File No. 28645

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for the Province of Manitoba)

BETWEEN:

ERNEST LIONEL JOSEPH BLAIS

Appellant (Accused)

- and -

HER MAJESTY THE QUEEN

Respondent (Informant)

FACTUM OF THE INTERVENER
(CONGRESS OF ABORIGINAL PEOPLES)

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PART I - STATEMENT OF FACTS

1. *This Intervener and its Perspective.* The Congress of Aboriginal Peoples brings together into one national Aboriginal organization twelve provincial and territorial affiliates which represent approximately 850,000 Métis and off-reserve Indian peoples.

2. Intervener adopts the facts as stated in the Appellant's factum.

PART II - POINTS IN ISSUE

3. Is the Appellant, being a Métis, encompassed by the term "Indian" in paragraph 13 of

the Natural Resources Transfer Agreement, 1930?

4. Intervener submits that the Appellant, being Métis, is an Indian within para. 13 of the NRTA.

PART III - ARGUMENT

5. The Royal Commission on Aboriginal Peoples observed:

> A further argument that can be made as evidence of the inclusion of Métis in the *Constitution Act, 1930* is the fact that the term Indian or Indians has never been defined in any of Canada's constitutional documents. From the *Royal Proclamation of 1763* to the *Constitution Act, 1982*, there is strong support for the view that the term Indians was used generically to refer to Indigenous or Aboriginal peoples. In 1982, Aboriginal peoples replaced the term.... There does not appear to be any reason to believe that the term Indians had a different meaning in different constitutional documents as Canada's constitution evolved.
>
> RCAP, *Report*, Vol. 4, p. 370
> *Re Eskimos* [1939] S.C.R. 104 (per Kerwin J: "When the Imperial Parliament enacted that there should be confided to the Dominion Parliament power to deal with 'Indians and Lands reserved for the Indians' the intention was to allocate to it authority over all the aborigines within the territory to be included within the confederation.")

6. *Overview.* RCAP's conclusion that Métis are within the meaning of "Indians" in para.13 of the *NRTA* is buttressed by five considerations, which this factum develops:

(a) Canadian authorities, before and immediately after Confederation, referred to the Métis as Indians, and dealt with them as such;

(b) The constitutional boundaries of "Indians" have never been clear. Parliament and Federal administrative instrumentalities have played upon this ambiguity to include and exclude Métis from Federal regimes as suited their objectives;

(c) The *Nowegijick* principle applied to specific rights at *NRTA* para. 13 should resolve this ambiguity in favour of Aboriginal people. It is specious and dishonourable for

governments to invent a non-existent conflict between Métis and Indians about harvesting game when there is no evidence of scarcity, the province of Manitoba is huge and its population small, and no representative of any Indian Nation has appeared before any court here, or any court in *Powley,* to make or support this point;

(d) The purpose of the *NRTA*, para.13 was to assure to Aboriginal people who depended on hunting for survival that nothing in the transfer would threaten their survival. In 1930, many Métis depended on hunting for survival, as do many today. It is an affront to the honour of the Crown to suppose that the transfer made the subsistence way of life of these many Métis dependant on the pleasure of the province;

(e) Canada acquired control of Manitoba lands in 1870 through a settlement with the Métis designed "towards the extinguishment of the Indian Title to the lands in the Province". Canada then knew the Métis as "Indians" because only "Indians" could have Indian title. Canada's control of Manitoba's lands created an anomalous situation: Canada did not control the lands of the original four provinces in 1867, nor did it control the lands of British Columbia admitted to Confederation in 1871. The anomaly was corrected by the *NRTA* in 1930. The "Indians" referred to in para 13 of the *NRTA* included the same "Indians" – ie, the Métis – in respect of which the anomaly of 1870 was created.

(a) Canada Dealt with Métis as Indians before and after Confederation

7. In a letter dated March 14, 1818 on Half Breed Nationalism, William McGillivray, a leading agent for the North-West Company, referred to a "treaty" in 1814 between the "half-breeds and the colonists;" (p. 138) . At p. 140 he states:

> The assemblage of the half-breeds requires a little further comment ... they one and all look upon themselves as members of **an independent tribe of natives**, entitled to a property in the soil, to a flag of their own,

and to protection from the British Government.

It is absurd to consider them legally in any other light than as Indians; the British law admits of no filiation of illegitimate children but that of the mother; and as these persons cannot in law claim any advantage by paternal right, it follows, that they ought not to be subjected to any disadvantages which might be supposed to arise from the fortuitous circumstances of their parentage.

