March 12, 2018

Mr. Dean Stairs, Chair
East Coast Music Association
2307 Clifton Street, suite 5
Halifax NS
B3K 4T9

RE: Open Letter to the ECMA. The Nomination of Maxim Cormier as an ECMA Indigenous Artist

Greetings,

It has come to our attention that the ECMA has stripped the young musician Maxim Cormier of his nomination for an Indigenous music award on the basis that he does not qualify as an Indigenous person. It appears that the ECMA grounds this action in their belief that there were no historical Métis Acadian communities in the Maritime provinces, and thus Maxim does not qualify as Indigenous under section 35 of the *Constitution Act, 1982*.

If, in fact, the ECMA has based its decision on either or both of the preceding criteria, we respectfully submit that the ECMA is mistaken both in their interpretation of current jurisprudence in Aboriginal Law, and in their analysis of the historical existence of the Acadian Métis of the Maritimes.

In terms of Constitutional Law, reference to an historical Métis community and the evidence needed to demonstrate the existence of such a community refers to what is known as the *Powley* test. This test consists of ten criteria, three of which are related to the identification of Métis. These criteria would be invoked in a trial involving an offence, which would be nullified if the defendant benefits from rights and protections recognized by s. 35 of the *Constitution Act, 1982*. Those three criteria are self-identification, ancestral connection and community acceptance:

> The verification of a claimant's membership in the relevant contemporary community is crucial, since individuals are only entitled to exercise Metis aboriginal rights by virtue of their ancestral connection to and current membership in a Metis community. **Self-identification, ancestral connection, and community acceptance** are factors which define Metis identity for the purpose of claiming Metis rights under s. 35. (our emphasis)[1]

The question of Métis identity from a legal standpoint is, however, not limited by s.35 alone. The Supreme Court of Canada has stated in the *Daniels* case (2016) that the fiduciary responsibility of the Federal government is not limited to those Métis able to meet the *Powley* test. The court in *Daniels* went further, stating that:

> [17] There is no consensus on who is considered Metis or a non-status Indian, nor need there be. Cultural and ethnic labels do not lend themselves to neat boundaries. 'Metis' can refer to the historic Metis community in Manitoba's Red River Settlement or it can be used as a general term for anyone with mixed European and Aboriginal heritage. Some mixed-ancestry communities identify as Metis, others as Indian:
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> > There is no one exclusive Metis People in Canada, anymore than there is no one exclusive Indian People in Canada. The Metis of eastern Canada and northern Canada are as distinct from Red River Metis as any two Peoples can be. . . . As early as 1650, a distinct Metis community developed in LeHeve [sic], Nova Scotia, separate from Acadians and Micmac Indians. All Metis are aboriginal people. All have Indian ancestry.[2]

Many rights and services are extended to Métis Peoples across Canada outside the strict confines of the *Powley* test criteria, and in the absence of the need to prove an historical community. [3] The Supreme Court of Canada has stated in *Daniels* 2016 that the fiduciary responsibility of the Federal government cannot be limited to the Métis that meet only the *Powley* test, as per the section 91 (24) of the Constitution of 1867:

> The first declaration should be granted: Métis and non-status Indians are "Indians" under s. 91 (24). The appeal should therefore be allowed in part. **The Federal Court of Appeal's conclusion that the first declaration should exclude non-status Indians or apply only to those Métis who meet the *Powley* criteria, should be set aside**, and the trial judge's decision restored.[4] (Our emphasis)

Given the Supreme Court's most recent statements on Métis identity, we respectfully suggest that the decision of the ECMA to deny the Indigenous identity of Maxim Cormier on the basis of the *Powley* test constitutes a misuse of the intended purpose of the test set forth by the Supreme Court of Canada.

We do not believe that the ECMA was required to adjudicate the potential s. 35 rights of Maxim Cormier or to rely upon constitutional grounds to deny his Indigenous identity. It is our understanding that Maxim Cormier did not intend to assert a constitutional right when he expressed his self-identity as an Indigenous person for the purpose of the ECMA nomination.

Using only Federally recognized Métis memberships would be a mistake

We would, moreover, strongly caution the EMCA against employing a logic that a Métis person needs to be the member of a federally accredited organization to be considered truly "Métis" or "Indigenous."

