Court File № T-2172-99

IN THE FEDERAL COURT OF CANADA

B E T W E E N:

HARRY DANIELS, GABRIEL DANIELS, LEAH GARDNER, TERRY JOUDREY and THE CONGRESS OF ABORIGINAL PEOPLES

Plaintiffs

- and -

HER MAJESTY THE QUEEN, as represented by THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT and THE ATTORNEY GENERAL OF CANADA

Defendants

PLAINTIFFS' MEMORANDUM OF FACT AND LAW

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PART I – OVERVIEW

A. Issues and their Importance

1. In this action, Plaintiffs claim declarations:

   (a) That Métis and Non-Status Indians ("MNSI") are "Indians" within the meaning of *Constitution Act, 1867*, s. 91(24);

   (b) That the Crown in right of Canada ("Canada") owes a fiduciary duty to MNSI as Aboriginal peoples; and

   (c) That Canada must negotiate and consult with MNSI, on a collective basis through representatives of their choice, with respect to their rights, interests and needs as Aboriginal peoples.[1]

[1] Fresh as Amended Statement of Claim, paras. 22, 27.

2. These are issues of critical importance to Canada's 200,000 Métis and 400,000 Non-Status Indians. Canada denies jurisdiction over Métis and Non-Status Indians, claiming the provinces are responsible; the provinces also deny jurisdiction over MNSI, claiming Canada is responsible.[2]

3. The consequence is that Métis and Non-Status Indians are trapped in a jurisdictional vacuum, where no government accepts responsibility for them or programs adequately for their needs as aboriginal peoples. This is the principal reason why MNSI are under-serviced by governments, and why they have not reached their full potential in Canadian society. As the Defendant's Secretary of State observed in a memo to Cabinet:

> The Métis and non-status Indian people, lacking even the protection of the Department of Indian Affairs and Northern Development, are far more exposed to discrimination and other social disabilities. It is true to say that in the absence of Federal initiative in this field they are the most disadvantaged of all Canadian citizens.[3]

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[2] CR-008795, pp. 1, 7, Ex. P127: In *R. v. Powley*, the Superior Court of Justice quoted the following exchange from the transcript, between counsel and Tony Belcourt, President of the Métis Nation of Ontario:

Q. And what are the other Provincial Governments responses to the Métis?

A. Generally, the Provincial Government responses, there haven't been any pieces of legislation concerning the Métis and most Provincial Governments take the position, we've been political footballs ever since I've been involved in lobbying at the federal level for some 28 years now. We are . . . we are a political football. The Federal Government says we don't have the responsibility for you, the Provinces do and the Provinces take the opposite position. We don't have the responsibility, the Federal Government does.

R. v. Powley, 47 O.R. (3d) 30, at para. 76 (S.C.J.); affirmed [2003] 2 S.C.R. 211. The "tactical maneuvering" of federal and provincial authorities with respect to this issue was also criticized by Justice Wakeling of the Saskatchewan Court of Appeal, in *R. v. Grumbo*, a case in which the Saskatchewan Crown conceded that Métis were Indians within the meaning of s.91(24); *R. v. Grumbo*, [1998] 3 C.N.L.R. 172 (Sask. C.A.), per Wakeling J.A. (dissenting).

[3] CR-008005, Ex. P124 - Gérard Pelletier, Secretary of State, Confidential Memorandum to Cabinet, "Métis and Non-Status Indians - Research Proposals", July 6, 1972, p. 5 (6 in Summation).

4. In 1996, the Royal Commission on Aboriginal Peoples said in its 4000 page *Report* that the jurisdiction issue "is the most basic current form of governmental discrimination." The Commission observed that "until this discriminatory practice has been changed, no other remedial measures can be as effective as they should be".[4]

5. The Commission called upon the federal government to "acknowledge that s. 91(24) … applies to Métis people and base its legislation, policies and programs on that recognition," or clarify the situation by action in the Courts.[5]

6. Canada has done neither. In the meantime, MNSI are denied effective access to a wide range of programs, benefits and rights, and languish as Canada's "forgotten people".

B. The Precedents

7. This case asks the Court to interpret Parliament's legislative jurisdiction at *Constitution Act, 1867*, s. 91(24).

8. Section 91(24) invests Parliament with exclusive power to make laws in relation to all matters coming within the class of subject styled "Indians and

[4] Report of the Royal Commission on Aboriginal Peoples, (Ottawa: Canada Communications Group, 1996), Vol. IV, at p. 209-10, 219-20.
[5] Id., p 210.

Lands reserved for the Indians". Specifically, the court must determine whether MNSI are a "matter" that "comes within" the class of "Indians".

9. The Supreme Court of Canada precedents show that Parliament's legislative jurisdiction at s. 91(24) is "broad".[6] By resort to s. 91(24) Parliament may define who is and who is not an Indian. Parliament may establish criteria for Indian status to be acquired or lost. Parliament may attach consequences to Indian status.[7]

10. The precedents show that Parliament's s. 91(24) power ("Indian Power") must be exercised within "constitutional limits." Legislation in relation to aboriginal ancestry is within those limits. Legislation in relation to intermarriage between

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[6] *Reference re Eskimos*, [1939] S.C.R. 104. At para 35 Chief Justice Duff, for himself, Davis and Hudson JJ. (Crocket J. concurring), referred to the "ample evidence of the broad denotation of the term 'Indian' as employed" in s. 91(24).

At para. 38 Chief Justice Duff, for himself, Davis and Hudson JJ. (Crocket J. concurring), stated: "Nor can I agree that the context (in head no. 24) has the effect of restricting the term 'Indians.' If 'Indians' standing alone in its application to British North America denotes the aborigines, then the fact that there were aborigines for whom lands had not been reserved seems to afford no good reason for limiting the scope of the term 'Indians' itself."

Peter W. Hogg, *Constitutional Law of Canada* (Scarborough, Ont.: Carswell, 2007) at 28.1(b): "These "non-status Indians" … are also undoubtedly "Indians" within the meaning of s.91(24) … [the Métis] are probably "Indians" within the meaning of s.91(24)."

Canada, *Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol. 4 (Ottawa: Supply and Services Canada, 1996) at 209 - 210: s.91(24) was intended to refer to "all the aborigines of the territory and subsequently included in the Dominion."

Lysk, K.M. "The Unique Constitutional Position of the Canadian Indian" (1967) 45 Can. Bar Rev. 513 at 515: "The meaning on the term "Indian" in particular statutes may, of course, be narrower than the corresponding term in the British North America Act, … It may be too, that a person who was once an Indian for the purposes of the Indian Act, but has lost his status as an Indian under that Act by enfranchisement, may nevertheless continue to be an Indian for the purposes of the British North America Act."

[7] *Lavell v. Canada (Attorney General)*, [1974] S.C.R. 1349 [Lavell].

Aboriginals and non-Aboriginals, and consequences resulting, are within those limits.[8]

11. Métis and Non Status Indians are persons of Aboriginal ancestry. MNSI have evolved as a result of intermarriage between aboriginals and non-aboriginals. These are the critical indicia the Supreme Court precedents say activate Parliament's s. 91(24) power to make laws in relation to the matter of Indian status and its consequences.[9]

12. As this brief will show, Parliament has used its s. 91(24) power since 1867 to define and to redefine Métis and Non status Indians at various times, for various purposes and under varying circumstances as either Indians or not Indians in the *Indian Act* and in other legislative schemes as suits the prevailing necessities of the day as Parliament sees them.[10]

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[8] *Canard v. Canada (Attorney General)* [1976] 1 S.C.R. 170 [Canard]. At p. 207 Justice Beetz stated that Parliament may define the expression "Indian": "This Parliament can do within constitutional limits by using criteria suited to this purpose but among which it would not appear unreasonable to count marriage and filiation and, unavoidably, intermarriages, in the light of either Indian customs and values which, apparently were not proven in Lavell, or of legislative history…".

[9] *Lavell*, supra., *Canard*, *supra*.

[10] Evidence of Gwynneth Jones, *Transcript*, May 26, vol. 17, pp. 2870-72.
Parliament's activity in this regard began immediately after Confederation. S.C. 1868, c. 42, s. 15 defined as Indians "all women lawfully married to any [Indian]; the children issue of such marriages, and their descendants." By *The Indian Act, 1876*, S.C. 1876, c. 18, s. 3(e) Parliament granted authority to Indian agents to transform half-breeds (as Métis were then known) into Indians. Parliament's activity in this regard was continuously exercised throughout the treaty and scrip periods 1871-1931 to transform tens of thousands of Metis into Indians.

13. In particular, in the modern period, Parliament used its section 91(24) power to transform hundreds of thousands of MNSI into status Indians.[11] A court decision that Parliament does not possess this power will be unprecedented, and will create widespread difficulties for many people and governments. As a constitutional decision, such a ruling would leave Parliament without legislative power to correct these difficulties.

14. The precedents suggest that Parliament may use MNSI's characteristics of aboriginal ancestry and/or intermarriage between Indians and non Indians as constitutionally relevant springboards for the attribution to MNSI of Indian status; to specify how MNSI may acquire or lose Indian status, and to attach consequences to Indian status for MNSI.

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[11] In the modern period, Parliament enacted Bill C-31, *An Act to Amend the Indian Act* (assented to June 28, 1985). In the years 1985-2000, about 115,000 persons regained Indian status through Bill C-31; approximately 60,000 children born after 1985 owe their Indian status to Bill C-31: see Stewart Clatworthy, "Impacts of the 1985 Amendments to the Indian Act on First Nations Populations" in Jerry P. White, Paul S. Maxim and Dan Beavon (eds.), *Aboriginal Conditions: Research as a Foundation for Public Policy* (Vancouver: UBC Press 2003) at 67-68].

In 1984, Canada recognized the Conne River Band, later known as the Miawpukek Band, by order-in-council: *Order Declaring a Body of Indians at Conne River, Newfoundland, to be a Band of Indians for Purposes of the Act*, SOR/84-501 (1984) 118 Canada Gazette I 2935; *Miawpukek Band Order*, SOR/89-533 (1989) 123 Canada Gazette 4692. By this action Canada transformed the Conne River people from Non Status Indians to Status Indians: Examination of Ian Cowie, *Transcript*, May 5, vol. 4, p. 441.

Parliament's power to transform MNSI into Indians is actively utilized today. The *Gender Equity in Indian Registration Act* (Bill C-3, assented to Dec 15, 2010) is expected to transform approximately 45,000 MNSI into status Indians: P 439, Explanatory Paper, "Estimates of Demographic Implications from Indian Registration Amendment – McIvor v. Canada March 2010" from INAC website; P440, Explanatory Paper, "Discussion Paper on Need for Changes to the Indian Act Affecting Indian Registration and Band Membership McIvor v. Canada" from INAC website.

15. In this sense, the precedents suggest that Parliament's s. 91(24) jurisdiction extends to legislation in relation to the matters of Indian status and its resulting consequences for Métis and Non status Indians. In this sense as well, the court may declare that MNSI are "Indians" within the meaning of s. 91(24).

C. Principles of Constitutional Interpretation

16. Interpretation of a constitutional head of power requires "broad, purposive analysis, which interprets specific provisions of a constitutional document in the light of its larger objects."[12]

17. The purposive approach must be progressively applied; the Constitution is a living tree that "ensure[s] that Confederation can be adapted to new social realities."[13]

18. The Supreme Court of Canada explained the Court's responsibilities in a division of powers case as here:

> If an issue comes before a court, the court must refer to the framers' description of the power in order to identify its essential components, and must be guided by the way in which courts have interpreted the power in

[12] *Hunter v. Southam*, [1984] 2 S.C.R. 145, 156.

[13] *Re Employment Insurance Act*, 2005 SCC 56 at para. 9; *Confédération des syndicats nationaux v. Canada (Attorney General)*, 2008 SCC 68, paras 27, 29-32; ***Same-Sex Marriage Reference***, [2004] 3 S.C.R. 698 at paras. 22-30 ("our Constitution is a living tree which, by progressive interpretation, accommodates and addresses the realities of modern life"); *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145 at 155 ("A constitution…is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power.)"; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 at 136 (P.C.) ("narrow and technical construction" rejected in favour of "a large and liberal interpretation…within certain fixed limits"; Constitution as "a living tree capable of growth and expansion within its natural limits"); *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras. 79-82 (unwritten constitutional principles which animate constitutional interpretation include protection of minorities, specifically the aboriginal peoples).

> the past. In this area, the meaning of the words used may be adapted to modern-day realities...[14]

19. While courts may look at the debates or correspondence relating to a constitutional head of power as providing context, "the debates or correspondence"

> are not conclusive as to the precise scope of the legislative competence. They reflect, to a large extent, the society of the day, whereas the competence is essentially dynamic: *Martin Service Station Ltd. v. Minister of National Revenue*, [1977] 2 S.C.R. 996, at p. 1006. In giving them predominant weight, the Quebec Court of Appeal adopted an original intent approach to interpreting the Constitution rather than the progressive approach the Court has taken for a number of years.[15]

20. Courts must appreciate that constitutional powers are capable of growth within natural limits by having regard to relevant historical elements and modern day realities.[16]

21. Interpretation of powers in sections 91 and s. 92 of the *Constitution Act, 1867* "must evolve and must be tailored to the changing political and cultural realities of Canadian society".[17]

22. To sum up: As constitutional powers are drafted for the future, the meaning of any particular power is to be found in the purposes for which the

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[14] *Re Employment Insurance Act*, [2005] 2 S.C.R. 669, at paras. 10, 46-7; reaffirmed and explained in Confédération des syndicats nationaux v. Canada (Attorney General), 2008 SCC 68, paras. 29-32.
[15] *Re Employment Insurance Act*, [2005] 2 S.C.R. 669, at para. 9.
[16] *Re Employment Insurance Act*, [2005] 2 S.C.R. 669, at paras. 10, 46-7.
[17] *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R 3, at para 23.

power was created. Those purposes are to be considered progressively, as they become manifest in historical development and modern day reality.

D. Structure of this Brief

23. The brief begins with the equivalent of Defendant's concessions. These appear in the documents surrounding the Aboriginal constitutional process which extended from 1978 to 1992. The years 1978-1992 were a time of intense constitutional ferment, during which the place of aboriginal people in Canada's constitutional structure was debated, constitutional amendments to Parliament's Indian Affairs power were proposed and some of these were made.[18]

24. Conflict developed between Canada and the provinces about which was responsible to pay for MNSI programming.[19] To manage this conflict, Canada took positions about which level of government had jurisdiction over MNSI.[20]

25. Canada developed an understanding of the jurisdiction issue within its internal processes and structures. Canada's internal understanding is that "In general terms the federal government does possess the power to legislate theoretically in all domains with respect to Métis and non-status Indians under section 91(24)".[21]

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[18] For a chronology see CR-008761, pp. 5-10, pp. 66-80 Ex. P126.
[19] Virtually identical conflict developed between Canada and Quebec in the 1930s concerning which was responsible to pay for Inuit programming, a conflict that was resolved by the Supreme Court in *Re Eskimos*, [1939] S.C.R. 104.
[20] For a chronology see CR-012121, pp. 12-19, Ex. P198.
[21] Cr-010716 P32, p. 42 (p 46 Summation), Evidence of Ian Cowie, Transcript, vol. 4, May 5, p. 455.

26. Canada communicated that understanding to its officials throughout the process.

> This was our understanding of the base position of the federal government following very broad-ranging consultation in the preparation of the document. So it was reflective of a federal government interpretation of its authority under 91(24) (p 457)
>
> it was seminal. It was the frame within which everything else was positioned (p 462)
>
> That language would not have survived if there had been significant questions raised by anyone in the system (p 471)
>
> there was an absolutely unique review process, both in terms of calibre of the individuals who were involved and the extensiveness of the review that went in (pp. 476-7).[22]

The documentary and testimonial evidence which record this understanding are tantamount to Defendant's concessions.[23]

27. Canada developed a second position which it used to interface with Canadian aboriginal people during the period 1978-92 - a public position. This second position contradicted Canada's internal position that MNSI come within s. 91(24). The second position was reserved for public fora, particularly interfaces between Canada and representatives of MNSI.

28. This brief then turns to the required purposive, progressive approach to *Constitution Act, 1867*, s. 91(24). It discusses the Framers' purposes for giving jurisdiction over Indians and Lands reserved for the Indians exclusively to

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[22] Evidence of Ian Cowie, Transcript, vol. 4, May 5, p. 457-77.

[23] The Defendants' admission cannot supplant the Court's responsibility for constitutional analysis.

Parliament, and not to the provincial legislatures. It considers the essential components of the power required to accomplish those purposes when the Framers chose Parliament as the repository of the Indian Power. The brief explores the relationship between the Indian Power and the larger objects of confederation.

29. The brief then considers growth of the Indian Power within its natural limits, by examining the realities that motivated Parliament repeatedly to enact laws relating to the status of MNSI over the course of Canadian history.

30. Lastly, the brief considers the modern realities which motivated Parliament to confer Indian status on more than 100,000 MNSI in the 1980s, to confer Indian status on other large groups of MNSI subsequently and to confer Indian status on approximately 45,000 more MNSI by legislation in 2010. The brief considers the modern realities which are likely to motivate Parliament to continue this trend, or otherwise to enact laws relating to the Indian status of MNSI into the foreseeable future.

31. We say that the Defendants' "concession" type communications, the purposes the Framers pursued when they gave the Indian power exclusively to Parliament, the essential components of the power needed to accomplish those purposes, the relation of these purposes to the larger objects of Confederation, Parliament's historical use of the power to enact legislation relating to the status

of MNSI throughout Canadian history, the modern day realities Parliament confronts and is likely to confront in future regarding MNSI status issues, and the Supreme Court precedents concerning s. 91(24) lead to the conclusion that MNSI is a matter that comes within the term “Indians” at. s. 91(24).

E. Terminology

32. Neither Aboriginal peoples, government officials, historians nor other scholars have used consistent terminology in describing or referring to persons of mixed Aboriginal and non-Aboriginal ancestry.

> The French referred to the fur trade Métis as *coureurs de bois* (forest runners) and *bois brulés* (burnt-wood people) in recognition of their wilderness occupations and their dark complexions. The Labrador Métis (whose culture had early roots) were originally called "livyers" or "settlers", those who remained in the fishing settlements year-round rather than returning periodically to Europe or Newfoundland. The Cree people expressed the Métis character in the term *Otepayemsuak*, meaning the "independent ones".[24]

Other historical terms used include “country-born”, “halfbreeds”, and “mixed-bloods”. In more recent decades, the term “Non-Status Indian” has been used by the federal government[25] and by some Aboriginal peoples themselves (sometimes in contradistinction to “Métis” and sometimes not) as a broad category of persons of Indian ancestry and self-identification who do not enjoy status under the *Indian Act*.

33. The federal government has dealt with mixed ancestry Indians under different labels and in different capacities. As will be detailed below, the

[24] *R. v. Powley*, [2003] 2 S.C.R. 207, at para.10, quoting *RCAP Report*, Vol. 4, at 199-200.
[25] CR-012121, Ex. P198; CA-000848, Ex. P422).

nomenclature of “Indians” on the one hand, and “Halfbreeds” or “Métis” on the other, was often a reflection of rather haphazard self-selection by individuals or families, and classification by officials according to whether they took scrip or treaty, rather than any judgment based upon blood quantum, culture or “Indianness”.[26] In the 19th and early 20th centuries, individuals frequently moved between categories.[27] The federal government has also used the terms “treaty Indian” and “non-treaty Indian” to refer to Indians who do or do not enjoy the benefits of treaties - this may or may not coincide with status under the *Indian Act*,[28] or the definition of “Indian” for other purposes such as the NRTA.[29]

34. The situation described by Dwight Dorey, a former Chief of the Congress of Aboriginal Peoples, helps to understand the dilemma:

> I was born of Mi’Kmaq and non-Aboriginal parentage - my mother being Mi’Kmaq and my father a “white” squatter on reserved Mi’Kmaq land….In 1985, my mother became entitled to be registered as an Indian for the first time. She was then 72 years of age and I, at the time, was 40. Being of mixed blood I am often referred to as “half-breed” or Métis, although technically I was a “non-status” Indian for most of my life. I was raised on “Indian” land…Two years later I married a Mi’Kmaq woman who was born with status on reserve, but later lost it through a previous marriage to a non-Indian. We both eventually acquired status as a result of the 1985 *Indian Act* amendments. We moved to Millbrook reserve.… Some years later, through a Supreme Court decision … I became recognised as a Treaty Indian … So, in effect, I remain a mixed blood Mi’kmaq (some would

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[26] CR-008005, pp. 2-3, Ex. P124, Cabinet Memorandum: Metis and Non Status Indians Research Proposals.

[27] E. Snider, “Admission of Half-Breeds into Treaty” (1976), CA-000777, Ex. P113.

[28] See e.g. *R. v. Fowler* (1993), 134 N.B.R. (2d) 361 (Prov. Ct.); *R. v. Harquail* (1993), 144 N.B.R. (2d) 146 (Prov. Ct.); *R. v. Chevrier*, [1989] 1 C.N.L.R. 128 (Ont. Dist. Ct.). The Federal Government, in an internal document entitled “Fiduciary Relationship of the Crown with Aboriginal Peoples: Implementation and Management Issues; A Guide for Managers”, has recognized that treaty rights may be based upon language such as “descendants”, which may not coincide with status: see CA-000845, p.14, Ex. P114.

[29] (CA-000338, Ex. P199; CR-007635, Ex. P200) INAC “Dept. of Justice” Vol. #4 (1911-1937) C. Memo from W. Stuart Edwards, Deputy Minister of Justice (Aug. 30, 1933) opining that “Indians of the province” in s. 12 of the Alberta *Natural Resources Transfer Agreement* encompasses both treaty and non-treaty Indians.

> describe as Métis) living my first 40 years as a "non-status" and non-treaty Indian, who then gained status and recognition as a "treaty" Indian with constitutionally protected rights...[30]

35. In the modern period of constitutional revision the Defendant's documents use the compendious term "MNSI" [Métis and Non Status Indians] to describe the broad modern communities that consist of mixed ancestry Aboriginal peoples who are excluded from having "status" under the *Indian Act* or are registered Inuit.

36. In this brief, we use the term "MNSI" in the same sense as the Defendants' documents. When speaking of historical communities or individuals, we refer to "mixed ancestry Aboriginals" or "mixed ancestry Indians". When quoting from historical documents we quote the terminology used in the original (e.g. halfbreeds, mixed-bloods etc.).

F. Parties

Congress of Aboriginal Peoples

37. The Congress of Aboriginal Peoples ("CAP") is a body corporate that offers representation to Métis and Non-Status Indians throughout Canada. CAP's objects include "to advance on all occasions the [...] interests of the Aboriginal

[30] Dwight A. Dorey, "The Future of Off-Reserve Aboriginal Peoples" in *Aboriginal Rights Litigation* (Butterworths, 2003) p. 11; Examination of Dwight Dorey, *Transcript*, May 3, vol. 2, pp. 111-129.

people of Canada and to co-ordinate their efforts for the purpose of promoting their common interests through collective action."[31]

38. Pursuant to that mandate, CAP has invested 12 years and approximately two million dollars to bring this case through trial, an effort likely beyond the capability of any individual Métis person or Non-Status Indian.