Being therefore Indians, they, as is frequently the case among the tribes in this vast continent, as *young men* (the technical term for warrior) have a right to form a new tribe on any unoccupied, or (according to the Indian law) any conquered territory. That the half-breed under the denominations of *bois brulés* and *metifs* have **formed a separate and distinct tribe of Indians** for a considerable time back, has been proved to you by various depositions. [Emphasis added.]

Respondent's Record, I, p. 186 (the full text appears in the Authorities)

8. *An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada*, S.P.C. 1850, c. 42 (13 & 14 Vict, Prov. of Can.) was the first Canadian statute to define "Indians". It defined Indians as including Metis.

> Be it declared and enacted: That the following classes of persons are and shall be considered as Indians...*Secondly*. –All persons intermarried with any such Indians and residing amongst them, *and the descendants of all such persons*...; (emphasis added).

9. One year after Confederation, the *Department of Secretary of State Act* enacted, for certain purposes, a similar definition of 'Indians' that likewise included the Metis:

> s. 15. ...the following persons and classes of persons, and none other, shall be considered as Indians...*Secondly*. All persons residing among such Indians, whose parents were or are, or either

> of them was or is, descended on either side from Indians or an Indian reputed to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property, *and the descendants of all such persons*... (emphasis added)
>
> *Department of Secretary of State Act,* S.C. 1868, c. 42, s. 15

10. On May 2, 1870, Sir John A. MacDonald introduced the *Manitoba Act*, into the House of Commons. To explain why a reservation of land was made for the Métis, he said:

> That in order to compensate the claims of the half-breed population, as **partly inheriting the Indian rights**, there shall be placed at the disposal of the local Legislature one million and a half acres of land to be selected anywhere in the territory of the Province of Manitoba, by the said Legislature, in separate or joint lots, having regard to the usages and customs of the country, out of all the lands now not possessed, to be distributed as soon as possible amongst the different heads of half breed families according to the number of children of both sexes then existing in each family under such legislative enactments, which may be found advisable to secure the transmission and holding of the said lands amongst the half breed families --- To extinguish Indian claims.

11. Prime Minister Macdonald also told the House:

> There shall, however, out of the lands there, **be a reservation for the purpose of extinguishing the Indian title**, of 1,200,000 acres. That land is to be appropriated as a reservation for the purpose of settlement **by half-breeds and their children** of whatever origin on very much the same principle as lands were appropriated to U.E. Loyalists for purposes of settlement by their children. **This reservation, as I have said, is for the purpose of extinguishing the Indian title** and all claims upon the lands with the limits of the Province... [Emphasis added.]

12. Later the same day, Prime Minister Macdonald said in the House (pp. 1329-1330):

> ... the reservation of 1,200,000 acres which it was proposed to place under the control of the Province, was not for the purpose of buying out the full blooded Indians and extinguishing their titles. There were very few such Indians remaining in the Province, but such as there were they would be distinctly under the guardianship of the Dominion Government. **The main representatives of the original tribes were their descendants, the half-breeds**... [Emphasis added.]

13. On May 9, 1870 Sir Georges E. Cartier, the second most important figure in the government of Canada, told the House (p.1450):

> ... that **any inhabitant of the Red River country having Indian blood in his veins was considered to be an Indian**. They were dealing now with a territory in which Indian claims had been extinguished, and now had to deal with their descendant - the half-breeds. That was the reason the new Province had been made so small. [Emphasis added.]

14. It should be obvious that only “Indians” are capable of having “Indian title”.

(b) The Constitutional Boundaries of the Term “Indians” are Imprecise

15. The constitutional boundaries of the term “Indians” have never been clearly defined.

16. *Inclusion of Métis in the Indian Act.* Parliament included some Métis as “Indians” in successive versions of the *Indian Act* until 1951. The first *Indian Act*, in 1876, defined “Indian” as “Any male person of Indian blood reputed to belong to a particular band” and “any child of such person”. Under this *Act*, mixed blood persons generally were “Indians”.

17. The 1876 *Act* provided "that no half-breed in Manitoba who has shared in the distribution of half-breed lands shall be accounted an Indian" and that "no half-breed head of family...shall, unless under very special circumstances...be accounted an Indian." The felt necessity to exclude Manitoba "half-breeds" who participated in the *Manitoba Act* land distribution suggests, as the Courts and commentators have observed, that Parliament considered that the usual reach of the term "Indians" included Métis.

> *R. v. Howson*, (1894) 1 Terr. L.R. 492, at 495 (NWTSC en banc).
> *Indian Act*, S.C. 1876, c. 18, s. 3.3 (*e*).
> B. Morse and J. Giokas, "Do the Métis Fall Within Section 91(24) of the *Constitution Act, 1877*?", *Aboriginal Self-Government: Legal and Constitutional Issues - Papers Prepared as Part of the Research Program of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services Canada, 1995) 140.