Applying this logic would be unfair to the specific situation of Métis Acadians, locked in conflicts that have been documented by the Royal Commission on Aboriginal Peoples with Western-based organizations attempting to arrogate the term" Métis" since 1983. We would also remind ECMA that the "Maritime Métis" were highlighted as existing by this Royal Commission in these exact terms, confirming their struggle for recognition for more than 20 years:

> The Maritimes
>
> Metis people in the Maritime provinces can also trace their communities to early contacts between the Aboriginal populations (Mi'kmaq and Wuastukwiuk, or Maliseet) of the region and French or British newcomers. Rewards were offered by British authorities in the early eighteenth century to British subjects who married Indians. The offspring of Aboriginal-European marriages often congregated, as in Labrador, in communities away from those of both ancestral peoples. Along with most of the rest of the early Maritime population, Metis people were profoundly affected by the British expulsion of Acadians between 1755 and 1763. Metis communities endured or regenerated, however, in parts of what are now Nova Scotia and New Brunswick. One of the earliest recorded uses of the word "Metis" ("Isle Mettise") occurs on a map drawn in 1758 of the area drained by the Saint John River.[5]

More importantly, perhaps, we would caution that employing this type of reasoning which consists of limiting Indigenous recognition only to people whose identity is decided as "valid" by Federal authorities or to prefer a number of Indigenous self-appointed organizations only (or any arguments derived from such reasoning). We believe that using this rationale risks eroding the inherent capacity of all Indigenous People to exercise their self-determination rights, in line with the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), including the fundamental right of the Acadian-Métis People to determine their own membership in line with their unique culture and history.

In other words, an Indigenous person, including a "Métis" person, is free to choose the communal organization that best represent his or her interest from a regional perspective (based on mutual acceptance), and should not be pressured at the expense of losing the recognition of their Indigenous identity to join the membership of any external political organizations that could trump the ability of local communities to control and exercise their self-determination rights.

Opening that door could potentially threaten the self-determination capacities of any Indigenous communities if the Federal government would privilege a number of Indigenous organizations that would best align with its interest at the expense of inherent recognition of all Indigenous Peoples.

This right of belonging for an Indigenous person to a community that best represents their culture, we insist, should not be constrained by interference or pressure to accept any form of third-party management or organizational oversight that would be in power to decide a community membership (or the Indigenous identity of its members) in exchange to access services granted to other Indigenous Peoples.

The Self-determination rights of Métis Regional Communities: UNDRIP

It should be clear that self-determination and self-identification are recognized as fundamental principles in international legal conventions on Indigenous Rights.

The International Court of Justice has acknowledged "the principle of self-determination through the free and genuine expression of the will of the Peoples" of the territory in question.[6] The United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") moreover declared that the Indigenous Peoples themselves should be in control of their identity and membership:

> Indigenous Peoples have the right to determine their own identity or membership in accordance with their customs and traditions. By virtue of that right Indigenous Peoples freely determine their political status and freely pursue their economic, social and cultural development.[7]

This fundamental right, we believe, extends to the Acadian-Métis People of the Maritime provinces, and, in this case, the Métis community that Maxim Cormier has decided to join as best expressing his local Indigenous culture.

It is our understanding that Maxim Cormier self-identifies as an Indigenous person ("Métis-Acadian"), and has been recognized and accepted by a community that regroups members sharing the kinship ties, as well as the distinctive cultural practices of the Métis Acadians attached to a specific region of Acadia (the "Highlands Métis Nation"). To be clear, we are not suggesting that only self-identification should be enough in assessing the Indigenous identity of Maxim Cormier, but rather to take in fair consideration the additional criteria of ancestral connection and community acceptance from an unbiased standpoint.

The recognition of self-identification, ancestral connection and community acceptance

Consequently, we would encourage ECMA to recognize this organization on its own standing in line with UNDRIP, and to recognize the inherent rights of Maxim Cormier as an Indigenous person to freely associate with the Indigenous community ready to accept him, on their common accord.

In that regard, we point toward the example of the Australian courts and their adoption of a three-part definition of indigeneity that also appears to match our suggestion: descent, self-identification, and community acceptance.[8]

The High Court of Australia in *Commonwealth v. Tasmania* considered the definition of "Aboriginal" in the context of s. 51 (xx vi) of the Australian Constitution. This three-part test for indigeneity was also adopted by the majority of the High Court in *Mabo v. Queensland* (No. 2)[9], in reference to the identification of Indigenous People holding native title:

> Membership of the indigenous people depends on biological descent from the indigenous people **and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people**. (our emphasis)

While keeping in mind the nuances added by the Supreme Court of Canada as to the criteria of "community acceptance"[10], we thus suggest that these three criteria (ancestral connection, self-identification, and community acceptance) should be considered sufficient to ensure a respectful and neutral assessment of the Indigeneity of Maxim Cormier.