39. CAP made this effort because the jurisdiction issue causes real harm to real people CAP represents on the ground.[32]

Gabriel Daniels

40. Gabriel Daniels is the son of Harry Daniels,[33] a widely recognized advocate for Métis rights and the first plaintiff in this action.[34] Gabriel identifies as Métis,[35] as did his father, mother, paternal grandmother, and maternal grandmother.[36]

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[31] D-1, p. 5.

[32] Examination of Ian Cowie, *Transcript*, May 5, vol. 4, p. 471: "Q: Can you comment as to whether or not there is buck passing back and forth between federal and provincial governments re servicing Métis and non-status Indians […]? A: In my experience there's no question there are individual casualties of the government disputes and there were periods where this was a very significant problem;" p. 518: "That's a very real problem on the ground;" Cr-011016, Exhibit P37, p 39: ""It is Indian programs and Indian people who bear the brunt of Federal-Provincial financing disputes, since a common result is that the services or enriched services are simply not provided." Examination of Ian Cowie, *Transcript*, May 5, vol. 4, p. 520: "Q: Is that a valid statement? A: Yes."

[33] Examination of Gabriel Daniels, *Transcript*, May 9, vol. 6, p. 747.

[34] Examination of Gabriel Daniels, *Transcript*, May 9, vol. 6, p. 753

[35] Examination of Gabriel Daniels, *Transcript*, May 9, vol. 6, p. 753.

[36] Examination of Gabriel Daniels, *Transcript*, May 9, vol. 6, p. 749 ff.

41. Gabriel's lineage extends through Eliza Letendre, born in Batoche in 1873, his great-grandmother.[37] Gabriel participates in Métis cultural activities and is a member of several Métis organizations.[38]

42. Gabriel also participates in Indian activities including pow-wows, sweat lodges, and round dances.[39] His grandmother, Nora Fisher, was sent to Indian residential school alongside Status Indian children.[40] Later, the federal government ruled that Nora Fisher was ineligible for Indian status.[41]

Leah Gardner

43. Leah Gardner is a Non-Status Indian, residing in Wabigoon, Ontario.[42] Her father has Indian status through Bill C-31, as did her late husband.[43] Both of her children have status.[44]

44. Gardner applied for status but her application was denied because she falls beyond the status-restoring reach of Bill C-31.[45]

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[37] Examination of Gabriel Daniels, *Transcript*, May 9, vol. 6, p. 756.
[38] Examination of Gabriel Daniels, *Transcript*, May 9, vol. 6, pp. 767-68, 772.
[39] Examination of Gabriel Daniels, *Transcript*, May 9, vol. 6, p. 770.
[40] Examination of Gabriel Daniels, *Transcript*, May 9, vol. 6, p. 759.
[41] Examination of Gabriel Daniels, *Transcript*, May 9, vol. 6, p. 759; P-66, p. 1: Indian Affairs identified Nora Fisher as non-status Indian in a letter written to her daughter, Lenda Mary Fisher, denying Lenda's application for Indian status. Indian Affairs did not properly register Nora Fisher as a status Indian. Lenda was also told that none "of [her] ancestors were entitled to be registered as Indian."
[42] Examination of Leah Gardner, *Transcript*, May 9, vol. 6, pp. 786, 793.
[43] Examination of Leah Gardner, *Transcript*, May 9, vol. 6, pp. 789, 794.
[44] Examination of Leah Gardner, *Transcript*, May 9, vol. 6, p. 796.
[45] Examination of Leah Gardner, *Transcript*, May 9, vol. 6, p. 801.

45. As a result, Gardner's children are members of the Eagle Lake First Nation, but she is not.[46] Gardner's relatives live on the reserves near Wabigoon.[47] As a Non-Status Indian, Gardner is ineligible to live on the reserve.[48] She cannot access the variety of benefits and services available to reserve occupants.[49]

46. Non-Status Indians off-reserve often lack a sense of belonging to an identifiable community and have fewer opportunities to participate in cultural activities.[50]

47. Gardner's family's situation - divided along lines of status - is a common occurrence among Aboriginal families.[51]

Terry Joudrey

48. Terry Joudrey is a Non-Status Indian[52] who resides at Elmwood, Nova Scotia.[53] Both his mother and his grandmother were Status Indians.[54] He has been a member of the Native Council of Nova Scotia since 1990.[55]

[46] Examination of Leah Gardner, *Transcript*, May 9, vol. 6, p. 796.
[47] Examination of Leah Gardner, *Transcript*, May 9, vol. 6, p. 804.
[48] Examination of Dwight Dorey, *Transcript*, May 3, vol. 2, p. 136.
[49] Examination of Dwight Dorey, *Transcript*, May 3, vol. 2, p. 138.
[50] Examination of Dwight Dorey, *Transcript*, May 3, vol. 2, p. 139.
[51] Examination of Dwight Dorey, *Transcript*, May 3, vol. 2, p. 136.
[52] Examination of Terry Joudrey, *Transcript*, May 10, vol. 7, p. 866.
[53] Examination of Terry Joudrey, *Transcript*, May 10, vol. 7, pp. 873-74.
[54] Examination of Terry Joudrey, *Transcript*, May 10, vol. 7, pp. 863-64.
[55] Examination of Terry Joudrey, *Transcript*, May 10, vol. 7, p. 878.

49. Terry has hunted and fished his entire life, activities that he recognizes as Indian traditions.[56] He carries with him an Aboriginal Treaty Rights Association card, which he uses as a license for hunting and fishing.[57]

Her Majesty the Queen

50. The Defendant, Her Majesty the Queen ("HMTQ") is the person in whom the executive government and authority of and over Canada is vested pursuant to s. 9 of the Constitution Act, 1867.

The Minister of Indian Affairs and Northern Development

51. The Minister of Indian Affairs is the officer of the Government of Canada whose powers, duties, and functions "include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to Indian affairs;" (*Department of Indian Affairs and Northern Development Act*, RSC 1985, c. I-6, s. 4(a)).

The Attorney General of Canada

52. The Attorney General of Canada is the officer of the Government of Canada who has "the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada;" (*Department of Justice Act*, RSC 1985, c. J-2, s. 5(d)).

[56] Examination of Terry Joudrey, *Transcript*, May 10, vol. 7, pp.870-72.
[57] Examination of Terry Joudrey, *Transcript*, May 10, vol. 7, p. 868.

PART II - CANADA'S "POSITIONS"

A. Constitutional Process: 1968-1992

(1) Patriation and Its Aftermath

53. In 1965, the Royal Commission on Bilingualism and Biculturalism reported that:

> Canada, without being fully conscious of the fact, is passing through the greatest crisis in its history ... a crisis which if it should persist and gather momentum could destroy Canada.

André Laurendeau, a B & B Commissioner, believed this crisis required major constitutional reforms and adjustments "that aim to modify the balance of power."[58]

54. Canada began a process to amend the constitution. This effort failed in 1972.

55. In 1976 the Parti Québécois was elected as the Government of Quebec. Prime Minister Trudeau renewed attempts to amend the Constitution of Canada. When this effort failed to gain provincial support, Trudeau announced that the Government of Canada would use old procedures to amend the constitution unilaterally.[59]

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[58] Canada, *Report of the Royal Commission on Bilingualism and Biculturalism* (Ottawa: Queen's Printer, 1967), I, p. xvii; Patricia Smart (ed.), *The Diary of André Laurendeau* (Toronto: Lorimer, 1991), p. 58.

[59] Peter W. Hogg, *Constitutional Law of Canada*, Student ed. (Scarborough: Carswell, 2002) at 63.Kirbymemorandum, http://faculty.marianopolis.edu/c.belanger/QuebecHistory/docs/1982/17.htm.
Michael B. Stein, *Canadian Constitutional Renewal, 1968-1981: A Case Study in Integrative Bargaining*, Research Paper No. 27(Kingston, Institute of Intergovernmental Affairs, Queen's University), p.27: The Kirby memo argued that "it is by no means certain that consensus on a significant number of items will, in the end, emerge, and … where the provinces do reach full

56. Trudeau's caucus held no seats in the House of Commons west of Manitoba. The NDP had 26 seats in the Western provinces. Trudeau's government sought NDP support for unilateral patriation to give the effort national legitimacy.[60]

57. Trudeau's strategy achieved the patriation reforms in 1982, albeit over the dissent of all political parties in Quebec.

58. Responding to an overture from Quebec in 1986,[61] Canada initiated consultations seeking further constitutional amendments. This continued through the Meech Lake constitutional process of 1987-1990, and concluded with the Charlottetown constitutional process of 1990 -1992.

(2) Aboriginal Constitutional Process

59. The NDP made its support for unilateral constitutional amendment conditional on a willingness to augment native rights.[62] This brought Aboriginal issues into the centre of constitutional negotiations.

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agreement on certain items … the federal government may not be a party to it". The Kirby memo recommended that "the federal government try to bring out the agreement on a package which appears to be within reach, and failing this, to show that disagreement leading to unilateral federal action is the result of an impossibly cumbersome process, or of the intransigence of the provincial governments, and not the fault of the federal government."

[60] William J. Yurko, *Parliament and Patriation: The Triumph of Unilateralism, a Personal Perspective* (Ottawa, William J. Yurko 1984) p. 170.

[61] Gil Remillard, Minister of Intergovernmental Affairs (Quebec), *Rebuilding the Relationship: Quebec and its Confederation Partners*, speech at Mont Gabriel, Quebec, May 9, 1986 in Peter Leslie, Canada: The State of the Federation (1986), p. 97.

[62] "In January, the prime minister bowed to repeated lobbying by Broadbent and others to augment native rights, an issue over which the federal NDP was threatening to withdraw its support for the entire package. On 13 February, when the committee's report was tabled in Parliament, it contained an historic new addition to the native rights clause, acknowledging and

60. In 1982, Her Majesty proclaimed a major constitutional amendment concerning aboriginal peoples as part of the *Constitution Act, 1982*.[63] Part IV of

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affirming aboriginal and treaty claims and titles and, for the first time, recognizing the Métis as an indigenous people with fundamental, though undefined, claims."
[…]
"The threat of the federal NDP caucus to withdraw its support of the constitution resolution, unless it is amended to include a clause recognizing the existence of aboriginal and treaty rights, has pushed the government into a change of heart. Trudeau and his justice minister, Jean Chrétien, abandon their argument that aboriginal rights cannot be written into a constitution until they first have been defined…" (Robert Sheppard & Michael Valpy, The National Deal: The Fight for a Canadian Constitution, (Toronto: Fleet Books, 1982) at 121, 123, 143, 162);

"Dear Norman:

I and my colleagues in the NDP are strongly committed to obtaining these rights for Canada's native people. It may well be that my support and that of many NDP Members of Parliament for the constitutional package will hinge on the passage of these amendments in the House of Commons…

Yours Sincerely,
Nelson A. Riis
Member of Parliament" (Letter from Nelson A. Riis, Member of Parliament to Mr. Norman LaRue, Box 820, Kamloops, B.C April 6, 1981);

"Canada's proposed constitution has been amended to include a positive recognition and affirmation of the aboriginal and treaty rights of the Indian, Métis and Inuit people of Canada. The amendment, introduced by New Democrat MP Peter Ittinuar, was accepted by the parliamentary committee on the constitution…NDP leader Ed Broadbent, along with MP's Peter Ittinuar and Jim Manly worked long and hard to force the government to accept changes that would entrench aboriginal and treaty rights. Finally the Liberals reversed themselves and allowed Peter Ittinuar to present amendments to entrench rights." (Jim Manley, M.P. Cowichan-Malahat-The Islands, NDP Indian Affairs Critic, The Constitution: Finally a Victory in NDP Native Network: Unemployment Issue, (Ottawa, February 16, 1981) at 4;

"The House of Commons has unanimously approved NDP amendments to the proposed constitution that strengthen aboriginal rights…Recognition and affirmation of aboriginal rights in the constitution was the result of intensive work by the New Democratic Party." (Jim Manley, M.P. Cowichan-Malahat-The Islands, NDP Indian Affairs Critic, Constitution: NDP Amendments Guarantee Rights in NDP Native Network: Special Edition (Ottawa, March 4, 1982) at 2.

According to William Yurko, the MP for Edmonton East who put forward a motion in the House of Commons to patriate unilaterally in 1980, Ed Broadbent supported unilateral patriation but demanded an amendment on provincial ownership of natural resources. Trudeau agreed to make three resource related amendments, which Broadbent accepted: "Broadbent, having now proudly announced his support for the resolution, also added that his party would pursue additional amendments to give added protection to women, native Canadians and deal with a proposed amending formula. See William J. Yurko, *Parliament and Patriation: The Triumph of Unilateralism*, *a Personal Perspective* (Ottawa, William J. Yurko 1984) p.167-170.

[63] Constitution Act, 1982, s. 35.

the *Constitution Act, 1982* required a First Ministers' conference within one year with an agenda item respecting "the identification and definition of the rights of [the aboriginal peoples of Canada]". Part IV.1, proclaimed in 1983, required two further First Ministers' conferences with agenda items including "constitutional matters that directly affect the aboriginal peoples of Canada."[64] In 1992, the Charlottetown constitutional process produced far reaching proposals for constitutional amendments concerning Canada's aboriginal people that were put to Canadians in a national referendum. Included in these was a proposal to amend *Constitution Act, 1867*, s. 91(24).

(3) Defendants' Internal Documents: Concessions that MNSI Come Within s. 91(24)

61. Aboriginal issues had been included in the discussions and proposals that led to Patriation. They received detailed consideration in the subsequent Aboriginal constitutional process.

62. To develop its understanding of Aboriginal constitutional issues, the federal government relied on the Corporate Policy Branch of the Department of Indian Affairs, a substantial 122 person unit. The Director General was Ian Cowie.[65]

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[64] *Constitutional Amendment Proclamation, 1983*, SI/84-102, added s. 35.1. This amended Part II of the *Constitution Act, 1982* to require that "before any amendment is made to class 24 of section 91(24) of the *Constitution Act of 1867*" the Prime Minister must convene a constitutional conference composed of the First Ministers, and the Prime Minister "will invite the representatives of the aboriginal people of Canada to participate."

[65] Evidence of Ian Cowie, Transcript, vol. 4, May 5, p. 441-2, 444-5: (p. 474-5: "Q. You were it, or your unit was? A. They were it in terms of generating the substantive work…").

63. In the period 1978 - 1980, Cowie's group drafted and redrafted numerous times a comprehensive discussion paper, *Natives and the Constitution*.[66] Cowie's group received review and sign off from senior officials in DIAND and other departments;[67] in depth input from central agencies, especially the Federal Provincial Relations Office [FPRO] and the Privy Council Office [PCO], and significant interdepartmental review and sign off from line departments.[68] *Natives and the Constitution* was a significant undertaking.

64. *Natives and the Constitution* provided the Defendant with a thorough review of jurisdictional concerns about s. 91(24).

65. *Natives and the Constitution* was attached to Cabinet memos.[69]

66. Significant parts of the document, including those parts relating to MNSI and the s. 91(24) issue were used in the Defendant's internal briefings and preparations for constitutional amendment discussions, including the Defendant's preparations for FMC 1983.[70]

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[66] CR-010716, Ex. P32 - *Natives and the Constitution*, Background and Discussion Paper, Intergovernmental Affairs, Corporate Policy, DIAND, August 1980.

[67] Paul Tellier (DM) Arthur Kroeger (DM), Huguette Labelle (ADM/DG), John Tait (DM), Michael Kirby, Ian Binnie, Roger Tassé, Barbara Reed et. al.: Evidence of Ian Cowie, Transcript, vol. 4, May 5, p. 473, 475-6.

[68] Evidence of Ian Cowie, Transcript, vol. 4, May 5, p. 474-5 "A. …what came into play because of the prominence of the issues and their relationship to the broader constitutional agenda, was an informal interdepartmental review mechanism that included the Privy Council office, Federal-Provincial Relations Office, the Department of Justice, MSSD, which is the Ministry of State for Social Development."

[69] Evidence of Ian Cowie, Transcript, vol. 4, May 5, p. 454; CR-006643, Ex. P35 shows the use of parts of the document used to brief Ministers and to seek Cabinet direction on federal government positioning for FMC 1983.

[70] Evidence of Ian Cowie, Transcript, vol. 4, May 5, p. 454.

67. As a consequence of its research and analysis during this period, the Defendant concluded that it had legislative jurisdiction in relation to Métis and Non-Status Indians. *Natives and the Constitution* stated this clearly:

> In general terms, the Federal Government does possess the power to legislate theoretically in all domains in respect of Métis and Non-Status Indians under Section 91(24) of the BNA Act. [Emphasis in the original.][71]

[71] CR-008231, Ex. P33 - Arthur Kroeger, Memorandum for a Meeting between the Minister and MNSI groups, September 7, 1979, p.2. The Deputy Minister advised the Minister that "[a]lthough the Federal Government arguably has the power under s.91 (24) to legislate or accept responsibility for MNSI it has not chosen to do so as a matter of political decision-making to date."

CR-010615, Ex. P36 - Ian Cowie, Coordinator/Chief Advisor, Tripartite Branch, DIAND, September 5, 1979, p.3. This statement also appears in CR-010716, Ex. P32 - "Natives and the Constitution" Background and Discussion Paper, Intergovernmental Affairs, Corporate Policy, DIAND, August 1980, p.46. See also p. 2: "…a person who is not considered an Indian under the *Indian Act* because he has opted to be enfranchised is still an Indian for the purpose of the BNA Act… The legal and historical evidence appears to be convincing that the mere fact that a person has mixed blood has never been a bar to the assertion of Native claims." At p. 3: "if an individual possesses sufficient racial and social characteristics to be termed a 'Native person' he will be considered an 'Indian' within the meaning of the BNA Act. This means he is within the legislative jurisdiction of the federal government irrespective of the fact that the same individual may be excluded from the coverage of the *Indian Act*." Also at p.3: "Those Métis who have received scrip or lands are excluded from the provisions of the *Indian Act*. These Métis are still 'Indians' within the meaning of the British North America Act and the Federal Government continues to have the power to legislate with respect to this group of people." [Emphasis in the original.]

CR-011016, Ex. P37 - Memorandum to Cabinet re "Aboriginal Peoples and the Constitution of Canada" (January 1983), sent by Ian B. Cowie, Director General of Corporate Policy, INAC, to the Deputy Minister, page 12 "Under Section 91(24) of the Constitution (B.N.A.) Act the federal parliament has exclusive legislative jurisdiction with respect to 'Indians and lands reserved for the Indians'. 'Indians' includes Inuit (by Supreme Court determination) and probably includes Métis."

CR-011125, Ex. P165 - Government of Canada, "Working Group 3 - Land and Resources", February 20, 1984: The federal position at the First Minister's Conference is that "some Métis are s.91(24) Indians". This document is an attachment to CR-011120, March 12, 1984 letter from Doug Kane, A/Director Intergovernmental Affairs, Corporate Policy, INAC, to IGA Regional Managers.

CR-008761, Ex. P126 - "Background to the 1985 First Minister Conference on the Constitution" prepared by Constitutional Affairs Directorate, DIAND, December 1984 - p. 73: "The majority of legal opinion, however, affirms that most of the Métis are included in the meaning of the term "Indian" under section 91(24)". See also p. 154: "Section 91(24) establishes the preeminence of the federal government regarding 'Indians and lands reserved for the Indians'…. Indians, in this context, includes status and non-status Indians."

68. In 1979, the Deputy Minister of Indian and Northern Affairs Canada, Arthur Kroeger, wrote a memo to the Minister which answered question 1 of the statement of claim in the affirmative:

> Although the Federal Government arguably has the power under Section 91(24) to legislate or accept responsibility for MNSI it has chosen not to do so as a matter of political decision making to date.[72]

69. The Government's conclusion was reasoned and principled, as it was based upon the presumed intention of the Framers of the *Constitution Act, 1867*:

> A survey of legislation around the time of Confederation reveals that persons now regarded as Métis or non-status Indians were considered Indians by Parliamentarians of the time, and therefore within the bounds of federal legislative competence. In the absence of evidence to the contrary, it could be presumed that this view of the term 'Indian' was shared by their contemporaries - the architects of the BNA Act. …Those Métis who have received scrip or lands are excluded from the provisions of the Indian Act, but are still 'Indians' within the meaning of the BNA Act".[73]

Natives and the Constitution (1980) concluded:

> Section 91(24) of the *BNA Act* confers upon the federal Parliament the power to make laws in relation to "Indians and land reserved for Indians". "Indians" includes Inuit and in all likelihood includes "non-status Indians" and a good number of Métis.[74]

Natives and the Constitution elaborated on which non-status Indians and Métis are s. 91(24) Indians:

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[72] CR-008231, Ex. P33 - Arthur Kroeger, Memorandum for a Meeting between the Minister and MNSI groups, September 7, 1979, p.2.

[73] CR-010716, Ex. P32 - "Natives and the Constitution" Background and Discussion Paper, Intergovernmental Affairs, Corporate Policy, DIAND, August 1980, page 43.
See also CR-011741, Ex. P138 - "Identification and Registration of Aboriginal Peoples - Executive Summary", DIAND, Indian Registration and Band Lists Directorate, Marion Amos, 1991, p.4: "The early broad definitions of "Indian" in the pre-confederation legislation could have included persons of mixed blood under certain circumstances. There was no legislative definition of 'Metis' and they did not constitute a separate group: there were only Indians and non-Indians."

[74] CR-010716, Ex. P32 - "Natives and the Constitution" Background and Discussion Paper, Intergovernmental Affairs, Corporate Policy, DIAND, August 1980, p.5-6.

> Métis people who come under the Treaty are presently in the same legal position as other Indians who signed land cession treaties. Those Métis who have received scrip or lands are excluded from the provisions of the Indian Act, but are still 'Indians' within the meaning of the BNA Act. Métis who have received neither scrip, land, nor treaty benefits still arguably retain the right to Aboriginal claims… Should a person possess 'sufficient' racial and social characteristics to be considered a 'native person', that individual will be regarded as an 'Indian' within the legislative jurisdiction of the federal government, regardless of the fact that he or she may be excluded from the coverage of the Indian Act.[75]

70. *Natives and the Constitution* went through an "absolutely unique review process, both in terms of calibre of the individuals who were involved and the extensiveness of the review that went in."[76] Layers of officials in DIAND, in central agencies and in line departments provided input, reviewed, discussed and signed off on the paper.

71. Those portions of *Natives and the Constitution* relating to MNSI received no requests for revision.[77]

72. The position that Canada has jurisdiction over MNSI is consistent in all versions of *Natives and the Constitution*.[78]

73. The position in *Natives and the Constitution* that Canada has jurisdiction over MNSI was used to brief Cabinet Ministers, and to develop federal

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[75] CR-010716, Ex. Ex. P32 - "Natives and the Constitution" Background and Discussion Paper, Intergovernmental Affairs, Corporate Policy, DIAND, August 1980, p.47.
[76] Evidence of Ian Cowie, Transcript, vol. 4, May 5, p. 476-77
[77] Evidence of Ian Cowie, Transcript, vol. 4, May 5, p. 478-9
[78] Evidence of Ian Cowie, Transcript, vol. 4, May 5, 478-9, p. 470: ("A. The understandings, in essence, were in place from 1978, to my knowledge, through 1983. The language is essentially the same through virtually every presentation.")

government position statements on Aboriginal people and the constitution.[79] This position formed the basis of government positioning during the period when proposals for amendments to s.91(24) were a live topic for inter-governmental discussion.