18. Successive *Indian Acts* continued to include some Métis as 'Indians', and to exclude "half-breeds in Manitoba" who accepted scrip. The *Indian Act* of 1927, in force at the time of the *NRTA* in 1930, is no exception. Only with the 1951 *Indian Act* were all Métis who accepted scrip, regardless of province of residence, excluded from the *Indian Act* regime.

> *Indian Act*, R.S.C. 1927, c. 98, s. 16.
> *Indian Act*, S.C. 1951, c. 29, s. 12

19. *Inclusion of Métis in the Treaties.* Canada's treaties with Indians allowed many "half-breeds" living among the Indians to be included as "Indians". Prof. Morse and Mr. Giokas explained that:

> Persons of mixed ancestry were treaty beneficiaries under the Robinson and subsequent numbered treaties, and in at least one instance they entered an Indian treaty by way of adhesion as a separate group designated as 'half-breed'...
>
> Morse and Giokas, supra., at 193.

20. In 1871 Indian Commissioner Wemyss M. Simpson wrote to the Secretary of State for the Provinces to say that:

> During the payment of the several bands, it was found that in some...a number of those residing among the Indians, and calling themselves Indians, are in reality half-breeds, and entitled to share in the land grant under the provisions of the *Manitoba Act*. I was most particular, therefor, in causing it to be explained...that any person now electing to be classed with Indians...would...thereby forfeit his or her right to another grant as a half-breed.
>
> Morse and Giokas, supra., p. 140.
>
> A. Morris, *The Treaties of Canada With the Indians of Manitoba and the North-West Territories* (Saskatoon: Fifth House Publishers, 1991) at 41.

21. Federal government agents negotiating treaties on the Prairies in the late nineteenth century found it difficult to distinguish between "pure" Indians and the "half-breeds", many of whom were living among the Indians and following the "Indian mode of life". Various treaty commissioners permitted "half breeds" to choose scrip or adherence to treaties between Canada and 'full-blooded' Indians. RCAP documented this as follows:

> There is evidence that the scrip commissioner, Mr. McKenna (who also happened to be the treaty commissioner) assured the Métis in the area covered by Treaty 10 that their way of life would not be affected by accepting scrip. Most Métis, like their Indian relations and neighbours, had no other way to survive, a point supported by the commissioner in his report: 'The Indians dealt with are in character, habit and manner of dress and mode of living similar to the Chipewyans and Crees of the Athabaska country. It is difficult to draw a line of demarcation between those who classed themselves as Indians and those who elected to be *treated with* as half-breeds. Both dress alike and follow the same mode of life...'
>
> RCAP, *Report*, Vol. 4, p. 360.

22. Canada's practice of allowing Métis a choice of adhering to treaties or accepting scrip illustrates that the Federal Government accepted that Métis people were "Indians" by virtue of their ancestry and way of life, and sufficiently "Indian" to be

grouped with “pure” Indians under the same treaties.

23. That Canada put Métis people to a choice of treaty or script, and the resulting Métis act of choosing, is not an act of selecting *constitutional identity*. This was merely a choice of statutory regimes. Canada has no power to put Métis or Indians to a choice of *constitutional identity*. Métis people are what they are under the constitution, regardless of any statutory definition or administrative regime.

24. Prof. Morse and Mr. Giokas concluded:

> Federal policy, practice and legislative intent show that mixed-blood persons generally and the Métis Nation of the West have always been dealt with in the final analysis as possessing ‘Indian title’ on the basis that they were ‘Indians’ in a constitutional sense and in the sense of being indigenous people rather than Europeans.
>
> Morse and Giokas, supra., p. 192

(c) The *Nowegijick* Principle

25. There is obviously a margin of appreciation surrounding the term “Indian” in the constitution in general and paragraph 13 of the *NRTA* in particular. In cases of ambiguity involving constitutional provisions relating to Aboriginal people, “doubtful provisions should be resolved in favour of the Indians”.The *Nowegijick* principle is not limited to statutes dealing with Indians in the narrow sense, but extends to the interpretation of the rights of all Aboriginal peoples under the constitution. In *R. v. Sutherland*, Dickson J held that para. 13 of the Manitoba *NRTA* at issue here

> should be interpreted so as to resolve any doubts in favour of the Indians, the beneficiaries of the rights assured by the paragraph.
>
> *R. v. Nowegijick*, [1983] 1 S.C.R. 29
> *R. v. Sutherland*, [1980] 2 S.C.R. 451, 464

