt-in to any NWTMN final agreement, if appropriate, and (c) attempt to foster better relations between the NWTMN and the North Slave Métis Alliance by means of promoting constructive dialogue between the two groups, including making resources and/or processes available to each of them to engage in mutual dialogue with clear objectives, as may be appropriate.

FORT RESOLUTION

Fort Resolution requires special mention given that I heard from a number of public government representatives concerned that the independent negotiations of the Akaitcho Dene and the NWTMN could potentially tear the community of Fort Resolution into two solitudes that do not reflect the reality of the community. Based on my discussions with GNWT, Canada, Akaitcho Dene and NWTMN representatives, I make the following observations.

Both the Akaitcho Dene and the NWTMN representatives with whom I met displayed sensitivity to the other in terms of what their negotiations and potential final agreements would mean for the community of Fort Resolution. I heard clearly that flexibility should be provided to the community itself that will allow it, over time, to determine its ultimate governance status and regime.

I heard concerns, particularly from the GNWT, that certainty should be achieved regarding the governance regime for Fort Resolution. Certainty is a moving target in many respects. There is no reason on its face why agreements with the Akaitcho Dene and the NWTMN need to consider and address Fort Resolution's ultimate governance regime as a community, unless there is a mutual agreement and understanding of what that ultimate governance regime will be. It is not difficult to imagine agreements with both the Akaitcho Dene and the NWTMN that deal with governance to the extent reasonably possible and, in the case of Fort Resolution, ensure that flexibility and the desires of the community itself are contemplated. One risk is that Fort Resolution, with a population of approximately 650 individuals, would be split if one or both public governments insist on firm positions being taken by either or both of the Akaitcho Dene and the NWTMN in order to finalize an agreement, prior to the community being ready.

Agreements with Aboriginal peoples should further reconciliation at all levels and not cause further division.

RECOMMENDATION NO. 6

Canada and the GNWT should take a flexible and practical approach when dealing with the issue of governance and Fort Resolution in their respective negotiations with the Akaitcho Dene and the NWTMN. They should allow Fort Resolution, in due time and not before the community is ready and consistent with any applicable claims' agreements, to determine the appropriate governance regime for the community and prevent the negotiation of internal governance regimes for the Akaitcho Dene and the NWTMN in their respective agreements.

K’ATL’ODEECHE FIRST NATION

I met with the K’atl’odeeche First Nation in September 2016 and had other discussions with K’atl’odeeche First Nation representatives in the Fall 2016. The K’atl’odeeche First Nation expressed concerns about the boundaries of the NWTMN claim area (particularly to the extent that the NWTMN claim area extends west of the Buffalo River) and the pre-eminence of K’atl’odeeche rights in the area. I was able to review some of the extensive traditional knowledge and traditional land used information that the K’atl’odeeche First Nation has compiled.

Any final settlement of claims in the Southeast NWT needs to respect the asserted rights and interests of the K’atl’odeeche First Nation. Likewise, K’atl’odeeche First Nation should respect the process of reconciliation engaged in by Canada and the GNWT with regard to other Aboriginal peoples that may involve lands over which the K’atl’odeeche and others jointly assert Aboriginal claims.

ATHABASCA DENESULINE AND GHOTELNENE K'ODTINEH DENE

Canada and the Athabasca Denesuline are negotiating an out of court settlement agreement that will address Athabasca Denesuline's rights in Southeast NWT. It is intended that once completed, the agreement with the Athabasca Denesuline will be a treaty. Presently, as a result of a dispute over land quantum, the GNWT is not a party to the negotiations. I had a discussion with Athabasca Denesuline representatives in November 2016. I appreciated the Athabasca Denesuline sharing their comprehensive traditional land use maps and information relating to the Southeast NWT with me.

Canada and the Ghotelnene K'odtineh Dene are negotiating an out of court settlement agreement that will address the Ghotelnene K'odtineh Dene's rights in Southeast NWT. It is intended that once completed, the agreement with the Ghotelnene K'odtineh Dene will be a treaty. Although the draft agreement is substantially complete, I understand that there are some outstanding issues that remain to be resolved between the GNWT and Canada. I had a discussion with Ghotelnene K'odtineh Dene representatives in November 2016 to better understand their interests and objectives in the area.

Canada has initiated consultation on both agreements (Athabasca Denesuline and Ghotelnene K'odtineh Dene).