74. Significant parts of *Natives and the Constitution* appear in the documents that prepared federal positioning for FMC 1983. Documents that went to Cabinet stated:

> Section 91(24 would probably allow the federal government to legislate not only in relation to Indians and Inuit, but also to most Metis…The main area of dispute is money, not legislative authority….[80]

75. Ian Cowie summed up the uniqueness of this process:

> To have an issue of that significance endure over a five year period in a process which involves the scrutiny of the Prime Minister, ministers, and the senior bureaucracy at a very, very unique level, you would not get, in my view, a combination of individuals with the background against a set of issues. And to have the statements repeat and present themselves with the same content tells you that there was no serious issues or challenge through that period of time.[81]

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[79] Evidence of Ian Cowie, Transcript, vol. 4, May 5, p. 454.
[80] CR-006643, pp. 34-35, Ex. P35 (Summation).
[81] Evidence of Ian Cowie, Transcript, vol. 4, May 5, p. 509-10.

And see CR-010716, Ex. P32 - "Natives and the Constitution" Background and Discussion Paper, Intergovernmental Affairs, Corporate Policy, DIAND, August 1980, p.6: "'Indians' includes Inuit and in all likelihood includes 'non-status' Indians and a good number of Métis."

CR-011016, Ex. P37 - Memorandum to Cabinet re "Aboriginal Peoples and the Constitution of Canada" (January 1983), sent by Ian B. Cowie, Director General of Corporate Policy, INAC, to the Deputy Minister, page 12 "Under Section 91(24) of the Constitution (B.N.A.) Act the federal parliament has exclusive legislative jurisdiction with respect to 'Indians and lands reserved for the Indians'. 'Indians' includes Inuit (by Supreme Court determination) and probably includes Métis."

CR-006643, Ex. P35 - "Constitutional Conference on Native Rights", March 1983, likely sent by Ian Cowie, Director General of Corporate Policy at INAC (see CR-006642, Ex. P56) p.6-7: "The federal government has authority under ss. 91(24) of the Constitution Act, 1867, to legislate in relation to Indians, Inuit, and probably many Métis. It has passed major legislation in relation only to Indians, and has exercised widespread responsibility in relation only to on-reserve Indians."

76. While Canada's internal understanding is usually hidden from public view, it was set out clearly by the Minister of Indian Affairs in a "Letter to the Editor" of *Policy Options* which was published in 1985.[82] Minister Crombie wrote there that he "would like to clarify an apparent misunderstanding regarding the constitutional recognition of non-status Indians." Minister Crombie explained that "there is a distinction between 'Indian' as defined in the Indian Act and 'Indian' as used in section 91(24) of the *Constitution Act, 1867*. He continued:

> The Indian Act definition refers to those people registered or eligible to be registered under the Indian Act. By definition, non-status people do not fit within this group. It has, however, generally been understood that certain aboriginal people other than status Indians, including the group usually identified as non-status Indians, are covered by the section 91(24) meaning of "Indians".
>
> Non-status people consequently participate in the constitutional talks with other aboriginal groups.[83]

CR-011125, Ex. P165 - Government of Canada, "Working Group 3 - Land and Resources", February 20, 1984: The federal position at the First Minister's Conference is that "some Métis are s.91(24) Indians". This document is an attachment to CR-011120, March 12, 1984 letter from Doug Kane, A/Director Intergovernmental Affairs, Corporate Policy, INAC, to IGA Regional Managers.

CR-008761, Ex. P126 - "Background to the 1985 First Minister Conference on the Constitution" prepared by Constitutional Affairs Directorate, DIAND, December 1984 - p. 73: "The majority of legal opinion, however, affirms that most of the Métis are included in the meaning of the term "Indian" under section 91(24)". See p. 154: "Section 91(24) establishes the preeminence of the federal government regarding 'Indians and lands reserved for the Indians'…. Indians, in this context, includes status and non-status Indians." Page 156 states that 105,000 non-status Indians have status under s.91(24).

CR-011376, Ex. P197 - Letter from Minister Crombie to the Editor of Policy Options, December 23, 1985: "It has, however, generally been understood that certain aboriginal people other than status Indians, including the group usually identified as non-status, are covered by the section 91(24) meaning of 'Indian'".

CR-009140, Ex. P131 - "Information memorandum for the Right Honourable Joe Clark", re April 28, 1992 meeting with Ron George, President of the NCC, p.2: "At present, the federal government has legislative authority for non-status Indians but does not exercise responsibility for this group."

[82] *Policy Options* is the Journal of the Institute for Research on Public Policy, a leading independent Canadian think tank.

[83] The Honourable David Crombie, Minister for Indian Affairs and Northern Development, "Letter:

The letter says that "the federal government is aware of this concern [the difficult legal and socio-economic situation of the non status Indian population]".

77. Minister Crombie's letter was written on Ministerial letterhead which identifies him as the Minister of Indian Affairs.[84] The conventions of Cabinet's collective responsibility imply that Mr. Crombie was expressing views consistent with government policy.[85]

78. This Court ordered the Defendant to make various inquiries for evidence that Mr. Crombie was expressing views inconsistent with Government policy. This Court also ordered the Defendant to make various inquires that any relevant official in INAC, central agencies or the Prime Minister's Office objected that Minister Crombie's letter misstated the true constitutional position. The Defendant was unable to produce any such evidence.[86]

79. The Defendant developed strategies and positioning for the Aboriginal constitutional conferences held on March 15-16 1983, March 8-9 1984, April 2-3 1985, and March 26-7 1987 as required by parts IV and IV.1 of the *Constitution Act, 1982*. The Defendant's internal deliberations and positioning were based on the understanding, set out in the above documents, that the federal government

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As Equal as Others" (1985), 7 *Policy Options* 27. See CR-011376, p.2, Ex. P197.

[84] CR-011376, Ex. P197 - The Honourable David Crombie, Minister for Indian Affairs and Northern Development, Letter to the Editor of *Policy Options*, 23 December 1985.

[85] Hogg, *Constitutional Law of Canada*, (5th 2007), I, p. 280.

[86] Court Order of Prothonotary Tabib, Aug. 5, 2009; Defendant's Answers, March 12, 2010. By the Defendant's answer to UT #52 of March 12, 2010 The Defendant admitted that the Prime Minister is charged with preventing Cabinet Ministers from making errant statements, and that no documents were found relating to Mr. Crombie's statement.

could occupy the field in relation to all Indians regardless of status under the *Indian Act* and that it arguably could do so for the Métis.[87]

80. A typical statement from these deliberations is:

> The majority of legal opinion, however, affirms that most of the Métis are included in the meaning of the term "Indian" under section 91(24) … Indians, in [section 91(24)], includes status and non-status Indians.[88]

(4) Canada's '*Legal Opinion*'

81. Ian Cowie testified that "the federal government interpretation of its authority under s. 91(24)", that "the federal government does possess the power to legislate theoretically in all domains with respect to Métis and non-status

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[87] Evidence of Ian Cowie, Transcript, vol. 4, May 5, p. 462.

CR-011125, Ex. P165 - Government of Canada, "Working Group 3 - Land and Resources", February 20, 1984: The federal position adopted in the working group at the First Minister's Conference is that "some Métis are s.91(24) Indians".

CR-008795, Ex. P127- "Responsibility for Aboriginal Peoples: Section 91(24) of the Constitution Act 1867", Secret Federal government document, November 7, 1984, p.12: The legal analysis of section 91(24) suggests "that federal jurisdiction may extend beyond status Indians and Inuit, to include a significantly larger number of people, primarily Métis and non-status Indians."

CR-008761, Ex. P126 - "Background to the 1985 First Minister Conference on the Constitution" prepared by Constitutional Affairs Directorate, DIAND, December 1984 - p. 73: "The majority of legal opinion, however, affirms that most of the Métis are included in the meaning of the term "Indian" under section 91(24)". See p. 154: "Section 91(24) establishes the preeminence of the federal government regarding 'Indians and lands reserved for the Indians'…. Indians, in this context, includes status and non-status Indians." Page 156 states that 105,000 non-status Indians have status under s.91(24).

CR-006643, pp. 34-5, Ex. P35 discussed above: "Constitutional Conference on Native Rights", March 1983, seems to have been sent by Ian Cowie, Director General of Corporate Policy at INAC (see CR-006642, Ex. P56) p.6-7: "The federal government has the authority under ss. 91(24) of the Constitution Act, 1867 to legislate in relation to Indians, Inuit and probably many Métis."

[88] CR-008761, Ex. P126 - "Background to the 1985 First Minister Conference on the Constitution" prepared by Constitutional Affairs Directorate, DIAND, December 1984 - p. 73 and p.154.

Indians under section 91(24)" remained “the same and the language remained the same” from 1978 through 1983.[89]

82. A high level, secret federal document stamped between Jan 1 and Mar 31 1984 observed that “the Federal Government must be prepared to deliver an initially ‘hard’ message to the Métis to set the stage for necessary transition from historical claims and general rhetoric towards pragmatic consideration of means to achieve concrete progress.”[90]

83. A high level, secret federal document dated Nov 14, 1984 observed that “The Federal Government requires a strong position with which to respond to the pressure from the MNC, NCC and the provinces to accept financial responsibility for Métis.”[91]

84. At the Ministers Meeting of Dec. 17-18, 1984, Justice Minister John Crosbie stated: “The Federal Department of Justice has concluded -- has reached a legal opinion that Parliament cannot legislate for the Metis as a distinct people….On the other hand Parliament can legislate for Indians whether they are registered or not because of Section 91(24).”[92]

[89] Evidence of Ian Cowie, Transcript, vol. 4, May 5, p. 457-8.
[90] CR-005196, Ex. P167, p. 15.
[91] CR-011164, Ex. P147, p 4.
[92] CR-012159, Ex. P202, p. 1.

85. Harry Daniels, then Vice President of the Native Council of Canada, asked for confirmation that Mr. Crosbie had said that Canada's position was that Canada could "legislate for Indians whether they have status or not." Mr. Crosbie confirmed that such was Canada's position.[93]

86. Ian Cowie attended this meeting as Deputy Minister for Saskatchewan and heard Crosbie's statement. Cowie testified that he never positioned the federal government that way until the end of 1983 when he left federal service, nor did he ever see the issue positioned that way in any federal document.[94]

87. On Jan. 29, 1985 Harry Daniels wrote to Minister Crosbie to "request by return mail a copy of the 'Justice opinion' you have referred to."[95]

88. On March 15, 1985 Minister Crosbie refused to produce the Justice opinion.[96]

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[93] CR-012159, Ex. P202, pp. 1,3, is an official transcript of Mr. Crosbie's remarks. The confirmation occurs at p. 3. The conclusion about non status Indians coming within s. 91:24 was buttressed by a census count of the non status Indians in 1981. This estimated the number of non status Indians at 105,000, and noted specifically that the 105,000 non status Indians had "status under *Constitution Act, 1867*, s. 91:24": Ex. P126, CR-008761, p. 158,: "Status under 91:24 - Yes".

[94] Evidence of Ian Cowie, Transcript, vol. 4, May 5, p. 550-1.

[95] CA-000198, Ex. P24, p. 2.

[96] CA-000199, Ex. P25.

89. On March 15, 1985, Minister Crosbie proposed to CAP's President a meeting between Justice Officials and CAP Officials to "explain and discuss the basis for their views on the question of Parliament's jurisdiction."[97]

90. Despite CAP's agreement to and requests for such a meeting, Canada never participated in any such meeting.[98]

91. The Court admitted into evidence on consent a comprehensive 33 page document, dated July 22, 1985, which addressed "considerations relevant to NCC's preparations for the forthcoming meetings with Crosbie, Crombie and the PM". This document observed:

> the Justice opinion on S. 91(24) was drafted over a weekend by a Justice lawyer who intended to provide an in-house options paper to counter two previous papers, one from Justice and one from OACA [Office of Aboriginal and Constitutional Affairs] both of which stated that MNSI were under s. 91(24). As much to his surprise as to others, the paper was suddenly turned into a 'Justice opinion' by OACA and by Crosbie. In other words, the Feds are very weak on this issue and they know it.[99]

92. The Defendants tendered no evidence to contradict matters related in the preceding paragraph.

Charlottetown Constitutional Process

93. The issue whether Métis are embraced by s. 91(24) continued to be discussed during the Charlottetown Process of the 1990s.

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[97] CR-012160, Ex. P423, p. 2.
[98] Examination of Dwight Dorey, *Transcript*, May 3, vol. 2, p. 228-9.
[99] CA-000994, Ex. P195, p. 1, 14.

94. During the Charlottetown Accord process Canada agreed that s. 91(24) included all Aboriginal people. Canada agreed to propose a constitutional amendment to clarify the issue.[100]

95. The agreement was implemented by the *Charlottetown Accord*. Para. 54 of the *Consensus Report on the Constitution* provided*:*

> For greater certainty, a new provision should be added to the Constitution Act, 1867 to ensure that Section 91(24) applies to Aboriginal peoples.
>
> The new provision would not result in a reduction of existing expenditures by governments on Indians and Inuit or alter the fiduciary and treaty obligations of the federal government for Aboriginal peoples. This would be reflected in a political accord.[101]

The draft legal text of Canada's proposed amendment read:

> 91A. For greater certainty, class 24 of section 91 applies, except as provided in section 95E, in relation to all the Aboriginal peoples of Canada.[102]

Canada's proposed amendment, in its own terms, was "for greater certainty". It did not add to or alter the meaning of s. 91(24).

96. The *Charlottetown Accord* process was a critical moment in the history of s. 91(24). For the first time since 1867 Canada formally proposed a constitutional amendment to s. 91(24). Canada also distributed its proposal, along with the draft legal text, to each household in Canada.

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[100] CR-012241, Ex. P155, is a document that addresses options for clarifying roles and responsibilities. It sets out some of the impacts expected from Federal assumption of responsibility for all Aboriginal people at pp. 4-6.
[101] Exhibit D-45 (Consensus Report on the Constitution 1992).
[102] http://www.solon.org/Constitutions/Canada/English/Proposals/CharlottetownLegalDraft.html, s. 91A.

97. The debate on the Charlottetown Accord was long and intense. As the Chief proponent of the Accord, Canada defended it publicly.

98. The Minister of Constitutional Affairs, the Rt. Hon Joe Clark, was Canada's senior responsible official in the constitutional renewal process. Minister Clark defended approval of the *Charlottetown Accord* as critical to Canada's survival as an intact juridical entity.[103]

99. In this charged context, the Secretary to the Cabinet for Federal Provincial relations gave Minister Clark a memo setting out Canada's conclusions about jurisdiction relating to Non Status Indians. This memo was copied to the most senior bureaucratic official in the Government, the Clerk of the Privy Council.[104] The memo stated:

> At present the federal government has legislative authority for non-status Indians but does not exercise responsibility for this group.[105]

(5) Defendants' External Communications: Contradictions With Internal Documents

100. Canada's public position is that MNSI are not "Indians" under section 91(24).[106]

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[103] Rt. Hon. Joe Clark, "The Heart of the Question," in K. Sutherland, *Points of View No. 3: Referendum Round Table: Perspectives on the Charlottetown Accord* (Centre for Constitutional Studies, 1992), p 3 at 4: "I believe if we reject this agreement, this country will begin to crumble. The only question would be whether that would happen slowly, with a whimper, or more quickly, with a bang." Online at http://www.law.ualberta.ca/centres/ccs/uploads/PointsofViewNo3.pdf.
[104] CR-009140, Ex. P131 - "Information memorandum for the Right Honourable Joe Clark", re April 28, 1992 meeting with Ron George, President of the NCC, p.2.
[105] CR-009140, Ex. P131; CR-012227, Ex. P203 - "Information memorandum for the Right Honourable Joe Clark", re April 28, 1992 meeting with Ron George, President of the NCC, p.2.
[106] CR-012159, Ex. P202, pp. 1.

101. Canada's public position is the position that Canada has taken in this lawsuit. [107]

102. Canada's public position contradicts the internal conclusion Canada reached, which is set out in the internal documents discussed in the preceding sections.

103. Canadian officials, including the Prime Minister and other Ministers of the Crown, were supplied with stock pronouncements to communicate Canada's public position outside the federal government, including messages to communicate to the plaintiff as a representative of MNSI.[108]

CR-012639, Ex. P205, Ministers' Meeting on Aboriginal Constitutional Issues, June 12, 1986, pp. 86-94 (summation); clear statement of Federal position Canada not responsible for MNSI, with provincial and Aboriginal rejoinders.

CR-012640, Ex. P206, During the Ministers' Meeting on Aboriginal Constitutional Issues, Oct. 15, 1986, pp. 132 (summation). Canada's representative was asked whether "the s. 91(24) responsibility extends to the off reserve status and the non-status Indians." Canada's representative answered: "…the legal opinion is there is a non-status Indian. I think in terms of policy we feel it is a shared responsibility between the federal and the provincial…" Canada was then asked: "Is that a no or a yes?" Canada replied: "It's a qualified maybe."

CR-008846 (CR-012192), Ex. P207 - Letter from Prime Minister Brian Mulroney to Smokey Bruyere, President of the Native Council of Canada, 22 January 1986: "The federal government's view is that the Métis, as a distinct people, are not Indians within the meaning of s. 91(24) of the *Constitution Act, 1867* and therefore the provinces have to assume their fundamental role with respect to Métis people".

[107] In response to CAP's Interrogatory No. 1, Canada confirmed its position that Métis and non-status Indians are not "Indians" within the meaning of s.91(24).

[108] CR-011371, Ex. P137 - Briefing note from Bruce Rawson, Deputy Minister of INAC to David Crombie, Minister of INAC, November 22, 1985, re: meeting with the NCC. See p.2, the Minister is instructed that "[a]lthough the *Constitution Act 1982* (s.91-24) defines Indians and Inuit as a federal responsibility, Métis and non-status Indians (MNSI) are not included in that definition. Instead, it is the federal position that MNSI are the responsibility of the provinces, partly as a result of their having signed the *Constitution Act, 1982*".

CR-011754, Ex. P136 - Indian and Northern Affairs Canada Briefing Card, May 15, 1991: In

104. The Federal Government recognized that Métis and Non-Status Indians had Aboriginal needs like other Indians.[109] Because Canada was, and is, involved in a political dispute with the provinces over which level of government will provide services to MNSI, the Federal government faced a dilemma:

> The difficulties lie in how to recommend federal assistance for MNSI without jeopardizing the special relationship between DIAND and Status

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response to the question "What is the current situation regarding the federal decision to end payments for social services to Indians off-reserve", the suggested reply is "the federal position is that provinces are responsible for social services to all residents off-reserve and that DIAND accepts responsibility for funding services on reserve".

DIAND proposed a rights-based land claims process for the Dene Métis in 1996. The Privy Council Office wrote to DIAND expressing concern that this process may be interpreted as acknowledging Métis Aboriginal rights, and that acknowledging these rights would be inconsistent with the position taken by the federal government in litigation. See CR-009241, p.1-2, Ex. P157: "Our fundamental concern lies in the proposal by DIAND to enter into a comprehensive claim policy to participate in such a process. Deriving from this concern are legal, policy, and strategic considerations… It is our view that pursuit of a rights based process that may be interpreted as an acknowledgement of Métis Aboriginal rights, that may result in the creation of constitutionally protected rights related to land and resources, or is premised on the assumption of an outstanding federal obligation would be inconsistent with the federal position in current litigation".

Memo dated Dec. 24, 1997, CR-004894, Ex. P118, from Ken Medd to Mary Quinn about signing the 1997 version of the CAP Political Accord. Medd cautions against signing in a hurry because the draft covers topics such as "treaties, land claims, redirection of federal expenditures, Aboriginal housing and infrastructure requirements, lands and resource bases" etc. and there is a danger of "legitimizing" the idea that the department should be discussing these items with CAP and its constituency.

[109] CR-011016, Ex. P37 - Memorandum to Cabinet re "Aboriginal Peoples and the Constitution of Canada" (January 1983), sent by Ian B. Cowie, Director General of Corporate Policy, INAC, to the Deputy Minister and others, page 39. "It is Indian programs and Indian people who bear the brunt of federal-provincial financing disputes, since a common result is that the services or enriched services are simply not provided."

CR-006632, Ex. P121 - "Service Delivery and Financial Provisions", secret document prepared in the lead up to the 1983 First Minister's Conference, February 1983, p.4: "Métis and non-status Indians, although frequently subject to living conditions similar to those faced by status Indians, basically have access only to provincial and federal programs of general application."

The federal government has even suggested that living conditions for Métis are worse then those faced by status Indians. See CR-006635, Ex. P122 - "Briefing for meeting with the Prime Minister on Aboriginal peoples and the Constitution", notes for Austin, Lalonde, Munro, and MacGuigan, December 12, 1982, p.3-4: "Most natives in Canada live in conditions of Third World poverty … and in the case of Métis who identify in life-style with their Indian ancestry [conditions are] probably more abject."

> Indians and Inuit without appearing to imply special status or federal responsibilities for Métis and Non-Status Indians.[110]

105. In response to this dilemma, a secret federal government document stated that:

> The federal government must now develop a strategy for management of this jurisdiction/responsibility debate both inside and outside of the constitutional forum.[111]

106. Members of Cabinet were briefed that when they spoke publicly, the federal position is that federal jurisdiction extends only to status Indians and Inuit:

> Although the *Constitution Act, 1982* (ss.91-24) defines Indians and Inuit as a federal responsibility, Métis and non-status Indians (MNSI) are not included in that definition. Instead, it is the federal position that MNSI are the responsibility of the provinces.[112]

107. Members of Cabinet and Canadian officials were cautioned about the Defendant's public position when meeting with the plaintiff and MNC.[113]

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[110] CR-010647, Ex. P133 - Author unknown, Briefing Notes on Métis and Non-Status Indians, 1980, p. 7.

[111] CR-008795, Ex. P127 - "Responsibility for Aboriginal Peoples: Section 91(24) of the Constitution Act 1867", Secret Federal government document, November 7, 1984, p.2.

[112] CR-011371, Ex. P137 - Briefing note from Bruce Rawson, Deputy Minister of INAC to David Crombie, Minister of INAC, November 22, 1985, re: meeting with the NCC, p.2.

[113] CR-0011371, Ex. P137 - Briefing note from Bruce Rawson, Deputy Minister of INAC to David Crombie, Minister of INAC, November 22, 1985, re: meeting with the NCC, p.2.

CR-009018, Ex. P130 - Briefing notes for a meeting between the NCC and federal officials, date unknown. On p.2 officials are advised that the federal government takes no special responsibility for Métis and non-status Indians: "The message constantly communicated to the NCC was that while the Minister of Justice would continue to play a lead role on certain issues affecting its membership, (self-government issues and constitutional issues, for example), and continue to act as interlocutor, the establishment of a special structure or responsibility centre is not contemplated."

CR-009277, Ex. P132 - Confidential Discussion Paper, Federal Government - Native Council of Canada Consultative Process, date unknown, p.16: "The federal Government does not recognize native status except within the meaning of the British North America Act, the Indian Act, and the 1939 Supreme Court decision *Re: Eskimos*. The Provinces are held to have primary responsibility for all other native groups.