R. v. Sparrow, [1990] 1 S.C.R.1075 at 1106.

26. This principle is particularly relevant to an Aboriginal group as traditionally disadvantaged as the Métis because

> Underlying *Nowegijick* is an appreciation of societal responsibility and a concern with remedying disadvantage.
>
> *Mitchell v. Peguis Band*, [1990] 2 S.C.R. 85 at para. 15

27. In this appeal Manitoba argues (*Respondent's Factum*, para 107) that the *Nowegijick* principle should operate to prevent paragraph 13 of the *NRTA* from being interpreted to include the Métis as "Indians". Manitoba claims that Indians currently enjoying sustenance harvesting rights will be detrimentally affected by recognizing Métis constitutional rights.

28. The right to hunt big game in Manitoba is not currently limited to Indians. Manitoba allows non-Aboriginal people, without constitutional rights, to hunt for recreation, for sport and for food. Manitoba comprises a huge land mass, which is sparsely populated. There is no evidence whatsoever of scarcity in this case, as there was no evidence of scarcity in *Powley*. It is specious and dishonourable for governments to invent a non-existent conflict between Métis and Indians about harvesting game when no representative of any Indian Nation has appeared before any court in this case, or any court in *Powley*, to make or support this point.

> *R. v. Powley* (2000), 47 O.R. (3d) 30 at para. 68.
>
> *R. v. Powley* (2001), 53 O.R. (3d) 35 (Ont. C.A.) at para. 55 ("Other aboriginal hunters who enjoy treaty rights are allowed unrestricted hunting rights, and conservation concerns have not reached the stage where non-aboriginal hunters are forbidden access to the resource".)

(d) The Purpose of paragraph 13 of the *NRTA*

29. The purpose of paragraph 13 of the *NRTA* is to protect those Aboriginal people

who rely on subsistence hunting for survival from unjustified uses of the Province's new regulatory powers over natural resources. Paragraph 13 should be interpreted in light of the interest it was meant to protect.

30. The reference to "Indians" in para. 13 is a generic term, co-equal with the current term "Aboriginal people"; it cannot be tortured to express an implicit intention to exclude the Métis. If the Métis were meant to be excluded from the protection of para. 13, they would have been *expressly* excluded, in the way Métis scrip takers were expressly excluded from being accounted an "Indian" under the *Indian Act*.

RCAP, *Report*, Vol. 4, p. 370.

31. The Métis have traditionally relied upon the hunt as a means of sustenance. This is a concurrent finding of fact in the Courts below, and should not be disturbed here. The Court of Appeal acknowledged a "firm finding by the Trial Judge that hunting was integral to the Métis way of life".

Appellant's Record, p. 244, para. 54.

32. The Federal Government was well aware of this fact at the time of the *NRTA*. RCAP observed:

> There is evidence that the scrip commissioner, Mr. McKenna (who also happened to be the treaty commissioner) assured the Métis in the area covered by Treaty 10 that their way of life would not be affected by accepting scrip. Most Métis, like their Indian relations and neighbours, had no other way to survive, a point supported by the commissioner in his report".

RCAP, *Report*, Vol. 4, p. 360.

33. It is an affront to the honour of the Crown to suppose that the *NRTA*, subtly and implicitly, made the Métis' need to feed themselves by their traditional methods dependent on the pleasure of the province.

34. Many Métis people in Manitoba and elsewhere continue to rely upon the hunt as a means of survival. RCAP observed that even today "...significant numbers of Métis continue to follow traditional lifestyles...".

RCAP, *Report*, Vol. 4, p. 215

(e) Metis who were Indians in 1870 are the same Metis who were Indians in 1930

35. Mr. Blais' Métis ancestors, and approximately 8000 Métis like them, received land grants under s. 31 of the *Manitoba Act* because Canada considered them Indians possessed of Indian title. As Cartier said in the House (para 13 above), because of these "Indians" the land grant was made; because these "Indians" would form a majority, the new Province of Manitoba was made small; and, anomalously, because these "Indians" would be the provincial majority, Canada kept control of the lands.

R. v. Blais, per Swail, Prov. C.J., at para 153-4

36. As the direct descendant of one of these "Indians", Mr. Blais is an "Indian"; as the direct descendants of the other 8000 "Indians" of 1870, the Manitoba Métis of 1930 and today are "Indians" in the relevant sense. Canada must be taken to have considered them as such when it regularized the anomaly created in consequence of the 1870 "Indians" by the *NRTA* in 1930, and safeguarded "Indian" rights by para. 13.