The GNWT and a number of the Aboriginal groups situated in the NWT expressed concerns regarding the settlement of both trans-boundary claims using Southeast NWT lands. In the case of the Athabasca Denesuline, there was a sense expressed that the NWT was being used as land bank to deal with overlapping claims' issues resulting from the establishment of Nunavut in 1999. Canada, the Athabasca Denesuline and the Ghotelnene K'odtineh Dene expressed the view that offers have been made and accepted, and that the honour of the Crown requires Canada to fulfil the promises made.

I note in particular that the NWTMN was concerned about a few of the land selections made by the Athabasca Denesuline. This should be considered in due course.

It is clear that Section 35 is not restricted by provincial or territorial borders and, depending on the facts, such rights can traverse such provincial or territorial boundaries. Likewise, the honour of the Crown requires Canada and the GNWT to always act honourably when dealing with Section 35 interests and rights. At the same time, there are other Section 35 interests active in the Southeast NWT, as discussed above, and any settlements in the Southeast NWT must be aware of, and sensitive to, this legal and political reality. To this end, and in keeping the objective of reconciliation, it is in the best interests of Canada, the GNWT and Aboriginal and non-Aboriginal peoples of the North that all of the applicable governments and all those with Section 35 rights co-operate, to the extent reasonably possible, regarding the settlement of claims, including those claims of a trans-boundary nature.

Section 35 rights and interests demand a high-level of engagement and the honour of the Crown when Canada and the GNWT deal with Aboriginal groups. However, there is also the relationship ***between*** the two public governments in relation to the implementation of commitments made by the Crown to fulfil the objectives of Section 35 and the honour of the Crown. Canada and the GNWT should seek to work cooperatively and transparently with each other and in a way that does not obstruct the implementation of the honour of the Crown. Unilateral actions, while sometimes necessary, should be avoided whenever reasonably possible, given the distinct roles each public government has in terms of implementing settlement agreements in the NWT and to further the development of responsible government in the North.

I am aware that the Athabasca Denesuline and the Ghotelnene K'odtineh Dene suggested a mediated process to resolve the outstanding issues among the parties at their respective tables and that all parties have agreed to mediation.

WOOD BUFFALO NATIONAL PARK

A consistent theme I heard throughout the engagement period was a desire by Aboriginal peoples to have a better relationship with Parks Canada regarding the Wood Buffalo National Park (the "Park"). While not a focal point for any one Aboriginal group, it was clear that there is a need for a better working relationship between Parks Canada and the Aboriginal groups with whom I met. The issue of the allocation of lands within the Park arose in a number of discussions with the Métis, but the broader theme heard consistently was a desire for an overall better working relationship with Parks Canada regarding the management of the Park.

In 2006, Parks Canada invited 11 Aboriginal groups who have members that regularly harvest in the Park to jointly develop new traditional harvesting regulations that respected Aboriginal rights and traditional use. Until 2011, the group of 11 Aboriginal groups worked with Parks Canada to revise and update game regulations in a manner respectful of Aboriginal and treaty rights. In 2011, the process stalled after the seven Treaty 8 groups took a position that excluded the four Métis groups. Presently, the Aboriginal Committee for the Cooperative Management of Wood Buffalo National Park has met approximately three to four times per year and has developed a terms of reference. The majority of the Aboriginal groups have been participating on a regular basis. Three of the 11 groups have chosen to not participate on a regular basis.

I would encourage the relevant Aboriginal groups and Parks Canada to continue to attempt to work together and strive for a Park management regime that respects and accommodates ***all*** Aboriginal users.

RECOMMENDATION NO. 7

Canada, through Parks Canada, should continue its engagement exercise with those Aboriginal peoples having Section 35 interests in Wood Buffalo National Park with the objective of developing a more effective working relationships and furthering reconciliation with such Aboriginal peoples.

RESOURCE MANAGEMENT BOARDS

I heard a great deal of discussion about resource management boards. Specifically, I heard from GNWT representatives who stated how critical it was that the regulatory regime throughout the NWT should be consistent. I agree.

I also heard from Aboriginal peoples who were disgruntled that they may not have their own board or that they would need to share a resource management board with others, including non-resident Aboriginal peoples with Section 35 claims in the Southeast NWT.

It is clear that in order for progress to be made at the Akaitcho Dene and the NWTMN negotiation tables there needs to be an agreement on the appropriate wildlife and land and water board regime to be applicable in the Southeast NWT. All Aboriginal peoples involved should be respectful of their neighbours (Aboriginal and non-Aboriginal) and sensitive to the Section 35 rights of other Aboriginal peoples.