CR-009140, Ex. P131 - "Information memorandum for the Right Honourable Joe Clark", re April

B. Reasons for Canada's Public Position

108. The provinces[114] assert that Canada has jurisdiction and responsibility for MNSI programming, and that Canada alone should pay for services to MNSI.[115]

> Provinces generally consider Aboriginal people (on or off reserve) to be the responsibility of the Federal Government; reluctant to extend provincial programs and services without federal compensation for same.[116]

28, 1992 meeting with Ron George, President of the NCC. The memo states that "[a]t present, the federal government has legislative authority for non-status Indians but does not exercise responsibility for this group." This admission of jurisdiction appears in brackets, instructing Joe Clark not to make this admission public.

[114] With the exception of Alberta. See CR-006645, Ex. P426, "Aboriginal Constitutional Affairs", Interim briefing on factors involved in the upcoming 1985 and 1987 First Minister's Conferences, February 1, 1983, p.1: "With the exception of Alberta, provinces take the position that the Métis are a federal responsibility. The federal government has not shared this view."

[115] CR-008231, Ex. P33 - Arthur Kroeger, Memorandum for a Meeting between the Minister and MNSI groups, September 7, 1979, p.3. The Deputy Minister advises the Prime Minister that "all provincial governments … had, and continue to have, difficulty with the concept of programs aimed specifically and exclusively at the MNSI as an ethnic group." The provinces' reticence is due to concerns over the endorsement of special status for people of Indian Ancestry; budgetary constraints; a desire to reduce expenditures; and the large size of the group.

CR-010716, Ex. P32 - "Natives and the Constitution" Background and Discussion Paper, Intergovernmental Affairs, Corporate Policy, DIAND, August 1980, page 55-56: the provincial position is "that Section 91(24) of the BNA Act imposes total financial responsibility on the federal government for Indian people which it has derogated on an increasing basis, particularly in the off-reserve context."

CR-011016, Ex. P37 - Memorandum to Cabinet re "Aboriginal Peoples and the Constitution of Canada" (January 1983), sent by Ian B. Cowie, Director General of Corporate Policy, INAC, to the Deputy Minister, page 39-40: "With respect to program funding for Indians, provinces frequently take the position that federal <u>legislative</u> responsibility translates into federal <u>financial</u> responsibility for Indians … The dispute is a political one. Financial resources are constrained. The funding needs of aboriginal peoples are high in proportion to their numbers. In some instances the political appeal of increased expenditures for native peoples may be low, particularly at the provincial level."

CR-008390, Ex. P38 - "Agenda Head #2 - Social Aspects of Service Delivery", confidential DIAND document, p.50: "The provinces in reply cite section 91(24) of the B.N.A. Act to argue that Indians (and the financing of services to them, wherever they may live) is an exclusively federal responsibility."

[116] CR-012270, p. 11 (Summation), Ex. P162, Federal-Provincial Aboriginal Issues Working Group (1997); CR-012176, Ex. P144, is an analysis for Cabinet of RCAP's recommendations about Métis. P. 1 sets out the problem, and the reason for the resulting immobility, as follows: "Canada maintains that Métis as a distinct group are not 'Indians' under s. 91(24) and that it cannot legislate for them as such…The provinces assert that Métis are covered by s. 91(24) and, thus, primarily Canada's responsibility."

Canada considers the cost of providing services too high.[117] Canada's policy objective is that the provinces should deliver and share the cost of providing services to MNSI.[118]

109. The roots of this dispute go back many decades. In 1934, during the depression, representatives of the Alberta and Federal Governments exchanged correspondence in which each asserted that the other was responsible for the needs of "half-breeds". The Defendant's Indian Affairs Minister wrote to Alberta's Agriculture and Public Health Minister on October 10, 1934 that "half-breeds are not the responsibility of the Dominion Government and… the problem for relief of half-breed settlers is a matter for the consideration of the municipality or the Province concerned".[119] Alberta's Commissioner of Relief and Public Works complained to the Dominion Commissioner of Unemployment Relief in 1936 that Alberta should not be responsible for indigent "Halfbreeds living on Indian Reserves".[120] In 1939, Saskatchewan's Legislature Assembly resolved that the Government of Saskatchewan should continue efforts "to secure the aid of the Federal Government" in dealing with "the Métis problem" as "part and parcel of the Indian problem".[121]

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[117] CR-012193, Ex. P135 (May 16, 1989).
[118] CR-008390, Ex. P38 - "Agenda Head #2 - Social Aspects of Service Delivery", confidential DIAND document, p.61, describes cost-sharing arrangements as the "maximum position" the federal government could take with respect to the services dispute. See also p.50-51, where the federal government proposed cost sharing arrangements in 1965, 1972, and in tripartite negotiations in the late 1970s.
[119] CR-002501, Ex. P208.
[120] Letter dated June 12, 1936, CR-002520, Ex. P209; see also CR-002522, Ex. P210.
[121] Resolution of Saskatchewan Legislature dated April 17, 1939, CR-002528, Ex. P211.

110. In the 1970s, Canada's dispute with the Provinces over which should pay for services intensified, as Indians increasingly moved off reserve into the cities, particularly in the Prairie Provinces.

111. The focus of the dispute was whether off reserve Indians could access Provincial services of general application, and where accessed - which level of government should pay.[122]

112. To manage its dispute with the provinces about which level of government is responsible to provide and pay for services to MNSI Canada took the position, publicly, that it lacked jurisdiction over MNSI, and that, accordingly, the provinces are responsible to provide MNSI with government services.[123]

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[122] Evidence of Ian Cowie, Transcript, vol. 4, May 5, p. 500; Cr-006643, Ex. P35.

[123] CR-005872, Ex. P119 - Letter from federal government to "All Provincial Premiers and Ministers Responsible for Native Affairs", April 10, 1978: "Cabinet is of the view as well that the grave economic and social conditions in which large numbers of these native people continue to live, indicate an urgent need to ensure that, where circumstances permit, Federal programs be brought to bear more effectively on the problems that exist. These people are among the poorest of any group in Canada and the Federal government believes that their deprived circumstances warrant more attention than has been given to date by any level of government … To get a process of review underway, we intend to review existing Federal programs in order to determine their applicability to the needs of MNSI groups. In taking this step, the Government will bear in mind that many of those needs can only be met through programs and services which fall within provincial jurisdiction."

CR-006632, Ex. P121 - "Service Delivery and Financial Provisions", secret document prepared in the lead up to the 1983 First Minister's Conference, February 1983, p.11: "The federal government sees the provision of government services to Métis and non-status Indians as a provincial responsibility and in large part provinces accept responsibility as they do for other citizens."

CR-008390, Ex. P38 - "Agenda Head #2 - Social Aspects of Service Delivery", confidential DIAND document, p.50: "The consistently held federal view is that Indians off-reserve are provincial citizens, and entitled to whatever programs of general application each province may provide."

CR-005898, Ex. P120 - "Comment on Brief No. 2 (Natives)", federal government briefing note, p.3: "Ministers might wish to reiterate the provincial responsibility for the social and economic

113. Canada also substantially limited its programming to status Indians living on reserve, as a matter of policy.

> The federal government has chosen to exercise the authority assigned to it under the *BNA Act* narrowly, through the provisions of the *Indian Act*. It has further chosen, as a matter of policy, to limit its responsibility for the provision of direct services to status Indians, under the *Indian Act*, essentially to services provided on reserve. It has taken the position that off-reserve status Indians can legitimately look to the provincial governments for services available to all residents of the province without discrimination.[124]

114. Summarizing provincial attitudes in 1979, DIAND's Tripartite Branch characterized the situation as follows:

> Provincial willingness to deliver services has been markedly different from one province to another, but is generally characterized by reluctance to extend services to Indian people unless special cost-sharing arrangements are entered into.[125]

115. The provinces are reluctant to provide services to Aboriginal people because they "see Indian people as a very high cost group in most program areas, particularly in the social assistance and social services areas,"[126] and also because the provinces believe that s. 91(24) confers on the federal government a

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development of Métis and non-status Indians."

[124] CR-010716, Ex. P32 - "Natives and the Constitution" Background and Discussion Paper, Intergovernmental Affairs, Corporate Policy, DIAND, August 1980, page 51 (55 in Summation). See also page 42 (46 in Summation): "Although the provisions of the Indian Act do not differentiate between status Indian people living on and off reserves, the federal government has elected to exercise its authority rather narrowly, and to generally limit its responsibility (for the provision of services) to status Indians living on reserves." and p.44 (48 in Summation): "The federal government has chosen to exercise the authority assigned to it under the BNA Act very narrowly (by its definition of Indian in the Indian Act and policy decisions to provide only very limited direct services to off-reserve Indians). This has created a point of considerable contention".

[125] CR-008148, Ex. P125 - "Status Indians and the Constitution - Issues relating to federal-provincial responsibilities for the provision of services to status Indians", DIAND, Tripartite Branch, February 20, 1979, p.3.

[126] CR-008148, Ex. P125 - "Status Indians and the Constitution - Issues relating to federal-provincial responsibilities for the provision of services to status Indians", DIAND, Tripartite Branch, February 20, 1979, p.3.

political and financial responsibility for MNSI.

> The political responsibility is seen as the responsibility to act as a 'sponsor' for the needs and aspirations of aboriginal peoples, to ensure that aboriginal issues receive special consideration in the overall framework of government planning. Financial responsibility, simply put, means that, in their view, the federal government is to be primarily responsible for the provision of financial resources necessary to meet both the everyday needs of the aboriginal peoples, such as programs and services, as well as the political, economic and cultural aspirations of those peoples. [127]

Interestingly, the provinces' position is consistent with Canada's internal position - that Canada has jurisdiction over MNSI by s. 91(24).

116. Canada's dispute with the provinces concerns an unwillingness of either the Federal or provincial governments to pay for services that both agree need to be programmed to MNSI:[128]

> Perhaps more than any other single factor, it is the question of the magnitude of the costs involved that has impeded any resolution of the jurisdictional question in the context of individual provincial discussions.[129]
>
> For the provincial and the Federal Governments, it comes down to who is going to pay for the programs.[130]

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[127] CR-008795, Ex. P127 - "Responsibility for Aboriginal Peoples: Section 91(24) of the Constitution Act 1867", Secret Federal government document, November 7, 1984, p.3-4: "the provinces and the aboriginal peoples adopt the political view that inclusion under s. 91(24) confers on the federal government, aside from a legislative power and responsibility, both a political and a financial responsibility….Financial responsibility, simply put, means that, in their [the provinces'] view, the federal government is to be primarily responsible for the provision of the financial resources to meet both the everyday needs of the aboriginal peoples, such as programs and services, as well as the political, economic and cultural aspirations of those peoples."

[128] CR-008005, Ex. P124 - Gérard Pelletier, Secretary of State, Confidential Memorandum to Cabinet, "Métis and Non-Status Indians - Research Proposals", July 6, 1972, p. 5 (6 in Summation): "The Métis and non-status Indian people, lacking even the protection of the Department of Indian Affairs and Northern Development, are far more exposed to discrimination and other social disabilities. It is true to say that in the absence of Federal initiative in this field they are the most disadvantaged of all Canadian citizens."

[129] CR-010716, Ex. P32 - "Natives and the Constitution" Background and Discussion Paper, Intergovernmental Affairs, Corporate Policy, DIAND, August 1980, page 50. See also p. 47: "At present, it is clear that the interpretation of the word 'Indian' in the BNA Act is broad enough to encompass Inuit, non-status and a good number of Métis, as well as Status Indians. The apparent anomalies, inconsistencies and discriminatory provisions flow more from difficulties associated with the present enabling legislation (Indian Act) definitions of 'Indian'".

117. Ian Cowie explained that Canada believed it had full jurisdiction to program services to MNSI if it so chose, but that as a matter of policy, essentially for financial reasons, Canada chose not to program services to MNSI.[131]

118. The dispute between Canada and the provinces occurs at a second level, producing an issue which is not raised in this law suit - whether s. 91(24) jurisdiction over Aboriginal peoples is discretionary, or carries with it a requirement for the federal government to spend.[132]

> In simple terms, the problem is not really one of the existing constitutional allocation of responsibilities, but rather of the differing interpretation of the two levels of government with regard to the extent to which the allocation of constitutional legislative authority translates into a mandatory responsibility to provide and meet the full cost of providing all services to Indian people on- and off-reserve.[133]

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[130] CR-008389 (Jan 7, 1983), p. 1, Ex. P40.

[131] Evidence of Ian Cowie, Transcript, vol. 4, May 5, p. 526-7, 530-33.

[132] CR-010716, Ex. P32 - "Natives and the Constitution" Background and Discussion Paper, Intergovernmental Affairs, Corporate Policy, DIAND, August 1980, page 54: The provinces argue that "Section 91(24) imposes a financial obligation on the federal government", while the federal government argues that "section 91(24) is an enabling clause, and it is up to Parliament to decide if and how that power will be exercised."

[133] CR-010716, Ex. P32 - "Natives and the Constitution" Background and Discussion Paper, Intergovernmental Affairs, Corporate Policy, DIAND, August 1980, page 55 (59 in Summation).

CR-006643, Ex. P35 - "Constitutional Conference on Native Rights", prepared as part of the work up for the 1983 First Minister's Conference, sent by Ian Cowie, Director General of Corporate Policy at INAC (see CR-006642, Ex. P56), p.29: Section 91(24) would probably allow the federal government to legislate in relation not only to Indians and Inuit, but also to most Métis. In practice the government has legislated only in relation to Indians <u>on-reserve</u> and has accepted financial responsibility only for Indians on-reserve and Inuit. The main area of dispute is money, not legislative authority. [Emphasis in the original.]

CR-008389, Ex. P40 - "Services", January 7, 1983, confidential DIAND document: "…the jurisdictional arguments are by and large proxy arguments for the real issue of who is to pay."

See also CR-008390, Ex. P38 - "Agenda Head #2 - Social Aspects of Service Delivery", confidential DIAND document, p.58-59: "Resolution (or at least amelioration) of these problems does not appear to be impeded by the constitution as it stands. Rather, progress has been stalled fundamentally for two reasons: 1) Both levels of government have been reluctant to accept expanded financial responsibility for services whose costs are likely to grow quickly and unpredictably. The provinces have been particularly concerned to avoid allowing the federal government to save money as a result of any provincial initiatives to assist status Indians and other natives". See also p.60: "<u>Financing responsibility</u> - is the core source of conflict."

119. Although the dispute is based on responsibility for financing governmental services, "it must be stressed … that the services 'problem' exists because status Indians are generally poor and powerless."[134]

120. As noted in a secret document:

> Federal -provincial cooperation suffers as a result of the dispute and the losers are the Indians.[135]

C. The Federal / Provincial Dispute About Jurisdiction Harms MNSI

121. Canada's dispute with the provinces about jurisdiction has meant, practically, that Métis and Non-Status Indians "were historically ignored by both levels of government."[136] Canada's public denial of its jurisdictional authority has created a legislative vacuum in which the needs of MNSI have gone unmet.[137]

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[134] CR-008390, Ex. P38 - "Agenda Head #2 - Social Aspects of Service Delivery", confidential DIAND document, p.60.

[135] CR-006643, pp. 34-35 (Summation), Ex. P35.

[136] CR-008390, Ex. P38 - "Agenda Head #2 - Social Aspects of Service Delivery", confidential DIAND document, p.51. *Lovelace v. Ontario*, [2000] 1 S.C.R. 950 at para 70: The Supreme Court of Canada holds that the non-status appellants faced disadvantages such as "a chronic pattern of being ignored by both federal and provincial governments".

[137] CR-008795, Ex. P127 - "Responsibility for Aboriginal Peoples: Section 91(24) of the Constitution Act 1867", Secret Federal government document, November 7, 1984, p.3: "While Parliament is not compelled to act, however, it must be recalled that provinces are prevented from legislating with respect to Indians and lands reserved for Indians, so that inaction by Parliament would result in a complete lack of legislation making special provision for Indians and their lands." CR-12273, Ex. P163, recognizes that the Office of the Federal interlocutor must act so that "the needs of MNSI are met to the fullest possible extent" while "insuring that the position of the Federal Government is not compromised"; p. 4. The position of the Federal Government is that Federal jurisdiction ends at the reserve boundary.

122. The historical neglect of MNSI is reflected in the spending patterns of the federal and provincial governments. In 1982-1983, 78% of federal spending and 88% of provincial spending on Aboriginal people went to status Indians.[138]

123. Status Indians have access to distinct federal programming and services which are designed to meet their specific needs as Aboriginal people. Métis and Non-Status Indians have needs similar to those of status Indians.[139] Ian Cowie explained:

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[138] CR-006635, Ex. P122 - "Briefing for meeting with the Prime Minister on Aboriginal peoples and the Constitution", notes for Austin, Lalonde, Munro, and MacGuigan, December 12, 1982, p.4.

[139] CR-010994, Ex. P146 - Secret MSSD document (Ministry of State for Social Development), "Defining Métis and Non-Status Indians", 14 December 1982, p.2: There is a core population of Métis and non-status Indians "with many of the same demographic and socio-economic characteristics as status Indians." CR-011376 - The Honourable David Crombie, Minister for Indian Affairs and Northern Development, Letter to the Editor of *Policy Options*, 23 December 1985, p.2: "There are many other people of Indian ancestry who are generally considered as non-status Indians. In some cases, they are not covered by the amendments [i.e., Bill C-31] because their lack of status results from factors other than sexual discrimination in the Indian Act. For example, at the time of the first registration process some groups declined to be registered or were simply missed out. Many of today's non-status population descend from such people. The concerns of such people deserve attention, but dealing with such as issue goes beyond the specific purposes of Bill C-31."

CR-006632, Ex. P121 - "Service Delivery and Financial Provisions", secret document prepared in the lead up to the 1983 First Minister's Conference, February 1983, p.4: "Métis and non-status Indians, although frequently subject to living conditions similar to those faced by status Indians, basically have access only to provincial and federal programs of general application."

The federal government has even suggested that living conditions for Métis are worse then those faced by status Indians. See CR-006635, Ex. P122 - "Briefing for meeting with the Prime Minister on Aboriginal peoples and the Constitution", notes for Austin, Lalonde, Munro, and MacGuigan, December 12, 1982, p.3-4: "Most natives in Canada live in conditions of Third World poverty … and in the case of Métis who identify in life-style with their Indian ancestry [conditions are] probably more abject."

CR-010647, Ex. P133 - Author unknown, Briefing Notes on Métis and Non-Status Indians, 1980, p. 4. In March 1978, a joint committee of Ministers and the Native Council of Canada met to consider the socio-economic development of MNSI. "It was recognized that a large proportion of MNSI people in Canada suffers severe depravation [sic] in social, economic and employment opportunities."

> Q. In your experience is there any difference in the level of need between the off-reserve status Indians and the Métis and non-status Indian?
> A. There will be a small variance, but in essence the need is the same across groups.[140]

124. Because the federal government limits the exercise of its jurisdiction to status Indians, MNSI are excluded from these programs.[141] The provinces have few programs designed specifically for the needs of Métis and Non-Status Indians.[142] Programs of general application "have been unresponsive to the particular needs of Indian people".[143]

125. The specific programming and services which are available to status Indians but not to MNSI are:[144]

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[140] Evidence of Ian Cowie, Transcript, vol. 4, May 5, p. 530.

[141] CA-000904, Ex. P55 - Briefing notes for the federal chairperson Working Committee on Aboriginal peoples and the Constitution - Social Issues, DIAND Corporate Policy File A-1025-4/C2, vol. 1 (February 1/79 to April 30/80), p.46.

CR-010615, Ex. P36 - Ian Cowie, Coordinator/Chief Advisor, Tripartite Branch, DIAND, September 5, 1979, p.3: "In general terms, the Federal Government does possess the power to legislate theoretically in all domains in respect of Métis and Non-Status Indians under Section 91(24) of the BNA Act. To date, the federal government has chosen to exercise its power under this head of the BNA Act essentially in respect of status Indians as defined in the present Indian Act, and Inuit. Given this limited occupation of the field, responsibility as between the federal and provincial governments for the Métis/non-status is similar in most respects to the division of responsibility for the non-native population."

CR-008231, Ex. P33 - Arthur Kroeger, Memorandum for a Meeting between the Minister and MNSI groups, September 7, 1979, p.2: "… the Federal Government's accepted responsibility for MNSI is the same as for non-native lower income Canadians. Thus, there is no single Federal agency responsible for developing and administering programs to assist MNSI with socio-economic development".

[142] CR-006643, Ex. P35 - "Constitutional Conference on Native Rights", March 1983, sent by Ian Cowie, Director General of Corporate Policy at INAC (see CR-006642, Ex. P56) p.7: "Provinces accept Métis as ordinary provincial residents but have few special programs for them."

[143] CA-000697, Ex. P98 - "Draft position paper" by "officials of DIAND", on Indian Act revisions and education, undated, but circa September 1977, p.3-4.

[144] See generally, CR-012237, p. 12 of 30, Ex. P170, for a description of Federal Programs for Registered Indians., CR-012268, Ex. P171 (p 7 of 26 summation) states eligibility as registration as an Indian, and provides an updated list to 1996, CR-012271, Ex. P172, is the 1999 version.

- Health Services: Health and Welfare Canada funds community health services, environmental health and surveillance programs, and the National Native Alcohol and Drug Abuse Program.[145]
- Non-Insured Health Benefits (NIHB): Health and Welfare Canada covers the cost of provincial health insurance, user fees, prescription drugs, eyeglasses, dental care, medical supplies and equipment, assistive and prosthetic devices, and transportation costs to medical centers.[146]
- Post-Secondary Student Support: Covers the cost of tuition and registration fees, tutorial assistance, educational and counselling services, professional certification and examination, books, supplies, travel and living expenses, child care expenses, grants for Master's and Doctoral programs.[147]
- Educational Services: DIAND funds a university and college preparation program for status Indians, and the design and delivery of post-secondary education through regional and status Indian institutions. DIAND also funds special programs "to meet the needs of Indian students and their communities", such as teacher training, pre-law courses, and social work education.[148]
- The Canadian Aboriginal Economic Development Strategy (CAEDS): Provides funding for community economic development strategies, business development projects, job training, skills development, and employment programs.[149]
- Justice Services: DIAND funds the Band Constable Program, and the RCMP funds the Special Constable Program. These programs are intended to improve the quality of law enforcement and involve status Indian communities in their policing needs.[150]

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[145] CR-009025, Ex. P168 - T.K. Gussman Associates Inc., "Information about Government Programs and Statistics", report submitted to the Evaluation Directorate, DIAND, May 1990, p.30; CR-012199, Ex. P169 - Indian and Northern Affairs Canada, "You Wanted to Know: Programs and Services for Registered Indians," March 1996 (page 15 of 32 in Summation) .

[146] CR-009025, Ex. P168 - T.K. Gussman Associates Inc., "Information about Government Programs and Statistics", report submitted to the Evaluation Directorate, DIAND, May 1990, p.30; CR-012199, Ex. P169 - Indian and Northern Affairs Canada, "You Wanted to Know: Programs and Services for Registered Indians," March 1996 (page 22 of 32 in Summation) .
CR-011741, Ex. P138 - "Identification and Registration of Aboriginal Peoples", DIAND, Indian Registration and Band Lists Directorate, Marion Amos, 1991, p.21 (32 in Summation).