37. *NRTA heading "Indian Reserves".* It is unsound to conclude from the heading "Indian Reserves" atop *NRTA* para 11, and the reference in para 11 to "treaties with Indians of the Province", that *NRTA* para. 13 is limited to '*Indian Act* Indians', and thus excludes Métis. Contrary to this reasoning, this court ruled that treaty entitlement does not depend on Indian status or reserve residence. Contrary to this reasoning, over one-hundred-thousand-people without Indian status, living off reserve, have been acknowledged by Parliament to be 'Indians' by Bill C-31. Canada has a large population of non status 'Indians' which this Court acknowledged in *Lovelace*. Canada has a large population of off reserve 'Indians' which this

Court acknowledged in *Corbiere*. The facile reliance on the 'Indians Reserves' heading overlooks the correct test for treaty entitlement, these crucial non-status and off reserve Aboriginal issues, and these wrongful exclusions from Indian status and reserves. This sterile and purposeless textual sleight of hand cannot determine the constitutional boundaries of 'Indians'.

> *R. v. Simon*, [1985] 2 S.C.R. 387, at paras. 43-44 (treaty entitlement test = "sufficient connection" to treaty signatories, not Indian registration or reserve residence)
> *R.* v. *Fowler* (1993), 134 N.B.R. (2d) 361 (sufficient connection test applied to non-status Indian)
> RCAP, Report, IV, s. 3.2 (discussion of Bill C-31)
> *Lovelace v. Ontario*, [2000] 1 S.C.R. 950
> *Corbiere v. Canada*, [1999] 2 S.C.R. 203

38. *James Gallo's* '*evidence*'. Nor does this method gather strength from the 'evidence' of James Gallo, a middle manager with Indian and Northern Affairs Canada's Manitoba Regional office. Mr. Gallo gave his views on the ultimate issue before this Court. He did not use accepted methods of constitutional interpretation. He relied on erroneous assumptions about treaty entitlements. He relied on a letter from Duncan Cameron Scott, the well know Deputy Superintendent General of Indian Affairs, who administered the *Indian Act* with policies we now consider racist.

> I want to get rid of the Indian problem...Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question...
>
> see Cairns, *Citizens Plus* (2000), p. 17

39. *Constitutional policy*. Some say we should not "begin to treat Métis like Indians, encouraging them to withdraw among themselves ... they should be encouraged to integrate into society".

> T. Flanagan, *First Nations Second Thoughts* (McGill-Queen's UP, 2000) p. 196

40. This Court is invited to reply that the genius of Canada is to promote a strong sense of overarching loyalty to the Canadian state by encouraging distinctive identities to preserve,

promote and take pride in their cultural heritage. This Court is invited to reply in the words this court used in *Zundel*:

> People must be able to take pride in their roots, their religion and their culture. It is only then that people of every race, colour, religion and nationality can feel secure in the knowledge that they are truly equal to all other Canadians. Thus secure in the recognition of their innate dignity, Canadians of every ethnic background can take pride in their original culture and a still greater pride in being Canadian. Section 27 strives to ensure that in this land there will be tolerance for all based on a realization of the need to respect the dignity of all.
>
> *R. v. Zundel*, [1992] 2 S.C.R. 731, para 189

41. Traditional hunting is fundamental to Métis culture and identity.

> The Métis Nation culture is an Aboriginal culture, rooted in the land, and almost all who self-identify as Métis attach great value to the practice and preservation of traditional land-based activities...
>
> RCAP, *Report*, IV, p. 232-33

42. "[F]rom a moral and political perspective", the RCAP Commissioners wrote, "Métis people in the prairie provinces have the same need, and in our view the same moral right as their First Nation counterparts to seek sustenance from unoccupied public lands".

> In some cases, the need for change in provincial policies concerning Métis food harvesting is especially urgent because the individuals affected need the food for sustenance. The exclusion of Métis people from the food exemption has hit the poor the hardest. They should not have to await the outcome of prolonged political negotiations to feed their families.
>
> RCAP, *Report*, IV, p. 250

PART IV - ORDER REQUESTED

43. Intervener requests that the appeal be allowed and the constitutional question answered as follows:

The Appellant, being a Métis, is encompassed by the term "Indian" in paragraph 13 of the Natural Resources Transfer Agreement, 1930, as ratified by the Manitoba Natural Resources Act, (1930) 20-21 Geo. V, c.29 and confirmed by the Constitution Act (1930), 20-21 Geo. V, c. 26, and thereby is not in violation of s. 26 of the Wildlife Act.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 06th day of December, 2002.

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Joseph Eliot Magnet
Counsel for the Intervener,
Congress of Aboriginal People

PART V - TABLE OF AUTHORITIES