I found the discussions I had on the issue of boards in the NWT disconcerting. There was a disproportionate focus on the boards as creatures of governance rather than on the core issue at stake when any board considers a decision that could affect a constitutionally protected Section 35 right. In the end, the boards contemplated in the Southeast NWT, as I understand it, will advise the applicable minister, but both the boards and the relevant minister will be subject to the obligations and restrictions imposed by Section 35 and by what is ultimately set out in negotiated agreements.

All Section 35 rights holders have a right to be consulted regarding their rights and, to the extent that such boards are established to deal with such matters, all Section 35 rights holders must have a place in such structures, regardless of where they live. I would encourage all parties to look at the issue of boards as being convenient and efficient means of governance as opposed to a right in and of themselves.

CONCLUDING COMMENTS

Aboriginal groups with interests in the Southeast NWT have watched for a quarter of a century as their neighbours in the Mackenzie Valley have settled claims, developed institutions, and benefited economically and otherwise from certainty and stability. Meanwhile, the delay, caused in part by a plethora of different and sometimes competing claims, has fostered further fragmentation and complexity.

The regional approach, flowing from the failure of the unratified 1990 Dene/Métis Agreement, although successfully applied elsewhere, has not and will likely not succeed in the Southeast NWT. The legacy of this approach has been frustration, competition and conflict.

While it may be that shutting tables down and giving the various parties a break from what have been very intensive processes is always an option, it should be a last resort to trying to find common resolve to reach fair and mutually beneficial agreements. For the people of the Southeast NWT, this is their home and they are not leaving – finding agreements that work can only be the ultimate option.

There is hope for resolution if all parties can come to the table with a fresh perspective and in good faith attempt to resolve what has been, in some instances, long-standing disputes that need to be settled. Flexibility and reasonableness are necessary in all of the discussions affecting the Southeast NWT. Strong leadership by both government and Aboriginal representatives equally is needed if progress is to be made.

The path to reconciliation requires ***all*** parties to alter their approach to the negotiations if success is to be achieved. Reconciliation necessitates the careful balance and mutual appreciation of competing Section 35 claims and rights. At the end of the day, all of the Aboriginal peoples of the Southeast NWT are connected by familial, community and other connections to the land and should be able to live together and exercise their rights harmoniously. While there are many challenges, there are also opportunities for progress.

While the recommendations within this Report cannot guarantee success, the Report has attempted to set out the core issues observed that are preventing progress and has suggested means to promote success. I hope that the Report is useful to Canada, the GNWT and all of the relevant Aboriginal peoples in establishing the next steps for settling Aboriginal claims in the Northwest Territories.

SCHEDULE A

CONSOLIDATED LIST OF RECOMMENDATIONS

RECOMMENDATION NO. 1

It is recommended that Canada and the GNWT work together to provide a clear and stable regime which addresses the issue of overlapping claims and fosters and encourages all affected Aboriginal peoples to work together to mutually resolve outstanding overlapping claims and grievances in the Southeast NWT. Canada and the GNWT should also be clear with all participants that, in the absence of mutually agreed upon solutions, both governments may finalize agreements despite obstruction or unreasonable actions or positions by other Aboriginal peoples with interests in the Southeast NWT.

It is further recommended that Aboriginal groups with Section 35 interests in the Southeast NWT be encouraged to develop their own mechanisms and processes to resolve overlapping claims disputes ***as among them***. Where agreeable, Canada and the GNWT should consider providing resources to support such mechanisms and processes, including processes that utilize independent facilitators or decision-makers to assist the relevant parties in resolving their disputes.

RECOMMENDATION NO. 2

It is recommended that Canada and the GNWT and, to the extent applicable, the Aboriginal peoples involved, adopt and be guided by the Core Principles, as defined, in their future discussions and negotiations in the Southeast NWT, and in particular, with respect to the Akaitcho Dene and NWTMN negotiations.

RECOMMENDATION NO. 3

It is recommended that Canada, the GNWT and the Akaitcho Dene engage in exploratory discussions on a without prejudice basis and develop a workplan that would see meaningful movement toward an agreement-in-principle within 18-24 months, with such workplan setting out clear timeframes, schedules, deliverables, the provision of appropriate resources to the Akaitcho Dene and addressing the ***substantive*** issues facing the parties, including land, governance, resource management and enumeration.