[147] CR-009025, Ex. P168 - T.K. Gussman Associates Inc., "Information about Government Programs and Statistics", report submitted to the Evaluation Directorate, DIAND, May 1990, p.3; CR-012199, Ex. - Indian and Northern Affairs Canada, "You Wanted to Know: Programs and Services for Registered Indians," March 1996 (page 22 of 32 in Summation).

[148]CR-009025, Ex. P168 - T.K. Gussman Associates Inc., "Information about Government Programs and Statistics", report submitted to the Evaluation Directorate, DIAND, May 1990, p.37.

[149] CR-009025, Ex. P168 - T.K. Gussman Associates Inc., "Information about Government Programs and Statistics", report submitted to the Evaluation Directorate, DIAND, May 1990, p.46; CR-012199, Ex. P169 - Indian and Northern Affairs Canada, "You Wanted to Know: Programs and Services for Registered Indians," March 1996 (page 22 of 32 in Summation).

[150] CR-009025, Ex. P168 - T.K. Gussman Associates Inc., "Information about Government Programs and Statistics", report submitted to the Evaluation Directorate, DIAND, May 1990, p.49.

- Federal and Provincial Tax Exemptions: Personal property located on reserves, including income, is exempt from federal and provincial tax under s. 87 of the *Indian Act*. Generally, the Goods and Sales Tax (GST) and the Harmonized Sales Tax (HST) does not apply to goods and services purchased by status Indians on reserve, or goods purchased off-reserve but delivered to the reserve. Most provincial sales taxes operate similarly to the GST.[151]
- Housing: DIAND provides capital subsidies to assist with the construction of new housing and the renovation of existing housing. DIAND also funds project management, planning, training, and inspections.[152]
- Community Infrastructure: DIAND provides annual funds for "community facilities of appropriate quality and size to meet its governmental, recreational, cultural and social requirements".[153]
- Aboriginal-specific child and family services funded by DIAND.[154]
- Band funding: Bands receive core funding to cover their administrative costs, as well as funding for consultation on new initiatives and policies, Band employee benefits, management training and support, and Comprehensive Community Band Planning.[155]
- Funding for the 1979 *Indian Act* revision process.[156]
- The specific claims processes,[157] and only limited access to the

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[151] *Indian Act*, R.S.C. 1985, c. I-5, s. 87; Canada Revenue Agency, "Information for Status Indians", 23 March 2006, <http://www.cra-arc.gc.ca/aboriginals/status-e.html#Top>.

[152] CR-011741, Ex. P138 - "Identification and Registration of Aboriginal Peoples", DIAND, Indian Registration and Band Lists Directorate, Marion Amos, 1991, p.8 (19 in Summation); CR-012199, Ex. P169 - Indian and Northern Affairs Canada, "You Wanted to Know: Programs and Services for Registered Indians," March 1996 (pages 13 and 19 of 32 in Summation).

[153] CR-011741, Ex. P138 - "Identification and Registration of Aboriginal Peoples", DIAND, Indian Registration and Band Lists Directorate, Marion Amos, 1991, p.20 (31 in Summation).

[154] CR-009025, Ex. P168 - T.K. Gussman Associates Inc., "Information about Government Programs and Statistics", report submitted to the Evaluation Directorate, DIAND, May 1990, p.42. CR-008956, Ex. P425 - Minutes of May 19, 1989, meeting between the Federal-Provincial Relations Office, the Department of Justice, and the Métis National Council, p. 7.

[155] CR-008884, Ex. P129 - "Overview of Federal Services for Status Indians", 1987, p.13-14 and 16.

[156] CA-000788, Ex. P212 - Letter from J. Hugh Faulkner, to Harry Daniels, January 12, 1979, informing Mr. Daniels that the Treasury Board restricted funding for the Indian Act revision process to status Indian groups "status Indian groups represented by the NIB." Such restrictions were necessary in view of limited resources and the need to involve those groups directly affected by the Indian Act. But would welcome submissions from NCC or its PTOs re suggested amendments to the Act.

[157] Canada, Indian and Northern Affairs Canada, *Outstanding Business: A Native Claims Policy*, (Ottawa: INAC, 1982): In this policy statement, only "First Nations" can bring a specific claim. "First Nation" means an Indian Act Band, or a former band that has retained the right to bring a specific claim. This definition of First Nation was included in the *Specific Claims Resolution Act* [Not in Force] 2003, c.23, s.2; CR-012199, Ex. P169 - Indian and Northern Affairs Canada, "You Wanted to Know: Programs and Services for Registered Indians," March 1996 (page 16 of 32 in Summation).

In a Cabinet Memorandum in 1962, it was recommended that Métis be excluded from the proposed claims procedure (ultimately established in 1973) because they fell within provincial

comprehensive claims process.[158]
- Funding for negotiation of self-government agreements.[159]
- The use and benefit of lands in a reserve.
- the possession of reserve land allotted by the band councils.[160]

126. In addition, the cases make clear that refusal of registration to MNSI deprives them of intangible benefits which are:

- a sense of identity, cultural heritage, and belonging, and the ability to transmit these to offspring.[161]
- The imposition of a form of banishment from the Aboriginal community and the inability to participate with them in important cultural and traditional activities such as hunting, fishing and gathering.[162]

127. The Federal Government's position that MNSI are not s. 91(24) Indians has led to other negative consequences for MNSI. In *Lovelace v. Ontario*, the Supreme Court of Canada observed that MNSI communities "have experienced

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jurisdiction. John Leslie refers to this memo in "A Historical Survey of Government-Indian Relations, 1940-1970" (1993), CA-001098, Ex. P188.

CR-008956, Ex. P425 - Minutes of May 19, 1989, meeting between the Federal-Provincial Relations Office, the Department of Justice, and the Métis National Council, p. 2: Yvon Dumont, of the Manitoba Métis Federation stated that both federal and provincial governments would not negotiate on the Métis land claims, as "there was no basis for negotiation".

[158] CR-006143, Ex. P213; CR-006168, Ex. P214.

[159] CR-008884, Ex. P129 - "Overview of Federal Services for Status Indians", 1987, p.15; Canada, Indian Affairs and Northern Development, *Federal Policy Guide, Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Indian and Northern Affairs, 1995), <http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html>: "In negotiating new financial arrangements and cost-sharing agreements, the federal government maintains the position that it has primary but not exclusive responsibility for on-reserve Indians and the Inuit, while the provinces have primary but not exclusive responsibility for other Aboriginal peoples."

[160] See *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827, at para 123; Royal Commission Report at c. 2, pp. 21-23.

[161] *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827, at para 286; approved on this ground 2009 BCCA 153, paras 70-71.

[162] *McIvor v. The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827, at para 126; approved on this ground 2009 BCCA 153, para. 70.

layer upon layer of exclusion and discrimination", and are stigmatized as "less Aboriginal".[163]

128. The Secretary of State informed Cabinet of the consequences of the jurisdictional vacuum as early as 1972. In a memo prepared for Cabinet, the Secretary of State said:

> The Métis and non-status Indian people, lacking even the protection of the Department of Indian Affairs and Northern Development, are far more exposed to discrimination and other social disabilities. It is true to say that in the absence of Federal initiative in this field they are the most disadvantaged of all Canadian citizens.[164]

129. The Defendant's documents, time and again, point out how MNSI "must cope with severe disadvantage and sometimes desperate circumstances (p. 4) which the Defendant's documents describe as "intolerable judged by the standards of Canadian society;" (p. 22). The Defendant caused these problems for MNSI "by the introduction and administration of a national *Indian Act* (p. 5) which the Defendant's documents describe as "inequitable and inefficient":

> Inequitable because, faced with native people having similar problems, it metes out different treatment, inefficient because in line with an area concept of program delivery, it does not make sense to pursue different

[163] *Lovelace v. Ontario*, [2000] 1 S.C.R. 950 at para 90. See also para 71: The Court holds that the non-status appellants faced disadvantages such as "(i) a vulnerability to cultural assimilation, (ii) a compromised ability to protect their relationship with traditional homelands; (iii) a lack of access to culturally specific health, education, and social service programs, and (iv) a chronic pattern of being ignored by both federal and provincial governments". At para 72: "In *Corbiere, supra*, this Court recognized the vulnerability of off-reserve First Nations band members to unfair treatment on the basis of that group being stereotyped as "less Aboriginal" than band members living on a reserve (*per* McLachlin and Bastarache JJ. at para. 18, and *per* L'Heureux-Dubé J. at paras. 71 and 92). While the appellants are situated differently from the *Corbiere* claimants, I accept that the appellants in this appeal are vulnerable to stereotyping in a similar and a somewhat related fashion."

[164] CR-008005, Ex. P124 - Gérard Pelletier, Secretary of State, Confidential Memorandum to Cabinet, "Métis and Non-Status Indians - Research Proposals", July 6, 1972, p. 5 (6 in Summation).

> policies for groups living adjacent to each other … If the difficulties that MNSI face were marginal or if only small numbers were affected, the nature and extent of the interactions between the two orders of government (federal and provincial] would not be significant. As is generally agreed, however, the problems are real, ongoing and widespread; (p. 22).[165]

130. While the federal government is locked in a jurisdictional standoff with the provinces, Métis and Non-Status communities remain under-serviced and underdeveloped.

131. Exclusion from the services, programming and intangible benefits described above is an important reason why Métis and Non-Status Indians have not realized their full potential in Canadian society.

132. The federal government has recognized that excluding Métis and Non-Status Indians from Aboriginal specific programming is discriminatory:

> Federal-provincial buck-passing over services to Aboriginal peoples invites constitutional resolution because it operates at the expense of native peoples and is frequently discriminatory.[166]

133. The federal government has recognized that its denial of jurisdiction and the resulting service deficit causes suffering and underdevelopment for Métis and Non- Status Indians:

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[165] CR-012086, Ex. P151.

[166] CR-011016, Ex. P37 - Memorandum to Cabinet re "Aboriginal Peoples and the Constitution of Canada" (January 1983), sent by Ian B. Cowie, Director General of Corporate Policy, INAC, to the Deputy Minister and others, page 39-40. See also p.13: "Federal-provincial disputes over money permeate a broad range of services to native people, including health, welfare, education, policing, housing and economic development, generally at the expense of aboriginal populations affected."
RCAP concluded that this is the most basic form of discrimination (Vol IV, p. 219).

> It is Indian programs and Indian people who bear the brunt of federal-provincial financing disputes, since a common result is that the services or enriched services are simply not provided.[167]

134. DIAND has recognized that services for Métis and Non-Status Indians may be "too fragmented, insufficiently attuned to native needs, and too heavily oriented towards income replacement and support rather than development."[168]

135. Ian Cowie, explained:

> Q. Can you comment as to whether or not there is buck passing back and forth between federal and provincial governments re servicing Métis and non status Indians as referred to in this paragraph on page 54 of the hard copy [of CR-10716, P 32], in your experience?
> A. In my experience there's no question there are individual casualties of the government disputes and there were periods where this was a very significant problem.
> Q. In your experience are these casualties related to jurisdictional disputes?
> A. They almost all derive from the jurisdictional dispute and the associated question of who pays…
> Q. In your experience as a senior federal official, as Deputy Minister for the Province of Saskatchewan, and as an advisor to Aboriginal peoples that worked with Aboriginal peoples on the ground, is this passing back and forth between the federal and provincial governments causing real problems for real people on the ground or is the dispute theoretical?
> A. That's a very real problem on the ground.[169]

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[167] CR-011016, Ex. P37 - Memorandum to Cabinet re "Aboriginal Peoples and the Constitution of Canada" (January 1983), sent by Ian B. Cowie, Director General of Corporate Policy, INAC, to the Deputy Minister and others, page 39. See also p.13: "Federal-provincial disputes over money permeate a broad range of services to native people, including health, welfare, education, policing, housing and economic development, generally at the expense of aboriginal populations affected." CR-006662, Ex. P52, "Constitutional Conference on Native Rights", part of preparation for 1983 First Minister's Conference, sent by Ian Cowie, Director General of Corporate Policy at INAC (see CR-006642, Ex. P56), p.7: "The provinces claim that the federal government has financial responsibility for all Indians, and jurisdictional disputes often rebound to a detriment of individual Indians and communities."

[168] CR-008761, Ex. P126 - "Background to the 1985 First Minister Conference on the Constitution" prepared by Constitutional Affairs Directorate, DIAND, December 1984, p. 168. CR-010716, Ex. P32 - "Natives and the Constitution" Background and Discussion Paper, Intergovernmental Affairs, Corporate Policy, DIAND, August 1980, page 53: "Indian people are often faced with fragmented, unresponsive, and in some instances, inappropriate services."

[169] Evidence of Ian Cowie, Transcript, vol. 4, May 5, p. 471-2, 518.

136. Exclusion from the specific and limited exclusion from the comprehensive claims policies limits the means by which MNSI can assert their rights as Aboriginal peoples.

137. DIAND has observed that the present under-servicing of Aboriginal communities may lead to social dysfunction and even violence, if conditions for Aboriginal people do not improve.[170]

138. In the language of the Defendant's most senior officials Canada's position that Métis and Non Status Indian peoples fall outside of its constitutional authority and responsibility - is "arbitrary, anachronistic and harsh".[171] It is the result of deliberate decisions to restrain expenditures, in the face of demonstrated need of Non Status aboriginal peoples. It reflects policies to assimilate Aboriginal people which Defendant says it has abandoned in the modern context.[172]

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[170] CR-008390, Ex. P38 - "Agenda Head #2 - Social Aspects of Service Delivery", confidential DIAND document, p.58: Working against the status quo are three key factors: (i) the inadequacy of services, particularly for off-reserve status Indians, is very visible on the main streets of cities like Regina and Winnipeg; (ii) the Charter of Rights may render unsustainable (as a "discrimination" prohibited by section 15) the typical provincial denial of services to status Indians resident off reserve for less than a year; (iii) the situation will become worse when removal of sex discrimination from the *Indian Act* increases the number of off-reserve status Indians. Lurking in the background also are predictions of future violence in the Western cities with large native minorities unless conditions and prospects improve."

CR-008795, Ex. P127 - "Responsibility for Aboriginal Peoples: Section 91(24) of the Constitution Act, 1867", November 7, 1984, unknown secret federal government document, p.26: "Aboriginal problems are currently substantial and will continue to grow in the absence of concerted efforts by governments".

[171] CA-000176, p. 2, Ex. P215; 1976 Cabinet Memorandum.

[172] CA-000781, Ex. P427, INAC 1/1-8-3 Volume 39. July 27, 1978 letter from Minister of Indian Affairs (Faulkner) to Chiefs of Ontario. States (at p. 3) that "some sections of the Indian Act appear to be based on an assumption that assimilation was a desired objective." Government has moved decisively away from a policy of termination to continuation of Indian status. Says Indian Act needs to be cleansed of its "inadequate protection of Indian status and rights".

139. Although Canada promised to conduct a review of its position in 1984, and agreed in 1992 to a constitutional amendment clarifying that s. 91(24) applied to all Aboriginal people,[173] there has been no official change in the Defendants' public position. Canada's position has been maintained despite increasing recognition of MNSI rights in the courts.[174]

140. An exception concerns the rhetoric of former Prime Minister Martin, who stated that he wished to move beyond "jurisdictional wrangling,"[175] and that he recognized Canada's fiduciary duty to all aboriginal peoples.[176] That position changed with a change in government following elections.[177]

141. The Defendant's internal documents reveal that resolving the service deficit problem which plagues MNSI is not a priority for the federal government:

> In the absence of unusual statesmanship and good will on all sides, preservation of the status quo is the most likely outcome. The main reason is that any change will raise costs for one or more parties to the discussion. … Moreover, because the status quo is uncomfortable, rather than evidently disastrous, governments will probably prefer dealing with crises on an ad-hoc basis to enshrining arrangements whose long term consequences are hard to foresee with precision.[178]

The Defendant's internal documents predict that the long standing immobility will remain until disturbed by a court decision, with the consequence of continuing

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[173] Charlottetowne Accord, Consensus Report: "54. Section 91(24): For greater certainty, a new provision should be added to the Constitution Act, 1867 to ensure that Section 91(24) applies to Aboriginal peoples." The Draft Legal Text (Oct. 9, 1992), s. 8 incorporated this position.
[174] Most notably*, R. v. Powley*, [2003] 2 S.C.R. 207.
[175] Reply to Speech from Throne, CA-000867 (CAP02062), p.16.
[176] Transcript of Kelowna FMC, 2005, CA-000688 (CAP01866-7), p 140, 173-4.
[177] Examination of Dwight Dorey, *Transcript*, May 3, vol. 2, p. 248-9.
[178] CR-008390, Ex. P38 - "Agenda Head #2 - Social Aspects of Service Delivery", confidential DIAND document, p.16.4 (59 of document). CR-004916 - Marantz minutes, April 7, 1983 show federal government awareness of the possibility of gridlock; they are content to let it happen rather than see provinces "escape" their responsibility for MNSI.

discrimination.[179] Canada makes this prediction even as its internal documents observe that "the inadequacy of the services, particularly for off reserve status Indians, is very visible on the main streets of cities like Regina and Winnipeg."[180]

142. Ian Cowie explained:

> Q. Is this predicting that this buck passing is going to stop?
> A. No, not at all. It anticipates a continuation.[181]

143. To sum up: the Defendant's documents reveal that the dispute between the Federal and provincial governments has produced a large population of collaterally injured MNSI. MNSI are deprived of services, programming and intangible benefits that both levels of government recognize are needed. MNSI identity and sense of belonging to their communities is pressured. MNSI suffer under-development as peoples. They are prevented from reaching their full potential in Canadian society.

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[179] CR-008795, Ex. P127 - "Responsibility for Aboriginal Peoples: Section 91(24) of the Constitution Act, 1867", November 7, 1984, secret federal government document, p. 23-24: Unless the federal government is prepared to accept that it has responsibility for a larger group of aboriginal people than status Indians and Inuit, to include some Métis and non-status Indians, any discussion of jurisdiction will likely pit the federal government against most of the provinces and the aboriginal groups. … A discussion of jurisdiction within the constitutional forum is likely to result in a stalemate and fail to resolve the jurisdiction question. A final resolution would more likely require a court decision.

Confirmed by CR-012175, Ex. P142 (citing the unknown cost of Métis claims, the difficulty of finding funding for them in the absence of a higher court decision respecting division of federal/provincial authority. This document is an analysis for Cabinet of the RCAP recommendation that Canadian governments make land bases available to Métis communities.

[180] CR-008390, p. 59, Ex. P38.

[181] Evidence of Ian Cowie, Transcript, vol. 4, May 5, p. 543.

144. The Defendant's documents show that the service deficit problem is expected to continue to produce underdevelopment of MNSI communities across Canada. These problems will continue to plague MNSI and to blight Canadian society unless and until the court intervenes.

PART III - MNSI

A. Origins

145. The Defendant's documents describe how Canada created a class of people known as the Métis and Non-Status Indians. [182]

146. A 1972 Cabinet memorandum explained that the treaties were the seminal points at which Indian status was determined.[183] According to the memo: "Officials were not always diligent in seeking out certain of the Indian people". Officials "encountered great difficulty in recording the names of an alien language". As few of the Indians were aware of the historical importance of the treaties, "several groups did not participate."[184]

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[182] Contrary to what Defendant pleads at Amended Statement of Defence, December 1, 2005, paragraph 22.

[183] CR-008005, Ex. P124 - Gérard Pelletier, Secretary of State, Confidential Memorandum to Cabinet, "Métis and Non-Status Indians - Research Proposals", July 6, 1972.

[184] CR-008005, Ex. P124 - Gérard Pelletier, Secretary of State, Confidential Memorandum to Cabinet, "Métis and Non-Status Indians - Research Proposals", July 6, 1972, p.1-2 (2-3 in Summation page numbers: "History shows that these officials were not always diligent in seeking out certain of the Indian people who, at this time, were still semi-nomadic…"). See also CR-011376 - The Honourable David Crombie, Minister for Indian Affairs and Northern Development, Letter to the Editor of *Policy Options*, 23 December 1985, p.2: "There are many other people of Indian ancestry who are generally considered as non-status Indians. In some cases, they are not covered by the amendments because their lack of status results from factors other than sexual discrimination in the Indian Act. For example, at the time of the first registration process some groups declined to be registered or were simply missed out. Many of today's non-status population descend from such people."

147. The Defendant's documents record that some Indians avoided enumeration because they feared reprisals as a result of the Riel Rebellion.[185] As well, "various regulations from time to time resulted in many status Indians losing their Indian status."[186] Other status Indians gave up their status because "they chose not to labour under the disabilities imposed by the *Indian Act* which, for example, prevented Indians from voting in Federal and Provincial elections or serving in the military".[187]

148. Moreover, "the policy of successive federal governments has been to discourage many Indian people who wish to be recognized as holding Indian status".[188]

B. Development

149. The Defendant's documents describe how discriminatory practices which revoked status from Indian women who married non-status men, "had a major impact on the composition of a group called Non status Indians."[189] This started in 1851 and continued "throughout the evolution of the Indian Act" after formation of

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[185] CR-008005, Ex. P124 - Gérard Pelletier, Secretary of State, Confidential Memorandum to Cabinet, "Métis and Non-Status Indians - Research Proposals", July 6, 1972, p. 2 (3 in Summation page numbers).
[186] CR-008005, p 2, Ex. P124.
[187] CR-008005, Ex. P124 - Gérard Pelletier, Secretary of State, Confidential Memorandum to Cabinet, "Métis and Non-Status Indians - Research Proposals", July 6, 1972, p. 2 (3 in Summation page numbers).
[188] CR-008005, Ex. P124 - Gérard Pelletier, Secretary of State, Confidential Memorandum to Cabinet, "Métis and Non-Status Indians - Research Proposals", July 6, 1972, p. 2 (3 in Summation page numbers).
[189] CR-012121, para. 13, Ex. P198.

Canada.[190] The practice of enfranchisement, which began in 1857, "contributed substantial numbers to the ranks of the Non-Status Indians."[191]

150. While federal legislation distinguished between status Indians and other people of native ancestry, events in the Hudson's Bay territory in the west "evolved another class of Canadians called Métis."[192] These are "mixed ancestry descendants of the fur trade era who did not become registered as Indians during the treaty-making and registration processes"[193]

151. The Defendant's documents concluded:

> The cumulative effects over time of these parentage, legislative and administrative events produced, by evolution, a class of Canadians called Metis and Non-Status Indians.[194]

The federal government enacted amendments to the *Indian Act* in the early 20th century to encourage Métis to withdraw from treaty and to enfranchise. The effect "reduc[ed] the status Indian population and increase[ed] the numbers of MNSI".[195]

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[190] CR-008005, Ex. P124 - Gérard Pelletier, Secretary of State, Confidential Memorandum to Cabinet, "Métis and Non-Status Indians - Research Proposals", July 6, 1972, p. 2 (3 in Summation page numbers).
[191] CR-012121, Id., para 14, Ex. P198.
[192] CR-012121, Id., para 15, Ex. P198.
[193] CR-012121, Id., para 15, Ex, P198.
[194] CR-012121, Id., para 16, Ex. P198.
[195] CR-010994, Ex. P146 - MSSD, "Defining Métis and Non-Status Indians", 14 December 1982, p.1.