Current debates on "true" Métis Heritage and Culture: Ensuring Neutrality

Although there is scholarly debate concerning the location of the "true Métis" in the Prairie provinces, the Royal Commission on Aboriginal Peoples in the early 1990s openly acknowledged the existence of Métis far outside the confines of the western provinces. The Commission accepted as fact, based upon their substantial research, the existence of the "Maritime Métis", observing that:

> Metis People in the Maritime provinces can also trace their communities to early contacts between the Aboriginal populations (Mi'kmaq and Wuastukwiuk, or Maliseet) of the region and French or British newcomers. Rewards were offered by British authorities in the early eighteenth century to British subjects who married Indians. The offspring of Aboriginal-European marriages often congregated, as in Labrador, in communities away from those of both ancestral Peoples.

> Along with most of the rest of the early Maritime population, Metis People were profoundly affected by the British expulsion of Acadians between 1755 and 1763. Metis communities endured or regenerated, however, in parts of what are now Nova Scotia and New Brunswick. One of the earliest recorded uses of the word Metis ("Isle Mettise") occurs on a map drawn in 1758 of the area drained by the Saint John River.[11]

Conclusion: The Mius family, signatories of the 1726 treaty

We would like to highlight that, as experts on the question of Eastern Métis, neither my research assistants nor I were ever contacted on the case of Maxim Cormier by your organization, despite declarations to the effect that the ECMA did consult with relevant experts on this issue. We hold a SSHRC grant based at Carleton University to research the legal and historical situation of Eastern Métis, and we regret that we were never consulted by ECMA to offer our recommendation on this very important issue.

If the ECMA had contacted our office, we would have informed ECMA of the significant research confirming the fact of Métis Acadians and the limitations and risks of relying too heavily on the *Powley* test to deny Maxim Cormier's Indigenous heritage. We would have additionally informed the ECMA that we know Maxim Cormier to be the descendant of Joseph Mius D'Azy and Marie Amirault, a well-known Indigenous lineage found in many Mi'kmaq and Métis-Acadian families.

The Mius family were signatories to a 1726 Friendship Treaty with the Crown, and that document contains a direct acknowledgement of the Mius family as Indigenous People under the generic terms "Indians", which includes since the *Daniels* decision the "Métis" as per section 91(24). Further, Maxim's family and ancestors have ties to the Métis community of Cape Sable, a community that we are currently investigating. The Mius family and their descendants have been consistently identified in primary documents as "mixed-blood", "Métis" and "Bois-Brulés" over many years.

We have also found strong evidence indicating that a Métis population existed in this area, and of the existence of Acadian Métis communities in the Maritimes (such as the writings of Father Sigogne[12]). Havard, moreover, confirms in 1880 the geographical distribution of the Métis People to include the Maritimes provinces, as did Louis Riel himself in 1885[13]:

> If we could obtain the number of metis in Canada [i.e. Ontario and Québec], **New Brunswick, Nova Scotia**, Labrador, and in the northern part of New England, as well as that of the French descended families tainted with Indian blood in the States of Illinois and Missouri, I doubt not the total would reach at least 40,000 as the strength of the population of French-Canadian mixed-bloods in North America.[14] (our emphasis)

Consequently, historical evidence strongly suggests that Maxim Cormier does satisfy the objective criteria of "ancestral connection" when it comes to his Indigeneity, self-identification and community acceptance. Given the historical material reviewed, we argue that Maxim Cormier has valid and verifiable connections to a strong Indigenous heritage.

It is imperative that organizations like the ECMA ensure that their decisions and policies around Indigenous identity are correct in law and fact, and that they are shaped and implemented without bias and political partisanship. We therefore respectfully ask the ECMA to reverse their decision, and consider offering a profound apology not only to Maxim, but also to the Métis Acadians People of the Maritimes.