It is recommended that an independent facilitator, reporting to all three parties, be appointed to assist the parties in meeting their commitments and to facilitate timely communication among them, with such facilitator having direct access to the principals of each of the parties.

It is recommended that the development of a mutually agreed upon workplan among Canada, the GNWT and the Akaitcho Dene be prepared concurrently with Recommendations Nos. 1 and 2, so as not to cause further delay, and that the parties consider an abeyance agreement addressing the outstanding litigation.

It is recommended that if the parties cannot reach an agreement on a mutually acceptable workplan that has the potential to result in a meaningful agreement-in-principle, then the parties should discuss the extent to which further negotiations in the short term are helpful or productive to achieving reconciliation with the Akaitcho Dene.

RECOMMENDATION NO. 4

It is recommended that Canada, the GNWT and the NWTMN engage in exploratory discussions on a without prejudice basis and develop a workplan that would see meaningful movement toward a final agreement within 18-24 months, with such workplan setting out clear timeframes, schedules, deliverables, the provision of appropriate resources to the NWTMN and addressing the ***substantive*** issues facing the parties, including land, governance, resource management and enumeration.

It is recommended that an independent facilitator, reporting to all three parties, be considered by the parties, particularly with respect to more contentious or sensitive issues, to assist them in meeting their commitments and to facilitate timely communication among them, with such facilitator having direct access to the principals of each of the parties.

It is recommended that the development of a mutually agreed upon workplan among Canada, the GNWT and the NWTMN be prepared concurrently with the activities recommended in Recommendations Nos. 1 and 2, so as not to cause further delay.

It is recommended that if the parties cannot reach an agreement on a mutually acceptable workplan that has the potential to result in a meaningful final agreement, then the parties should discuss the extent to which further negotiations in the short term are helpful or productive to achieving a final agreement.

It is recommended that Canada and the GNWT should be open to discussing in good faith the NWTMN's harvesting interests north of Great Slave Lake as part of their negotiations with the NWTMN and give serious consideration to addressing such interests in any final agreement.

RECOMMENDATION NO. 5

It is recommended that Canada and the GNWT: (a) reconsider their positions on Section 2.5.1(b) of the NWTMN AIP, and in particular the use the words "eligible to be" set out in the last clause therein, so as not to have any final agreement with the NWTMN automatically affect any Aboriginal and treaty rights of the North Slave Métis Alliance and its members; (b) examine language for any final agreement with the NWTMN that would permit the North Slave Métis Alliance and its members to opt-in to any NWTMN final agreement, if appropriate, and (c) attempt to foster better relations between the NWTMN and the North Slave Métis Alliance by means of promoting constructive dialogue between the two groups, including making resources and/or processes available to each of them to engage in mutual dialogue with clear objectives, as may be appropriate.

RECOMMENDATION NO. 6

Canada and the GNWT should take a flexible and practical approach when dealing with the issue of governance and Fort Resolution in their respective negotiations with the Akaitcho Dene and the NWTMN. They should allow Fort Resolution, in due time and not before the community is ready and consistent with any applicable claims' agreements, to determine the appropriate governance regime for the community and prevent the negotiation of internal governance regimes for the Akaitcho Dene and the NWTMN in their respective agreements.

RECOMMENDATION NO. 7

Canada, through Parks Canada, should continue its engagement exercise with those Aboriginal peoples having Section 35 interests in Wood Buffalo National Park with the objective of developing a more effective working relationships and furthering reconciliation with such Aboriginal peoples.

SCHEDULE B

LIST OF GOVERNMENTS AND ORGANIZATIONS ENGAGED

- Athabasca Denesuline
- Fort Resolution Métis Council
- Fort Smith Métis Council
- Ghotelnene K'odtineh Dene
- Government of Canada, including the Department of Indigenous and Northern Affairs and the Department of Justice
- Government of the Northwest Territories, including the Department of Aboriginal Affairs and Intergovernmental Relations and the Department of Justice
- Hay River Métis Government Council
- K'atl'odeeche First Nation
- North Slave Métis Alliance
- Northwest Territories Treaty 8 Tribal Council, including Deninu Kue First Nation, Lutsel'ke First Nation, Yellowknives Dene First Nation, Dettah, and Yellowknives Dene First Nation, Ndilo
- Northwest Territory Métis Nation