C. Fragmented Communities

152. The Defendant's documents observe that Canada's legislative efforts created a class of Canadians "who feel themselves to be appropriate heirs to the Indian culture and traditions and yet are not recognized as having such status".[196]

153. These federal government policies and practices have created arbitrary divisions between communities leading to a form of statutory ex-communication of identifiable Métis and Non-Status Indians with "many of the same demographic and socio-economic characteristics as status Indians".[197]

154. The federal government has not defined or enumerated MNSI because of the budgetary and policy implications:

> … it is clear that any government policy which tended to change the status-quo, i.e. that made MNSI more attractive by bestowing on that group special rights or programs, could have repercussions of significant proportions. Whether a definition of the MNSI group will be required depends very much on policy developments.[198]

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[196] CR-008005, Ex. P124 - Gérard Pelletier, Secretary of State, Confidential Memorandum to Cabinet, "Métis and Non-Status Indians - Research Proposals", July 6, 1972, p. 2 (3 in Summation page numbers).

[197] CR-010994, Ex. P146 - MSSD, "Defining Métis and Non-Status Indians", 14 December 1982, p.2.

[198] CR-010994, Ex. P146 - MSSD, "Defining Métis and Non-Status Indians", 14 December 1982, p.2. CR-011762, Ex. P428 - Rem Westmoreland, Director General of the Specific Claims and Treaty Entitlement Branch, February 17, 1992, memorandum to Rick Van Loon, Sr. Assistant Deputy Minister, Claims and Northern Program, p. 2: Identifies a group of 500 NCC members who the Minister of DIAND may have a responsibility to, and states that extending the group of Aboriginal people to whom the Minister has responsibility would have cost implications that central agencies and the Ministers would not support: "Apart from these few, a widening of the net will require changes to ministerial authority which far exceed the likely level of support and understanding that the central agencies and Ministers will have." CR-007714, Ex. P123 - Arthur Kroeger, Deputy Minister of Indian and Northern Affairs Canada, to the Minister, p.3: Provincial governments also "have difficulty with the concept of programs aimed specifically and exclusively at the MNSI as an ethnic group" because of "the desire of many provincial governments to find ways of reducing expenditures. Open-ended programming for a group that would likely be larger than the Status Indian group is hence not seen as an attractive proposition".

D. Identification

155. Secret government documents disclosed only months before trial, provide precise counts of Non-Status Indians (404,200) and Métis (191,800) in1995.[199] The documents observe that "over the last decade, Cabinet has directed DIAND to focus its expenditures on status Indians on reserve".[200] The documents consider providing programming to MNSI; they object to doing so principally on the ground of cost. There is no objection on jurisdictional grounds to DIAND's ability to program to MNSI.[201]

156. The Defendant established the *Consultative Group on Métis and Non Status Indian Socio-Economic Development* in 1978, with approval of the Prime Minister of Canada. The Consultative Group held consultations with provincial governments and MNSI organizations, after which it filed two *Interim Reports* in 1979, and a *Report* (c. 1980).[202] The *Report* reviewed various definitions of MNSI, and settled on a definition based on ethnicity, culture, socio-economic factors and self definition (p. 3). According to these criteria, the Consultative Group estimated MNSI to number between 300,000 and 450,000 people (c. 1980). The

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[199] CR-12263, p. 1, Ex. P159.
[200] CR-12263, p. 15, Ex. P159.
[201] Evidence of Ian Cowie, Transcript, vol. 4, May 5, p. 531; CR-012263, Ex. P159 (PowerPoint deck), CR-012264, Ex. P145 (full Report); CR-012574, summary pp 1-2, p 7, Ex. P140.
[202] CR-012121, Ex. P198 (Second Interim Report 1979, which refers at para 4 to the First Interim Report 1979), CR-120086, Ex. P151. Report; CR-012149, Ex. P139 is a comprehensive review of existing MNSI research: it provides good information on who MNSI are, by what methods they can be identified, their location and socio-economic status. Analysis of the data led to the finding of a "core MNSI group" of between 300-450,000 MNSI" (p. 7), whose "structural and educational characteristics are closely similar to those of the status Indians but are sharply different from those of the overall Canadian population" (p 7). This information is deepened in CR-012150, Ex. P141, another staff study of MNSI for the Consultative Group, which provides detailed info on federal programming to MNSI. This information was incorporated into the Consultative Group's *Reports*.

Report did detailed studies which showed where MNSI lived and in what numbers (pp. 3-4).[203] These criteria, and the calculations based on them, remained relatively constant in analyses done since 1980.[204]

157. The Consultative Group concluded that "MNSI can demonstrate their existence as a unique group and force in Canada's history."[205]

158. A secret federal government document concluded that the basic consensus on how to define MNSI is "self-identification and/or community recognition:"[206]

> The MNSI group themselves should decide on membership within broad parameters agreed upon with the federal government, rather than an outside organization such as the federal government attempting to define who is eligible to be called MNSI.[207]

159. Canada has identified MNSI for specific legislative or programming purposes. The following are some of the methods that Canada has used to define or identify MNSI.

160. Canada defined non-status Indians as "persons of native ancestry who are not entitled to be registered under the *Indian Act*, i.e. either as a band member or

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[203] CR-012086, Ex. P151.
[204] See CR-012081, Ex. P150, Overview of the Federal Relationship with Metis and Off Reserve Aboriginal People, at pp. 2-3, which analyzed 1986 census data, and arrived at similar conclusions in the 1990s.
[205] CR-012150, p 56, Ex. P141.
[206] CR-010994, Ex. P146 - MSSD, "Defining Métis and Non-Status Indians", 14 December 1982, p.6.
[207] CR-010994, Ex. P146 - MSSD, "Defining Métis and Non-Status Indians", 14 December 1982, p.6.

on a general Indian list, or who have surrendered or lost their rights as status Indians".[208] A 1972 cabinet memorandum estimated the group of Non-Status Indians to include up to 500,000 people.[209]

161. The federal government partners with CAP and its affiliates to identify MNSI beneficiaries of the Aboriginal Human Resources Development Strategy (AHRDS). Under the AHRDS, the federal government allocated $1.6 billion over five years to assist all Aboriginal people, regardless of status, find employment.[210] This money is provided to Aboriginal organizations, including CAP and its affiliates, who use it to fund employment training for their members.

162. Thus, even for large dollar programming initiatives, the federal government is content to rely on Aboriginal organizations to identify MNSI communities and individuals who should be receiving services.[211]

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[208] CR-010994, Ex. P146 - MSSD, "Defining Métis and Non-Status Indians", 14 December 1982, p.2. See p.3-4, which examines several definitions of MNSI, including definitions from the *Alberta Métis Betterment Act*, the Report of the Métis and Non-status Indian Constitutional Review Commission (April 1981), policy statements from the NCC, a report prepared for the Consultative Group on MNSI (August, 1980).

[209] CR-008005, Ex. P124 - Gérard Pelletier, Secretary of State, Confidential Memorandum to Cabinet, "Métis and Non-Status Indians - Research Proposals", July 6, 1972, p.2 (3 in Summation pagination).

[210] Service Canada, "AHRDS - Aboriginal Human Resources Development Strategy", http://www17.hrdc-drhc.gc.ca/AHRDSInternet/general/public/thestrategy/Opportunities_e.asp, last updated 13 October 2005.
Service Canada, "AHRDS - Aboriginal Human Resources Development Strategy, Frequently Asked Questions", http://www17.hrdc-drhc.gc.ca/AHRDSInternet/general/public/thestrategy/thestrategy_FAQ_e.asp, last updated 28 February 2005.

[211] CA-000264, Ex P13 (HRDC Aboriginal Human Resources Development Strategy)"

163. The federal government has access to birth and marriage registers, and band membership lists. This information could assist in identifying Non-Status Indians.

164. The federal government has examined how the United States, Denmark and Australia define and enumerate Aboriginal people.[212] RCAP studies broadened this work to review how Finland, Sweden, Norway, Japan, Soviet Union and New Zealand define indigenousness, and deepened the previous research on Australia and the United States.[213]

165. In the work-ups to Bill C-31, the federal government had to identify the group of Non-Status Indians who would become eligible for re-instatement. Using its annual reports and Indian Membership administrative statistics, DIAND estimated that approximately 75,000 Non-Status Indians would become eligible for re-instatement.[214]

166. The census of 1981 specifically sought to identify Non-Status Indians and Métis. By including "non-status Indians" and "Métis" categories in the census questionnaire, 75,110 non-status Indians and 98,260 Métis were enumerated.[215]

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[212] CR-010994, Ex. P146 - MSSD, "Defining Métis and Non-Status Indians", 14 December 1982, p.4-5.
[213] CR-012262, Ex. P161.
[214] CR-011183, Ex. P148 - Secret DIAND document, "Statistical estimates and analyses of individuals who lost Indian status through marriage or enfranchisement and their spouses and descendants from 1921 to the present", 1985, p. 1-3. See also CR-011184, Ex. P149, for population estimate calculations.
[215] CR-008492, Ex. P23 - "Canada's Aboriginal People", February 1983, p.6.

In the 2001 census 291,000 people self identified as Métis and 104,000 people self identified as Non-Status Indians.[216]

167. A 1983 memorandum to Cabinet emphasized that MNSI who are treaty beneficiaries or land claimants could be identified and enumerated:

> Wherever specific constitutional or legal rights are contemplated, the individuals affected must be capable of precise definition. … Inuit, together with Indians and Métis who are actual or potential beneficiaries under comprehensive land claims are also in principle capable of precise identification based on objective criteria.[217]

The Cabinet memo concluded that notwithstanding real difficulties defining MNSI outside of claims areas,

> …some substantial Metis/non-status populations can be specifically identified.[218]

The memo went on to identify them.

168. The preceding paragraphs are consistent with the evidence of Ian Cowie who testified about problems of MNSI definition:

> there was hesitancy as to what the methodology would be. There was not a particular hesitancy or concern that a point of resolution was not reachable.[219]

169. Although the Defendants deny that Non-Status Indians exist as a legal category (SoD para 22), the Defendant can and does identify MSNI generally, and for special purposes such as Bill C-31 or the AHRDS. Even Federal

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[216] CR-012237, p. 10 of 30, Ex. P163.
[217] CR-011016, Ex. P37 - Memorandum to Cabinet re "Aboriginal Peoples and the Constitution of Canada" (January 1983), sent by Ian B. Cowie, Director General of Corporate Policy, INAC, to the Deputy Minister, p. 16.
[218] CR-011016, Ex. P37 - Memorandum to Cabinet re "Aboriginal Peoples and the Constitution of Canada" (January 1983), sent by Ian B. Cowie, Director General of Corporate Policy, INAC, to the Deputy Minister, p. 16.
[219] Evidence of Ian Cowie, Transcript, vol. 4, May 5, p. 558.

Departments, including INAC, ask employees to identify themselves as Métis or Non-Status Indian[220] and Public Service Canada's Employment application form asks candidates to identify themselves as Non Status Indian or Métis.[221]

170. Should it be necessary to identify MNSI for various purposes in the aftermath of this litigation, these methods of identification and enumeration show that Canada has available to it many methods of doing so.

PART IV - PURPOSES OF SECTION 91(24) AT CONFEDERATION

A. The Purposive Method

171. As explained in the Overview (para 18), this brief follows the required purposive, progressive approach to constitutional interpretation of s. 91(24).

172. The purposive, progressive approach is required, the Supreme Court of Canada explained, because "one of the most fundamental principles of Canadian constitutional interpretation [is] … that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life. This approach is necessary, the Court continued, to ensure "the continued relevance and, indeed, legitimacy of Canada's constituting document."[222]

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[220] CR-012253, Ex. P217; CR-012254, Ex. P218 (CMHC).
[221] CR-012256, Ex. P219.
[222] *Reference re Same Sex Marriage*, [2004] S.C.R. 698, paras 22, 23. See also *Canada (Attorney General) v. Hislop*, [2007] 1 S.C.R. 429 at para. 94; *Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016 at 1029; Re *Residential Tenancies Act*, 1979, [1981] 1 S.C.R. 714 at 723; *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357 at 365; and *Hunter v. Southam Inc*., [1984] 2 S.C.R. 145 at 155.

173. The principle that interpretation must "evolve and must be tailored to the changing political and cultural realities of Canadian society" applies to all parts of the Constitution, including the division of legislative powers.[223] Indeed, it is arguably most central to division of powers analysis, because these powers are set out in general language that has had to be adapted to accommodate enormous changes in Canadian society over the whole life of the country:

> During [the time from confederation to the present] … only four small changes were made in the distribution of powers. The doctrine of progressive interpretation is one of the means by which the *Constitution Act, 1867* has been able to adapt to changes in Canadian society. What this doctrine stipulates is that the general language used to describe the classes of subjects (or heads of power) is not to be frozen in the sense in which it would have been understood in 1867. For example, the phrase "undertakings connecting the provinces with any other or others of the provinces" (s.92(10(a)) includes an interprovincial telephone system, although the telephone was unknown in 1867; the phrase "criminal law" (s.91(27)) "is not confined to what was criminal by the law of England or of any province in 1867"; the phrase "banking" (s.91(15)) is not confined to "the extent and kind of business actually carried on by banks in Canada in 1867". On the contrary, the words of the Act are to be given a "progressive interpretation", so that they are continuously adapted to new conditions and new ideas. [citations omitted][224]

174. Here, the memorandum discusses the framers' purposes for giving jurisdiction over "Indians and Lands reserved for the Indians" exclusively to Parliament, and not to the provincial legislatures.

175. For convenience we repeat the Supreme Court's directions to trial courts concerning how to approach constitutional interpretation of a head of power in the *Constitution Act, 1867*.

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[223] *Can. Western Bank v. Alta*., [2007] 2 S.C.R. 3, para 23.
[224] Hogg, *Constitutional Law of Canada* (5th ed, supplemented), 15.9(f), p.15-48.

> If an issue comes before a court, the court must refer to the framers' description of the power in order to identify its essential components, and must be guided by the way in which courts have interpreted the power in the past. In this area, the meaning of the words used may be adapted to modern-day realities...[225]

176. Following the Supreme Court's direction, this memorandum considers: (1) what purposes the framers likely had in mind when they assigned jurisdiction over "Indians, and Lands reserved for the Indians" to Parliament at the time of Confederation; (2) in the post-Confederation period, what realities the federal authorities confronted as they pursued those purposes; and (3) in the modern period, including today, the realities that have an impact on the pursuit of those purposes.

177. The final section of this memorandum considers the evidence responsive to these questions in light of the Supreme Court's interpretation of s. 91(24) in the past, and mindful of the "living tree" doctrine[226] requiring that interpretation of heads of power must evolve "within natural limits" in light of relevant historical elements and modern day concerns[227] "to ensure that Confederation can be adapted to new social realities."[228]

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[225] *Re Employment Insurance Act*, 2005 SCC 56 at paras. 10, 46; reaffirmed and explained in *Confédération des syndicats nationaux v. Canada (Attorney General)*, 2008 SCC 68, paras 29-32
[226] *Hunter v. Southam*, [1984] 2 S.C.R. 145, at para. 16, citing American academic Paul Freund.
[227] *Re Employment Insurance Act*, 2005 SCC 56 at paras. 10, 46.
[228] *Re Employment Insurance Act*, 2005 SCC 56 at para. 9; *Confédération des syndicats nationaux v. Canada (Attorney General)*, 2008 SCC 68, paras 27, 29-32; ***Same-Sex Marriage Reference***, [2004] 3 S.C.R. 698 at paras. 22-30 ("our Constitution is a living tree which, by progressive interpretation, accommodates and addresses the realities of modern life"); *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145 at 155 ("A constitution…is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power.)"; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 at 136 (P.C.) ("narrow and technical construction" rejected in favour of "a large and liberal interpretation…within certain fixed limits";

B. The Purposes of s.91(24)

(1) The Larger Objects of Confederation

178. In *Black v. Law Society of Alberta*, the Supreme Court of Canada opined as follows on the overall purposes of Confederation:

> A dominant intention of the drafters of the *British North America Act* (now the *Constitution Act, 1867*) was to establish "a new political nationality" and, as the counterpart to national unity, the creation of a national economy: D. Creighton, British North America Act at Confederation: A Study Prepared for the Royal Commission on Dominion-Provincial Relations (1939), at p. 40. The attainment of economic integration occupied a place of central importance in the scheme. "It was an enterprise which was consciously adopted and deliberately put into execution.": Creighton, supra; see also *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357, at p. 373. The creation of a central government, the trade and commerce power, s. 121 and the building of a transcontinental railway were expected to help forge this economic union. The concept of Canada as a single country comprising what one would now call a common market was basic to the Confederation arrangements and the drafters of the *British North America Act* attempted to pull down the existing internal barriers that restricted movement within the country.[229]

179. Professor Wicken confirmed that these purposes were consistent with his opinion as an expert historian.[230] He elaborated on these purposes, explaining that the larger objects of Confederation were expansion, settlement, building of a railway, and development of a national economy. In his opinion:

- The expansion of British North America into the northwest and towards B.C. was a response to an economic and political crisis pre-Confederation;[231]
- The Union was premised on the eventual absorption of the Northwest and British Columbia;[232]

Constitution as "a living tree capable of growth and expansion within its natural limits"); *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras. 79-82 (unwritten constitutional principles which animate constitutional interpretation include protection of minorities, specifically the aboriginal peoples).

[229] *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591

[230] Examination of Dr. Wicken, *Transcript*, May 16, Vol. 10, p. 1486.

[231] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1401.

[232] Report of Dr. Wicken dated December 1, 2010, Exhibit P-252, pp. 16-17 [Wicken Report].

- Politicians of the day sought to integrate the Atlantic colonies (Newfoundland, PEI, Nova Scotia, New Brunswick) with Central Canada;[233]
- Section 146 of the *BNA Act, 1867*, shows an intent to absorb the provinces of Newfoundland, P.E.I., and British Columbia into the union, as well as Rupert's Land and the Northwest Territories;[234]
- Section 147 of the *BNA Act, 1867* shows advanced plans for including Newfoundland and P.E.I. into the Union;[235]
- The framers wanted to settle the Northwest with farmers, who would become a new market for central Canadian manufacturing;[236]
- Palliser, who had been sent to investigate the suitability of the Northwest for settlement, indicated that it was possible to settle along the Red River and the Assiniboine. He concluded that the land was fertile;[237]
- In the East, the framers wanted to maintain the population, to avoid out-migration;[238]
- The framers wanted to settle British Columbia, particularly Vancouver Island and the Lower Mainland;[239]
- The framers intended to build a transcontinental railway which would link the Atlantic Ocean to the Pacific;[240]
- Building a railway was absolutely essential for the national economy and for settlement;[241]
- Building a transcontinental railway would be the most efficient way to transport goods back and forth. This was central to developing the economy.[242]

180. The transcontinental railway, in particular, was central and integral to the framers' intentions at the time of Confederation:

- Joseph Howe (not present at the Confederation debates, but an important figure in Atlantic Canada) saw the importance of creating a railway which would link the Atlantic with central Canada. The railway would help Nova Scotia tap into the market in Central Canada;[243]

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[233] Examination of Dr. Wicken, *Transcript*, May 16, Vol. 10, pp. 1404-1405.
[234] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1407.
[235] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1407.
[236] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1402.
[237] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1433.
[238] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1431.
[239] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1432.
[240] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1409.
[241] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1410.
[242] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1402.
[243] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, pp. 1405-1406.

- Palliser was asked to gauge the feasibility of building a railway in the West. He writes in his report that: "I have no hesitation in stating that no obstacles exist to the construction of a railway from Red River to the eastern base of the Rocky Mountains";[244]
- Section 145 of the *BNA Act, 1867*, made it a duty of the government to provide a railway linking the Province of Canada with New Brunswick;[245]
- The *British Columbia Terms of Union*, s.11, provides that the Government of the Dominion would build a railway from the Pacific towards the Rocky Mountains, connecting BC to Central Canada through a railway.[246]
- The *PEI Terms of Union* makes maintaining a steam ship service linking PEI to the intercolonial railway a responsibility of the federal government.[247]
- The framers wanted to expand the economy, which included expanding settlement in the East, the West, in the Northwest, and in BC.[248]
- The framers planned on developing the economy by uniting the East with the West through a railway, by expanding agricultural settlement, and by developing the manufacturing industry in the urban areas of Canada.[249]
- Developing the manufacturing industry would in turn lead to less reliance on the US for its imports.[250]

181. This "expansionist" view of confederation was particularly associated with Sir John A. Macdonald. Together with others such as Cartier, Mowat, Brown, Galt, and McGee, Macdonald is widely viewed as expressing the dominant view of Confederation. Macdonald was the principal architect of the language of the *British North America Act*. According to Dr. Wicken:

- The primary framers were Macdonald, Mowat, Brown, Cartier, Galt, and McGee.[251]

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[244] Exhibit P-255, Report: Exploration of British North America further papers to the exploration by the expedition under Captain Palliser dated 1860, p. 5 [Palliser Papers].
[245] Exhibit P-254, Portions of the British North America Act, s. 145 [*BNA Act, 1867*].
[246] Exhibit P-257, Portions of Order of Her Majesty in Council admitting British Columbia into the Union, May 16, 1871, s.11.
[247] Exhibit P-258, Portions of Order of Her Majesty in Council admitting Prince Edward Island into the Union, June 26, 1873.
[248] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1431.
[249] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1443.
[250] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1445.

- Macdonald was the principal architect of Confederation.[252]
- Macdonald was one of the longest-serving leaders of the united colony of Canada. He had great diplomatic skills. He was central to the whole idea of Confederation.[253]
- Macdonald brought two secretaries to Charlottetown and Quebec conferences.[254]
- Macdonald's letter to Judge Gowan states that Macdonald had been left the task of turning the 72 resolutions into the *Constitution*. Macdonald felt that no-one else was capable of assisting him.[255]

182. Dr. Patterson, for the Defendants, suggested that some delegates from Atlantic Canada did not share Macdonald's expansionist views. However, those views were ultimately reflected in the Quebec Resolutions and the *BNA Act*, and most historians accept that Macdonald's view of Confederation was the dominant one. Patterson agreed that Macdonald held these views, as did some delegates from Atlantic Canada.

- Professor Patterson called the expansion-and-settlement view of Confederation "very much a John A. Macdonald version of Confederation."[256]
- John A. Macdonald did hold an expansion-and-settlement view of Confederation, and a substantial body of historical opinion supports this.[257]
- A substantial body of historical opinion also agrees that he was the most important of the framers.[258]
- The general historical opinion is that Macdonald transformed the 72 resolutions of the Quebec Conference into the Constitution.[259]
- Among the delegates from Atlantic Canada to the Charlottetown and Quebec Conferences, some were expansionist and others

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[251] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1466.
[252] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1466.
[253] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1467.
[254] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1468.
[255] Exhibit P-262, Office of Attorney-General for Canada, letter from John A. Macdonald dated November 13, 1864.
[256] Expert Report of Dr. Patterson, Exhibit P-261, p. 3 [Patterson Report].
[257] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1465.
[258] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1468.
[259] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1474.

were pragmatic, focusing on the expected benefits of the railway to the East.[260]

(2) The Importance of s.91(24) to the Larger Objects of Confederation

183. The federal power over "Indians and lands reserved for Indians" was essential to achieve the larger objects of Confederation. This federal power applied to the whole country, including areas such as Rupert's Land and the Northwest Territories that had not yet become part of Canada, and the colonies of British Columbia and P.E.I. In the Northwest, in particular, a large and nomadic Aboriginal population potentially stood in the way of expansion, settlement, and construction of the transcontinental railway.