Sincerely,

S Malette

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[1] *R. v. Powley,* [2003] 2 S.C.R. 207, 2003 SCC 43. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2076/index.do

[2] Daniels *v.* Canada (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 S.C.R. 99. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15858/index.do

[3] For example, as stated by the Intervention of the Metis Federation of Canada in the *Daniels* case: "self-identification of indigeneity is at the core of sentencing considerations for Aboriginal offenders under s. 718 .2(e) of the Criminal Code in light of the Gladue decision. 31 Courts consider an offender's self-identification as Aboriginal to be sufficient to trigger the application of Gladue, although this may not necessarily result in an adjusted sentence. Similarly, certain government entities and government-funded organizations offer services to those who self-identify as Indigenous. *R v Judge, 2013 ONSC 6803* at paras 20 I, 202, and 321, [2013] OJ No 5102 [Judge]. See *also R v Corbier,* 2007 ONCJ 712 at para 192, [2007] OJ No 5547; see also *Legal Services Society, Gladue Primer* (Legal Services Society, 2011) at 7. However, at least one court has instead applied the three *Powley* factors in assessing whether an individual was an "Aboriginal offender": *R v JN, 2013 ONCA 251* at para25, [2013) OJ No 1834." See the Intervention of the Metis Federation of Canada, Daniels et al. v. Minister of Indian Affairs and Northern Development and Attorney-General of Canada, et al. [2015] 2015 SCC 35945, para 18, note 32.

[4] *Daniels v. Canada* (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 S.C.R. 99. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15858/index.do

[5] Dussault R, Erasmus G, Canada. *Royal Commission on Aboriginal Peoples. Report of the Royal Commission on Aboriginal Peoples*. Ottawa: The Commission; 1996. http://data2.archives.ca/e/e448/e011188230-04.pdf

[6] See *Western Sahara*, Advisory Opinion of 16 October 1975, [1975] ICJ Rep 68 at para 162. Cited by the factum of the Intervener Metis Federation of Canada. Harry Daniels, et al. v. Her Majesty the Queen as represented by The Minister of Indian Affairs and Northern Development, et al. Docket 35945. https://www.scc-csc.ca/WebDocuments-DocumentsWeb/35945/FM070_Intervener_M%C3%A9tis-Federation-of-Canada.pdf

[7] *United Nations Declaration on the Rights of Indigenous Peoples,* 13 September 2007, GA Res. 611295, UNGAOR,61 51 Sess., Supp. No. 49 Vol. III, UN Doc. A/61/49 (endorsed by Canada 12 November 2010), art 33.

[8] *The Commonwealth of Australia v Tasmania*,[1983] HCA 2 l , (1983) 158 CLR l

[9] *Mabo v Queensland* (No. 2), [1992] HCA 23, (1992) 175 CLR l., see para 83.

[10] Namely, cases where this criteria could be deemed problematic as highlighted by the Supreme Court of Canada in *Daniels v. Canada* (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 S.C.R. 99, para https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15858/index.do

[11] Dussault R, Erasmus G, Canada. *Royal Commission on Aboriginal Peoples. Report of the Royal Commission on Aboriginal Peoples*. Ottawa: The Commission; 1996. http://data2.archives.ca/e/e448/e011188230-04.pdf

[12] Consult Sigogne, J.M. An April 29, 1809 letter to Monseigneur Joseph-Octave Plessis. Archidiocèse de Québec Archives. 312 CN, Nouvelle-Écosse, vol. 61.

[13] Louis Riel stating in his 1885 letter, identifying the two Canada and the Maritime province a few lines after this quote: "When it comes to the Eastern provinces of Canada, many Métis live there persecuted under the attires of the Indian costume. Their villages are villages of indigence. Their Indian title to the soil is, however, as good as the Indian title of the Métis of Manitoba." See Riel, Louis. 1985b. "3-072 Lettre à R.B. Deanne, à Edgar Dewdney, et à John A. Macdonald. Régina. 85/07/06." In The Collected Writings of Louis Riel / Les écrits complets de Louis Riel, edited by George Stanley, Raymond Huel, Gilles Martel, Glen Campbell, Thomas Flanagan and C. Rocan, Vol. 3, pp. 117–129. Edmonton: The University of Alberta Press, p. 121; our translation.

[14] Havard, V. 1880. "The French Half-Breeds of the Northwest." In *Annual Report of the Board of Regents of the Smithsonian Institution, Showing the Operations, Expenditures, and Condition of the Institution for the Year 1879.* Washington: Government Printing Office, 314-317.