- Absolutely critical to Confederation was the relationship between the objects of Confederation and Aboriginal peoples.[261]
- The *British Columbia Terms of Union*, s.13, makes Indians and the management of lands reserved for their use and benefit a responsibility assumed by the Dominion Government.[262]
- That the federal responsibility to build a railway and an assumption of responsibility for Indians are both in the same document is proof the ideas are interconnected.[263]
- PEI passed responsibility to the federal government of Indian affairs after joining the union. This is reflected in its terms of union.[264]
- That the federal responsibility to link PEI to the intercolonial railway and its assumption of responsibility for Indians are in the same document is proof that the ideas are interconnected.[265]
- The framers needed to reconcile Aboriginal people to the building of the railway and to any other measures which the federal government will undertake.[266]

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[260] Cross-Examination of Dr. Patterson, *Transcript*, June 1, vol. 21, pp. 3719-3720.
[261] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1446.
[262] Exhibit P-257, Portions of Order of Her Majesty in Council admitting British Columbia into the Union, May 16, 1871, s.13.
[263] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1423.
[264] Exhibit P-258, Portions of Order of Her Majesty in Council admitting Prince Edward Island into the Union, June 26, 1873.
[265] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1427.

- Maintaining peaceful relations with the Indians would protect the railway builders from attack.[267]
- Indians needed to be reconciled with expansion West to ensure the economic development of the nation.[268]
- Lands occupied by Aboriginal people would have to be surrendered in some fashion.[269]

(3) The Broad Purposes of s.91(24)

184. The Plaintiffs' experts have identified the broad purposes of s.91(24). Their evidence on this point is not contradicted by any competing account from the Defendants, as neither of the Defendants' experts understood this question as being within their mandate.[270] According to Dr. Wicken, these purposes may be summarized as follows:

- To control Aboriginal people and communities where necessary in order to facilitate development of the Dominion;
- To honour the obligations to Aboriginal people and communities that the Dominion inherited from Britain, while extinguishing interests that stood in the way of development; and
- In the longer term, to civilize and assimilate Aboriginal people and communities.[271]

185. Likewise, Ms. Jones summarized the purposes of s.91(24) in the following terms:

> This power was integral to the central government's plan to develop and settle the lands of the North-Western Territory. The Canadian Government, at Confederation, inherited principles and practices of Crown-Aboriginal relations that had been embedded in British North America for well over one hundred years by 1867. These included the recognition of Aboriginal title in the "Indian territories" and protocols recognizing the relationship between Aboriginal nations and the Crown.

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[266] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1443.
[267] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1429.
[268] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1446.
[269] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1447.
[270] Cross-Examination of Dr. Patterson, *Transcript*, June 1, vol. 21, pp. 3713-3717; Cross-Examination of Dr. Von Gernet, *Transcript*, June 9, vol. 26, pp. 4504-4505.
[271] Wicken Report, pp. 13-15.

> Canada also inherited a British policy of "civilization" of the Indians, in place since the 1830's.[272]

186. The historical roots of the first two of these broad purposes go back to at least the *Royal Proclamation, 1763*. The *Royal Proclamation* was made at the conclusion of the Seven Years' War, in which Britain and France had fought for supremacy in North America. Alliances with Indian nations and tribes had been important to the outcome of that war.[273] At the end of the conflict, the King

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[272] Expert Report of Ms. Jones, Exhibit P-302, p. 6 [Jones Report].

[273] Cross-Examination of Dr. Patterson, *Transcript*, June 1, vol. 21, pp. 3738-3741; This history is set out in detail by Lamer J. (as he then was), writing for the Court, in *R. v. Sioui* [1990] 1 S.C.R. 1025:

> Further, both the French and the English recognized the critical importance of alliances with the Indians, or at least their neutrality, in determining the outcome of the war between them and the security of the North American colonies.
>
> Following the crushing defeats of the English by the French in 1755, the English realized that control of North America could not be acquired without the co-operation of the Indians. Accordingly, from then on they made efforts to ally themselves with as many Indian nations as possible. The French, who had long realized the strategic role of the Indians in the success of any war effort, also did everything they could to secure their alliance or maintain alliances already established (J. Stagg, *Anglo-Indian Relations in North America to 1763* (1981); "Mr. Nelson's Memorial about the State of the Northern Colonies in America", September 24, 1696, reproduced in E. B. O'Callaghan, ed., *Documents relative to the Colonial History of New York* (1856), vol. VII, at p. 206*; "Letter from Sir William Johnson to William Pitt", October 24, 1760, in *The Papers of Sir William Johnson*, vol. III, 1921, at pp. 269 *et seq.*; "Mémoire de Bougainville sur l'artillerie du Canada", January 11, 1759, in *Rapport de l'archiviste de la Province de Québec pour 1923-1924* (1924), at p. 58; *Journal du Marquis de Montcalm durant ses campagnes en Canada de 1756 à 1759* (1895), at p. 428).
>
> England also wished to secure the friendship of the Indian nations by treating them with generosity and respect for fear that the safety and development of the colonies and their inhabitants would be compromised by Indians with feelings of hostility. One of the extracts from Knox's work which I cited above reports that the Canadians and the French soldiers who surrendered asked to be protected from Indians on the way back to their parishes. Another passage from Knox, also cited above, relates that the Canadians were terrified at the idea of seeing Sir William Johnson's Indians coming among them. This proves that in the minds of the local population the Indians represented a real and disturbing threat. The fact that England was also aware of the danger the colonies and their inhabitants might run if the Indians withdrew their co-operation is echoed in the following documents: "Letter from Sir William Johnson to the Lords of Trade", November 13, 1763, reproduced in O'Callaghan, ed., op. cit., at pp. 574, 579 and 580**; "Letter from Sir William Johnson to William Pitt", October 24, 1760, in *The Papers of Sir*

proclaimed as follows:

> And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds….
>
> And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid….
>
> And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests. and to the great Dissatisfaction of the said Indians: In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where We have thought proper to allow Settlement: but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose…[274]

William Johnson, vol. III, at pp. 270 and 274; M. Ratelle, *Contexte historique de la localisation des Attikameks et des Montagnais de 1760 à nos jours* (1987); "Letter from Amherst to Sir William Johnson", August 30, 1760, in *The Papers of Sir William Johnson*, vol. X, 1951, at p. 177; "Instructions from George II to Amherst", September 18, 1758, National Archives of Canada (MG 18 L 4 file 0 20/8); C. Colden, *The History of the Five Indian Nations of Canada* (1747), at p. 180; Stagg, op. cit., at pp. 166-67; and by analogy *Governor Murray's Journal of the Siege of Quebec*, entry of December 31, 1759, at pp. 15-16.

This "generous" policy which the British chose to adopt also found expression in other areas. The British Crown recognized that the Indians had certain ownership rights over their land, it sought to establish trade with them which would rise above the level of exploitation and give them a fair return. It also allowed them autonomy in their internal affairs, intervening in this area as little as possible.

[274] *Royal Proclamation, 1763*, Exhibit P-264.

187. As Dr. Wicken explained in his testimony, the *Royal Proclamation* system provided a model for dealing with Aboriginals. The federal government intended to carry this system forward, with such modifications as may be needed in the context of 19th century Canada:

- Sir William Johnson outlined some of the problems and some of the requirements that would be needed in order to ensure the peaceful settlement of British North America after 1763.[275]
- The *Royal Proclamation* creates a system for reconciling Aboriginal interests regarding lands. It requires a public ceremony between a representative of the Crown and the Indian community that will surrender lands.[276]
- This process continued until Confederation in 1867.[277]
- The framers would have been familiar with this process and would have wanted to implement it in the areas where government intended to expand.[278]
- The 1876 *Indian Ac*t integrated the process of seeking the surrender of Aboriginal title from Indians, which originated in the *Royal Proclamation*.[279]
- The framers felt that the *Royal Proclamation* system was an essential measure to pacifying the Indians; other measures would also be necessary.[280]

188. Throughout the new Dominion of Canada, Aboriginal peoples had to be reconciled to the new sovereignty:

- The *Royal Proclamation* system was one of reciprocal respect which the government is attempting to introduce. The government was attempting to reconcile Aboriginals — and bind them — to the new nation.[281]

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[275] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1500; Exhibit P-263, Letter from Sir William Johnson to the Lords of Trade, November 13, 1763, p. 573-581.
[276] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1502.
[277] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1503.
[278] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1504.
[279] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1507; Exhibit P-265, Chap. 18, *An Act to Amend and Consolidate the Laws respecting Indians*, s.26.
[280] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1508.
[281] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1509.

- The Indian Power would have included whatever was necessary to ensure that Aboriginal people integrated into the larger non-Aboriginal population.[282]
- The *Royal Proclamation* system attempted to reconcile Aboriginal peoples to the newer nation.[283]
- The Indian Power would allow the government to treat, pacify, civilize, and reconcile to their plans the Aboriginal peoples in Canada.[284]

189. In short, since at least the *Royal Proclamation*, Britain had understood that opening up lands for settlement could only be achieved on the basis that the rights of the Aboriginal peoples who were in occupation of the lands must be recognized, and that these rights must be dealt with in order to reconcile Aboriginal rights with the government's desire to settle the lands. These are the obligations that were inherited by Canada in 1867.

190. The *Royal Proclamation* was also part of an initiative to centralize control over relations with Aboriginal peoples in the British Crown. Prior to 1763, settlers had perpetrated "great frauds and abuses" in this area, and settler-dominated local governments were seen as prone to favouring the interests of settlers over Aboriginal interests.[285] In 1764, the Board of Trade issued a "Plan for the Future

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[282] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1573.
[283] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1509.
[284] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1449.
[285] Cross-Examination (and Re-Examination) of Ms. Jones, *Transcript*, May 27, vol. 18, pp. 2968, 3042-3043; Cross-Examination of Dr. Patterson, *Transcript*, June 1, vol. 21, pp. 3894-3899. Patterson provided the example of a Mr. Udiacke, a Nova Scotian who was apparently a member of the Legislative Council of Nova Scotia, and who appears to have personally benefitted from an improvident transaction by some Nova Scotia Mi'kmaq: Cross-Examination of Dr. Patterson, *Transcript*, June 2, vol. 22, p. 3807. See also Douglas Saunders, "Prior Claims: Aboriginal People in the Constitution of Canada," in Beck and Bernier, (eds.) *Canada and the New Constitution* (Montreal: IRPP, 1983), p. 238:

Management of Indian Affairs", which called for the repeal of laws relating to Indians by colonial legislatures.[286] The early treaties, the *Royal Proclamation*, the Board of Trade's 1764 Plan, and the assignment of jurisdiction over Indians to Congress in the U.S. Constitution of 1787, were all part of a line of thought that saw central authorities as the appropriate level of government to deal with Aboriginal affairs.[287] Assignment of jurisdiction over "Indians and lands reserved for Indians" to Parliament in 1867 was a "natural outgrowth" of the British Government's control over Indian affairs from the mid-18th century, and the U.S. example served as a precedent.[288]

191. While the Canadian colonies of the Province of Canada, Nova Scotia, and New Brunswick were briefly responsible for Indian affairs in the years immediately prior to Confederation, no colonial government or delegate to the Charlottetown or Quebec Conferences expressed a desire that any province have control over its Aboriginal population:

- No historical records or documentation show a desire for local autonomy over Indians expressed by any of the colonies represented at the Charlottetown or Quebec conferences.[289]
- In the Maritimes, s.91(24) was not a concern. There was no clamour to keep jurisdiction over Indians. If anything, the Maritime

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> Canadian officials decided that the BNA Act of 1867 should specify centralized authority over 'Indians, and lands reserved for the Indians'. To the extent that there was, indeed, a theory or principle behind the decision in favour of a centralized authority, that theory would have embodied the idea that the more distant level of government would better protect Indians against the interests of local settlers. While Indians were seen as 'problems', they were understood by political leaders to be the victims of colonial expansion. The idea of their need for protection was well established. It is to this tradition that we owe section 91(24) of the BNA Act.

[286] Exhibit D-113, Plan for the future management of Indian affairs, 1764.
[287] Cross-Examination of Dr. Patterson, *Transcript*, June 2, vol. 22, p. 3908.
[288] Wicken Report, p.3
[289] Examination of Dr. Wicken, *Transcript*, May 19, vol. 13, p. 2036.

colonies were anxious to offload the financial responsibility for Indians.[290]

- In Nova Scotia, Indian policy was drifting in the years leading up to Confederation. Dr. Patterson agreed that the area was under-resourced, that Commissioner Fairbanks never actually left the capital, and that Fairbanks was an apologist for granting the land away to the squatters.[291]

192. This case is therefore unlike many division of powers disputes, in which the scope of a federal power must be carefully circumscribed in order to ensure that it does not encroach upon powers claimed by the provinces.[292] Any finding that the federal Indian Power extends to MNSI would hardly be seen as a threat by the provinces.[293]

193. Civilization and assimilation, as noted by Ms. Jones, was a policy of more recent origin in Britain's dealings with Aboriginal peoples. All the experts who addressed this subject noted that it was not inherent to Crown-Aboriginal relations; moreover, it was abandoned in the modern period after the rejection of the federal government's White Paper of 1969. Nevertheless, it formed part of Indian policy at the time of Confederation:

- Ms. Jones described this policy as being in place since the 1830's,[294] and finding expression in the 1857 *Act to Encourage the*

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[290] Patterson Report at para. 42; Cross-Examination of Dr. Patterson, *Transcript*, June 1, vol. 21, p. 3704.
[291] Exhibit D-172, Report of the Indian Branch of the Department of the Secretary of State for the Provinces, 1872; Cross-Examination of Dr. Patterson, *Transcript*, June 2, vol. 22, pp. 3882-3886.
[292] See, e.g. *General Motors v. City National Leasing*, [1989] 1 S.C.R. 641, with respect to the general branch of the trade and commerce power.
[293] See Parts I-III above. Note that in *Re Eskimos*, [1939] S.C.R. 104, Canada and Quebec each took the position that the other had constitutional jurisdiction over the Inuit of that province.
[294] Jones Report, pp. 3, 25.

Gradual Civilization of the Indian Tribes in this Province, and to Amend the Laws Respecting Indians;[295]

- Dr. Wicken noted that this policy was associated with the influence of Wesleyans in 19th Century Britain and Canada;[296]
- Dr. Patterson agreed that the 18th Century Treaties of Peace and Friendship were different from the 19th century Western numbered treaties; they were aimed at regulating the interaction between Indians and non-Indians, and did not feature any concept of wardship;[297]
- Dr. Grammond and Dr. Patterson both testified that Canada abandoned the policy of assimilation after the rejection of the 1969 White Paper; Dr. Grammond described this as an "about-face".[298]

194. Evidence of a broad Indian Power was reflected in Parliament's goal of pacifying, civilizing, assimilating, educating, relocating, and reforming the economy of Indians:

- Dr. Wicken testified that one of the most important statutes in 1857 was the *Act to Encourage the Gradual Civilization of the Indian Tribes in this Province*, written by John A Macdonald, dealing with the process by which Indians will become non-Indians.[299]
- There was a long-term assimilation policy, indicated by other historical documents which predate Confederation.[300]
- The government planned on pacifying and integrating Aboriginals into the wage labour economy and to have them adopt ideas about private property, which is a fundamental aspect of European economy in the 1860s.[301]
- It is reasonable to conclude that the Indian Power would include the ability to relocate, settle, assist, educate, reform economically, reform socially, and civilize the Indians.[302]
- Palliser writes that some Aboriginal people were destitute in the Northwest and that they could be easily reconciled with agricultural work.[303]

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[295] Exhibit P-271.
[296] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, pp. 1453, 1536.
[297] Cross-Examination of Dr. Patterson, *Transcript*, June 1, vol. 21, pp. 3733.
[298] Cross-Examination of Dr. Patterson, *Transcript,* June 2, vol. 22, pp. 3925-3930; Examination of Dr. Grammond, *Transcript,* May 20, vol. 14, pp. 2209-2210, 2223.
[299] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, pp. 1452-53.
[300] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1453.
[301] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1454.
[302] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1599.
[303] Exhibit P-260, Excerpt from the Palliser Papers, p. 33.

(4) Parliament Required a Broad Power to Achieve the Purposes of s.91(24)

195. In Dr. Wicken's opinion, Parliament required a broad power under s.91(24) to achieve the larger objects of Confederation:

- The Indian Power was made a national power and not a provincial power because it had broad national significance. What happened in one area of the country that may affect the problems in the construction of the railway would impact upon other regions of the country.[304]
- The Indian Power needed to be as broad as possible to accomplish whatever plans the framers had.[305]
- The framers would have wanted the power to reconcile Aboriginals (pure blood and half breed) to the agricultural industry and away from the buffalo hunt.[306]
- Specifically in the Northwest, the framers knew, based on Palliser and Hind's reports, that there was a settlement at Red River. They knew about the Red River Métis.[307]
- The framers would likewise have given themselves whatever power was necessary to control the Labrador fishery.[308]

196. The framers were likely unaware of many of the details of the great diversity of Canada's Aboriginal peoples at the time of Confederation, particularly in more remote areas. Indeed, as conceded by Dr. Von Gernet, many of the framers were probably "woefully ignorant" of conditions in the Northwest. However, this fact supports a broad power – to deal with any and all challenges that the government might meet – rather than a narrow power.

- Six commission reports by various government bodies between 1828 and 1858 give fairly detailed information about the Aboriginals living in Canada East and Canada West at the time of Confederation.[309]

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[304] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, pp. 1477-1478.
[305] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1448.
[306] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1463.
[307] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, pp. 1510-1511.
[308] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1580.
[309] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1585.

- The framers knew there were Aboriginals in the Northwest, but there is a lot unknown. Very few people, at least among the framers, would have actually journeyed there.[310]
- Dr. Von Gernet opined that some of the framers were woefully ignorant of the Hudson's Bay Company and activities in the Northwest.[311]
- This lack of knowledge was evident in the debates in the House of Commons on the *Manitoba Act, 1870*. For example, on May 9, 1870 Howe stated: "And does not everybody now feel that there was a vast amount of information that ought to have been acquired before the honourable gentleman started upon his journey? I profess to know nothing more of the country than anybody else. I entered into it in entire ignorance of the state of affairs there."[312]
- Much was unknown by the framers. When surveyors were sent to Assiniboia in the fall of 1869 to prepare for the incorporation of Assiniboia into Canada, they encountered opposition. This episode illustrates not only a lack of sensitivity but also a lack of understanding of the nature of the community in this region at that time.
- The framers would have given themselves as broad a power as possible to ensure that as the new nation expanded into new and somewhat unknown territories, it had full power to deal with all challenges presented to their plans for settlement and development.[313]

197. Whether known or unknown by the framers, there was an enormous diversity among the Aboriginal peoples of Canada at the time of Confederation. For example:

- In the Maritimes, Mi'kmaq were frequently described as a "wandering people". In Nova Scotia, the large majority did not live on reserves, which were of poor quality and insufficient size to support the Mi'kmaq population;
- Mi'kmaq and Maliseet had intermarried with non-Indians since the days of Acadian settlement;
- In Labrador, which was foreseen to become part of Canada, there were no reserves, and Aboriginals lived in small family groups;

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[310] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1451.
[311] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1512; Exhibit P-266, Expert Report of Dr. Von Gernet, Exhibit D-180, p. 33 [Von Gernet Report].
[312] Exhibit P-267, Portions of House of Commons Debate, Monday May 2, 1870, p. 1466.
[313] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1452.

- Many Aboriginals of Labrador were described as “Half-breeds” in contemporaneous accounts;
- In Lower and Upper Canada, in the Quebec-Windsor corridor, intermarriage with non-Indians had been so prevalent that many reserves were described as being populated predominantly or even exclusively by “Half-breeds”;
- Many of the inhabitants of these reserves farmed, were educated, and lived in permanent houses;
- North of the Quebec-Windsor corridor, in present-day Ontario and Quebec, Aboriginals did not live on reserves. Rather, they lived in small nucleated settlements, and migrated with the seasons in search of game. These included mixed-ancestry Aboriginals;
- In the Upper Great Lakes, and throughout the Northwest, there was a varied and mixed Aboriginal population with no clear dividing lines between “Indians” and “Half-breeds”.

198. The framers of the *British North America Act* would likely have intended that the federal government have the power to control the wandering Half-breeds of Northern Ontario:

- The Quebec-Windsor corridor was well settled by the time of Confederation. There are many reserves in this area as well as extensive intermarriage between Aboriginal and non-Aboriginal people.[314]
- In northern Ontario the land is not sustainable for agriculture. As a result, many of the Aboriginal people spend part of their time on reserves and part off-reserve, hunting and fishing.[315]
- In the territories that subsequently became the subjects of Treaties 3, 5, and 9, there are no reserves. People there live in small nucleated settlements and migrate during the winter in small hunting bands.[316]
- Many half-breeds are included in Aboriginal groups in these unsurrendered lands.[317]
- The framers intended for these lands to be surrendered, that they would be settled by Europeans, and that they would be subject to economic development.[318]

[314] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1583.
[315] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1586.
[316] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, pp. 1587-1588.
[317] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1589.
[318] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, pp. 1590-1591.

199. Likewise, it would have been inconsistent with the larger objects of Confederation to carve out of s.91(24) the power to address "Half-breeds" wandering the plains of Western Canada. Dr. Wicken testified as follows:

- "Indians" in s.91(24) must have had a broad definition. There were mixed bloods in all parts of the British colonies. All of these people lived within Aboriginal communities and were often very close to or were parts of the Indian communities.[319]
- Many "Half-breeds" were engaged in the buffalo hunt; it was integral to their economy.[320]
- It is inconsistent with the big plans of the framers to allow roving bands hunting the buffalo in the Northwest. The federal government could not build a railway and expand and settle into this area if the hunt continued.[321]
- It is inconsistent to reconcile the Indians with the agricultural industry but to leave the "Half-breed" hunters alone. Industrialization focused on private property and the export of private commodities, and it is inconsistent to allow any groups to continue with the buffalo hunt, premised on public use of land.[322]
- Sir John A. Macdonald would have thought it nonsensical to allow the "Half-breeds" to roam over the plains to hunt buffalo in the face of his plan of expansion and settlement. This population had to be controlled and assimilated; doing so was necessary to ensure the orderly progression of expansion.[323]

200. Sir John A. Macdonald was the prime drafter of the Indian Power:

- Macdonald was the most important drafter of the Indian Power because of his experience as Attorney General of Canada West, the colony with the largest population of Aboriginal people, and because of his experience drafting the 1857 *Enfranchisement Act*.[324]
- It is reasonable to conclude that Macdonald had the most knowledge about the legal definitions of Indians.[325]

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[319] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1479.
[320] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1480.
[321] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, pp. 1461, 1481.
[322] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, pp. 1463-1464.
[323] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1483.
[324] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1475-76.
[325] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1669.

- The handwritten inclusions in the early Quebec Conference draft of the Indian Power, before it was included under the federal heads of power, were done by Sir John A. Macdonald.[326]
- The handwritten inclusion of the Indian Power in the federal heads of power from a Quebec Conference draft was done by Sir John A. Macdonald.[327]

(5) Pre-Confederation Treaties

201. Prior to Confederation, there was a long history of treaties between Indians and the British Crown. These treaties varied significantly in their scope, purposes, and characteristics.

202. In Nova Scotia, between 1725 and 1779, the British Crown entered into a series of "Peace and Friendship" treaties with the Mi'kmaq and Maliseet. These treaties were very different from the later numbered treaties of Western Canada. For example:

- The Peace and Friendship treaties were not treaties of cession, did not feature annuities, and did not provide for agricultural implements.[328]
- "Wardship" was not a feature of the Peace and Friendship treaties.[329]
- Rather, these treaties set out a series of reciprocal obligations, premised on recognition of British sovereignty, and designed to regulate interaction between Indians and settlers.[330]

203. Mixed-ancestry Aboriginals were not excluded from these treaties. To the contrary, mixed-ancestry Aboriginals such as Paul Laurent took leadership roles,

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[326] Examination of J.K. Johnson, *Transcript*, May 19, vol. 13, p. 2053.
[327] Examination of J.K. Johnson, *Transcript*, May 19, vol. 13, p.2054.
[328] Cross-Examination of Dr. Patterson, *Transcript*, June 1, vol. 21, p. 3736.
[329] Cross-Examination of Dr. Patterson, *Transcript*, June 1, vol. 21, p. 3733.
[330] Cross-Examination of Dr. Patterson, *Transcript*, June 1, vol. 21, pp. 3722-3723, 3730-3731.

and acted as cultural bridges to facilitate agreements.[331] This pattern was repeated in the 19th century.[332]

204. In the early 19th Century, various treaties of surrender were signed between Britain and Indians in Upper Canada. These treaties were essentially economic exchanges – Indians surrendered lands, and Britain provided one-time cash payments. Again, they did not feature annuities, and did not feature any concept of wardship.[333]

205. Most importantly, in 1850 William Robinson negotiated two treaties in the Upper Great Lakes – the Robinson-Huron and Robinson-Superior treaties. These treaties were the most important pre-Confederation precedents, in that they became the model for the post-Confederation numbered treaties in Western Canada.[334] Ms. Jones testified to the following:

- These treaties had some new features that were carried on into the subsequent numbered treaties;[335]
- These features included the establishment of annuity payments in perpetuity, recognition of a perpetual ongoing relationship between the Crown and treaty signatories, and the inclusion of hunting and fishing rights.[336]

206. The immediate impetus for the Robinson treaties was an incident that

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[331] Wicken Report, p.83.
[332] Several of the Chiefs who signed the Robinson Treaties were of mixed ancestry: Jones Report, p. 32. Likewise, Six Nations Chief Simcoe Kerr was a "quarter-blood": Examination of Dr. Von Gernet, *Transcript*, June 7, vol. 24, p. 4228.
[333] Examination of Ms. Jones, *Transcript*, May 24, vol. 15, pp. 2327-2328.
[334] Examination of Ms. Jones, *Transcript*, May 24, vol. 15, p. 2335.
[335] Examination of Ms. Jones, *Transcript*, May 24, vol. 15, pp. 2326-2327, May 25, vol. 16, pp. 2518-2519.
[336] Examination of Ms. Jones, *Transcript*, May 24, vol. 15, pp. 2327-2331.

occurred at Mica Bay in 1849. This conflict, in which "Half-breed" and "pure-blood" Indians acted together against a mining venture that they perceived to threaten their lands, demonstrated the need to control Indians and Half-breeds together, as they could act collectively. It is unlikely that this lesson was lost on the framers of the *BNA Act*. As Dr. Wicken testified:

- There was a close cultural, linguistic, and social tie between people identified as half breeds and pure bloods in the Lake Huron and Lake Superior region.[337]
- The framers would have given themselves the power to control incidents such as the Mica Bay mine conflict.[338]

207. Surveyors Vidal and Anderson were sent to the North Shore of Lakes Huron and Superior in 1849 to enumerate the Aboriginal population. They reported specifically on the presence of "Half-breeds" in the area, raising the issue of "determining how far halfbreeds are to be regarded as having a claim to share in the remuneration awarded to the Indians (as they can scarcely be altogether excluded without injustice to some)".[339] It was claimed by John Swanston, head of the Hudson's Bay Company post at Michipicoten (and himself a "Half-breed"), that some "Half-breeds" had a better claim to Treaty than some of the "Indians".[340]

208. Robinson himself was very familiar with the area, and undoubtedly knew of these claims and of the people who asserted them. Robinson could speak

[337] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1546.
[338] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1549.
[339] Jones Report, p. 31; Vidal and Anderson Report dated December 5, 1849, Exhibit P-311.
[340] Jones Report, p. 31.

Ojibway, and knew of the area through his business interests.[341] Robinson subsequently travelled to the North Shore to negotiate treaties in the summer of 1850. When pressed by some Chiefs to include the "Half-breeds" in the treaties, he replied as follows:

> As the half-breeds at Sault Ste. Marie and other places may seek to be recognized by the Government in future payments, it may be well that I should state here the answer that I gave to their demands on the present occasion. I told them I came to treat with the chiefs who were present, that the money would be paid to them – and that their receipt was sufficient for me – that when in their possession they might give as much or as little to that class of claimants as they pleased.[342]

209. In fact, Robinson went much further than this. He counted the "Half-breeds" in the population subject to the treaties, for the purpose of calculating the overall annuities owed. The Robinson-Huron treaty contained both an "escalator" and a "de-escalator" clause, whereby the number of people included under the treaty had financial significance for the Government in determining the amount of this obligation.[343] Later, the payments were converted to individual annuities, and "Half-breeds" continued to be paid, and were enumerated separately for this purpose.[344]

210. The "Half-breeds" of the Upper Great Lakes, and specifically those at Sault Ste. Marie, were the Métis who were considered by the Supreme Court of Canada in *R. v. Powley*.[345] The evidence in that case was that while these Métis

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[341] Examination of Ms. Jones, *Transcript*, May 24, vol. 15, pp. 2344-2345.
[342] W.B. Robinson to R. Bruce, 24 September 1850, Exhibit P-313.
[343] Examination of Ms. Jones, *Transcript*, May 24, vol. 15, pp. 2355-2357.
[344] Annuity Paylists for "Half-breeds" for the Robinson Treaties from 1863 and 1864 were entered as Exhibits D-59 and D-60.
[345] [2003] 2 S.C.R. 211.

had a separate identity, they had close ties with the “Indians” of the North Shore. Some took treaty, and lived on the Batchewana and Garden River Reserves. At Garden River, they occupied a separate part of the reserve, known as “Frenchtown”, indicating that they maintained their separate identity after taking treaty.[346] Others did not take treaty, and were members of the historic Métis community that was found to have s.35 rights in *Powley*. There is no evidence that those who took treaty were required to demonstrate that they lived with “Indians”, or were members of an “Indian” tribe, or followed an “Indian” way of life.

211. Collectively, these treaties demonstrate that Canada, in assuming the power over Indian Affairs exercised by Britain since the 18th Century, might need to do at least any of the following:

- Establish and maintain peaceful relationships with Aboriginals;
- Pay one-time cash amounts for the surrender of their interests in land;
- Pay ongoing annuities;
- Create or take surrenders of reserves; and
- Recognize, pacify, control, and deal with the interests in land of Métis who were seen as distinct from “Indians” in some respects, who did not necessarily live with “Indians”, were not necessarily members of an “Indian” tribe, and who did not necessarily follow an “Indian” way of life.

212. This diverse array of experiences, including specific experience with the Métis of the Upper Great Lakes in the years immediately prior to Confederation, suggests that the framers of the *BNA Act* needed to craft, and would have

[346] Examination of Ms. Jones, *Transcript*, May 24, vol. 15, pp. 2360-2361.

understood themselves to have crafted, a broad power under s.91(24) for the federal government to deal with a wide range of situations, in a wide range of ways, for a wide range of Aboriginal people.

(6) Pre-Confederation Statutes

213. Between 1842 and 1867, Canadian colonial legislatures passed a number of statutes relating to "Indians". In Nova Scotia and New Brunswick, none of the statutes purported to define who "Indians" were, despite the fact that there was a long history of unions between Aboriginals (Mi'kmaq and Maliseet) and European settlers, and resulting mixed ancestry Aboriginals.[347] Further, in Nova Scotia the majority of Aboriginals lived off-reserve. Nova Scotia legislation, among other things, provided for the distribution of clothing and blankets to "Indians", regardless of whether they were of mixed ancestry, lived on or off reserve, or were integrated into Indian "communities", however these might be defined.[348]

214. Both Dr. Von Gernet and Dr. Patterson sought to dismiss Nova Scotia as an "anomaly".[349] However, Nova Scotia aptly illustrates one aspect of the diversity of circumstances that the Indian Power was required to cover. It can hardly be supposed that the framers intended that the federal government would have no jurisdiction to continue doing what Nova Scotia was doing immediately

[347] Wicken Report, pp. 83-86, 95-97; Cross-Examination of Dr. Patterson, June 1, vol. 21, p. 3761.
[348] 1859 *Act Respecting Indians*, Exhibit D-161, s. 10. Dr. Patterson agreed in cross-examination that while he believed some off-reserve Indians would have maintained ties with communities on reserves, he could not say this of all of them. Distribution of clothing and blankets occurred through the Indian Agents in each county, not through any reserve or tribal system.
[349] Cross-Examination of Dr. Patterson, *Transcript*, June 2, vol. 22, p. 3867; Examination of Dr. Von Gernet, *Transcript*, June 9, vol. 26, pp. 4485-4486.

before Confederation, even if the federal government might choose to implement slightly different policies.[350]

215. In the Province of Canada, six statutes relating to "Indians" were passed between 1850 and 1861.[351] These statutes were highly situational. There were differences between Lower and Upper Canada, relating to the different histories and situations of their Aboriginal inhabitants. There were also differences in the purposes that each statute was meant to achieve. They addressed diverse issues such as the right to receive annuities, the right to share in reserve lands, protection from debt collection, and the scope of the prohibition on selling liquor to Indians. None purported to be a comprehensive code for Indian Affairs. Unlike the Nova Scotia and New Brunswick statutes, these statutes did contain various definitions of "Indian", framed in each case in the context of the purposes they were intended to achieve.

216. These pre-Confederation statutes defined Indians in such a way as to include *inter alia* Métis, Half-breeds, wandering or unsettled Indians, and off-

[350] Distribution of clothing and blankets to Indians in Nova Scotia via the Indian Agents continued immediately after Confederation, before it was reorganized by Joseph Howe: Report of the Indian Branch of the Department of the Secretary of State for the Provinces, 1872, Exhibit D-172. It is unclear how long Howe's approach lasted; in the mid-1920s trust funds for Nova Scotia's Indians were still organized by county, subject to the jurisdiction of each county's Indian Agent: Cross-Examination of Dr. Patterson, *Transcript*, June 2, vol. 22, pp. 3917-3918.

[351] *An Act for the Better Protection of the Lands and Property of the Indians of Lower Canada*, 1850 c. 42 (Exhibit P-269); *An Act for the Protection of the Indians in Upper Canada from Imposition and the Property Occupied or Enjoyed by them from Trespass and Injury*, 1850, c. 74 (Exhibit D-57); *An Act to Repeal in Part and Amend an Act, intituled, An Act for the Better Protection for the Lands and Property of the Indians in Lower Canada*, 1851, c.59 (Exhibit P-270); *An Act to Encourage the Gradual Civilization of the Indian Tribes in this Province*, 1857, c.26 (Exhibit P-271); *An Act Respecting Civilization and Enfranchisement of Certain Indians*, 1859, c.9 (Exhibit P-272); *An Act Respecting Indians and Indian Lands*, 1861, c.14 (Exhibit P-273).

reserve Indians:

- *An Act for the Better Protection of the Lands and Property of the Indians of Lower Canada*, 1850, c.42 defines Indians in a way that includes half-breeds. This reflects other historical documents before this period.[352]
- This Act defines Indians in a way that includes people living off reserve.[353]
- *An Act to Repeal in Part and Amend an Act, intituled, An Act for the Better Protection for the Lands and Property of the Indians in Lower Canada*, 1851, c.59 amended the definition of Indians in the 1850 Act, but still includes half-breeds.[354]
- This Act also defines people off reserve as Indians.[355]
- *An Act to Encourage the Gradual Civilization of the Indian Tribes in this Province*, 1857, c.26 defines Indians in a way that includes half-breeds.[356]
- This Act applies to Indians living off reserve.[357]

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[352] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1603; Exhibit P-269, *An Act for the better Protection of the Lands and Property of the Indians in Lower Canada*, August 10,1850, s.5. This section provides, in particular, that all descendants of persons intermarried with Indians and residing amongst them are considered Indians for the purpose of determining any right of property, possession or occupation.

[353] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1605; Exhibit P-269, *An Act for the better Protection of the Lands and Property of the Indians in Lower Canada*, August 10,1850, s.5. This section provides, in particular, that all persons adopted in infancy by any such Indians, and residing in the Village or upon the lands of such Tribe or Body of Indians, and their descendants, are Indians under the Act.

[354] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1609; Exhibit P-270, *An Act to repeal in part and to amend an Act, intituled, An Act for the better protection for the Lands and property of the Indians in Lower Canada*, August 30, 1851. The new definition in s.2 included all persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians.

[355] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1609; Exhibit P-270, *An Act to repeal in part and to amend an Act, intituled, An Act for the better protection for the Lands and property of the Indians in Lower Canada*, August 30, 1851. Section 2 provides that all persons of Indian blood, reputed to belong to the particular Tribe or Body of Indians interested in such lands or immoveable property, and their descendants, are Indians under the Act.

[356] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1614; Exhibit P-271, *An Act to encourage the gradual Civilization of the Indian Tribes in this Province*, June 10, 1857, s.1. This section includes “persons of Indian blood” as Indians for the purposes of the Act, which based on Exhibit P-315 is broad enough to include half-breeds. In 1858, Harrison, Assistant Attorney General for Upper Canada, writes to Pennefather, Superintendent of Indian Affairs for the Province of Canada regarding the definition of Indian found in *An Act for the protection of the Indians in Upper Canada,* 1850. He writes: "In the face of the last mentioned enactment, it is impossible to contend that the word "Indian" in 13 and 14 Vic chap 74, section 3 [the 1850 Act] is restricted in meaning to Indians of 'pure blood.' I am further to state the Attorney General is not aware of any legal decision whereby even before 20 Vic cap 26 the word was so construed." See also Examination of Ms. Jones, *Transcript*, May 24, vol. 15, pp. 2363-2368 for her discussion of this opinion.

[357] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1614; Exhibit P-271, *An Act to encourage the gradual Civilization of the Indian Tribes in this Province*, June 10, 1857, s.1. The

- *An Act Respecting Civilization and Enfranchisement of Certain Indians*, 1859, c.9 defines Indians in a way that includes half-breeds.[358]
- This Act applies to Indians living off reserve.[359]
- *An Act Respecting Indians and Indian Lands*, 1861, c.14 defines Indians in a way that includes half-breeds.[360]
- This Act defines Indians in a way that includes people living off reserve.[361]

217. Aboriginal people of mixed ancestry, living off-reserve, although not extended all the protections of these Acts, are still included as Indians as a general concept in these pre-Confederation statutes. Dr. Wicken testified as follows:

- J. Marcoux, a missionary among the Khanawake, wrote that the half-breeds and Indians were treated exactly the same before the law and had the same rights.[362]

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purpose of this Act is to regulate enfranchisement by Indians with an interest in reserve lands; however, it regulates rights for the wife, widow, and descendants who may be off reserve. For example, the wife and children of an enfranchised Indian are also enfranchised, but still have a right to share in annuities.

[358] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1624; Exhibit P-272, *An Act respecting Civilization and Enfranchisement of certain Indians*, s.1. This section includes “persons of Indian blood” as Indians for the purposes of the Act, which based on Exhibit P-315 is broad enough to include half-breeds. In 1858, Harrison, Assistant Attorney General for Upper Canada, writes to Pennefather, Superintendent of Indian Affairs for the Province of Canada regarding the definition of Indian found in *An Act for the protection of the Indians in Upper Canada,* 1850. He writes: "In the face of the last mentioned enactment, it is impossible to contend that the word "Indian" in 13 and 14 Vic chap 74, section 3 [the 1850 Act] is restricted in meaning to Indians of 'pure blood.' I am further to state the Attorney General is not aware of any legal decision whereby even before 20 Vic cap 26 the word was so construed." See also Examination of Ms. Jones, *Transcript*, May 24, vol. 15, pp. 2363-2368 for her discussion of this opinion.

[359] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1624; Exhibit P-272, *An Act respecting Civilization and Enfranchisement of certain Indians*, s.1. See note respecting 1857 Act, above.

[360] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1627; Exhibit P-273, *An Act respecting Indians and Indian Lands,* 1861, s.11. This section indicates that all persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians are considered Indians within the meaning of the Act.

[361] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1627; Exhibit P-273, *An Act respecting Indians and Indian Lands,* 1861, s.11. This section does not include reference to residence, making it broad enough to include both on-reserve and off-reserve Indians who otherwise meet the definition.

[362] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1600.

- The law reflected the social reality; it responded to problems that the legislators saw within Aboriginal societies.[363]
- The 1857 statute protected on-reserve Indians from having land seized by white merchants. Off-reserve Indians were not provided this protection. This distinction did not affect the definition of Indian.[364]
- For instance, an off-reserve Aboriginal with debts was still prohibited from buying liquor.[365]
- Another example is that a half-breed, off-reserve parent, not taking proper care of his or her child, could have that child taken away and put into an Indian industrial school.[366]

218. Likewise, Dr. Patterson admitted on cross-examination that Lewis Joseph, a Maliseet who had chosen to apply for a land grant as an individual rather than share in reserve lands, was still regarded as an "Indian". He further admitted that Joseph might well have continued to associate with his Indian community, despite his individual land grant.[367]

219. Dr. Von Gernet spent a great deal of time on these pre-Confederation statutes, both in his report and in his testimony. On two major points, the Plaintiffs' experts and Dr. Von Gernet are in agreement about their significance. First, Dr. Von Gernet opined that the Indian Power would have been understood as including the power to define Indians, in order to pursue policies relating to Indians that require such definition. For example, when distributing entitlements,

[363] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1602.
[364] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1617-1618; Exhibit P-271, *An Act to encourage the gradual Civilization of the Indian Tribes in this Province*, June 10, 1857, s.1.
[365] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1619.
[366] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1621.
[367] Cross-Examination of Dr. Patterson, *Transcript*, June 2, vol. 22, pp. 3819-3821.

the government must know who is eligible to receive them. Dr. Wicken agreed with this proposition.[368]

220. Second, Dr. Von Gernet opined that the definition of "Indians" could vary with the particular purpose of the statute or provision in issue. For example, when defining those who are entitled to receive annuities, legislation could use a broader definition than when defining those who are entitled to a share in reserve lands.[369] Again, the Plaintiffs agree – Dr. Grammond stated expressly that legal definitions of identity are always a function of a specific time and specific statutory purpose.[370]

221. However, the parties do not appear to agree on the significance of these statutes to the Indian Power. It appears that the Defendants might seek to draw from these various definitions an indication that the framers intended to exclude certain categories of Aboriginal persons from the Indian Power. The Plaintiffs, though, would draw the opposite conclusion. For the Plaintiffs, these six statutes, containing six different definitions of "Indians", enacted over the space of 11 years, and addressing a range of different issues, demonstrate the need for a broad power, not a narrow one.

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[368] Examination of Dr. Wicken, *Transcript,* May 17, vol. 11, p. 1645-46.
[369] Dr. Von Gernet made this observation in relation to the post-Confederation statute, *An Act for the Gradual Enfranchisement of Indians*, 1869 (Exhibit P-316), but it would apply equally to pre-Confederation statutes. Cross-Examination of Dr. Von Gernet, *Transcript*, June 10, vol. 27, p. 4662.
[370] Examination of Dr. Grammond, *Transcript,* May 20, vol. 14, pp. 2171-2173.

222. The framers of the *BNA Act*, if they had wished to narrow the definition of "Indians" in s.91(24), could have chosen among any one of these statutory definitions, or could have crafted a different definition entirely. However, they chose not to define "Indians" at all. Consistent with their task of constructing a power for the ages, to be used in pursuit of whatever policies future governments might wish to pursue, they left the words of s.91(24) undefined and unrestricted.

223. At the very least, the power to define Indians implied in s.91(24) must have been understood to be broad enough to encompass all of the definitions set out in the pre-Confederation statutes. As Dr. Wicken testified:

- All of the essential elements of the Indian Power in the pre-Confederation statutes would be reflected in the Indian Power as it was drafted at the Quebec Conference.[371]
- Nothing in the history of the pre-Confederation statutes and their definitions of Indians would suggest that the power to define wandering half-breeds, living off reserve, as Indians, was taken out of the Indian Power.[372]
- Nothing in the correspondence or debates suggests that the power to define wandering half-breeds, living off reserve, as Indians was taken out of the Indian Power.[373]
- We can presume that the subsequent draft of the Indian Power which includes the words "and Lands Reserved for the Indians" is a result of discussion within the chambers of the Quebec Conference.[374]
- The interlineations of the words "and Lands Reserved for the Indians" suggests that the drafters of the BNA Act are careful in terms of how they phrased this power. It reflects the historical trajectory that preceded 1864.[375]

[371] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1667.
[372] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1628.
[373] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1628.
[374] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1654.
[375] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1655.

224. Dr. Wicken summarized the differences between his and Dr. Von Gernet's approaches in the following terms:

- Dr. Von Gernet pigeonholes Indians by distinguishing them from half breeds.[376]
- The drafters were creating a constitutional power, which is different than a statutory power.[377]
- The pre-Confederation Statutes began the process of defining who's an Indian and who's not, and narrowing the definition as they saw fit, to deal with the problems as the legislators saw them. The Constitutional power was drafted to deal with Indian diversity; it's different from a statute.[378]

225. In cross-examination, Dr. Von Gernet essentially conceded these points. He agreed that the power to make laws in regards to Indians must be broader than any specific definition of Indians for a particular statutory purpose:

- "Once you have decided that you need policies, you need to be able to identify Indians, you can no longer get away with simply leaving that question open."[379]
- One definition of the term "Indians" is its legal definition, which changes from time to time.[380]
- Some definitions of Indians will be broader and some will be narrower, depending on the policies being implemented.[381]
- There is also a definition of Indians for the purpose of making laws about Indians.[382]
- The definition of Indians for the purpose of making laws about Indians is broader than the definition of Indians for statutory purposes because the greater includes the lesser.[383]
- Dr. Von Gernet's report does not identify a limit to Parliament's power to change the definition of Indian.[384]

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[376] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1682.
[377] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1684.
[378] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1685.
[379] Examination of Dr. Von Gernet, *Transcript*, June 6, vol. 23, p. 4005.
[380] Cross-Examination of Dr. Von Gernet, *Transcript*, June 9, vol. 26, p. 4596.
[381] Cross-Examination of Dr. Von Gernet, *Transcript*, June 10, vol. 27, p. 4661.
[382] Cross-Examination of Dr. Von Gernet, *Transcript*, June 10, vol. 27, p. 4663.
[383] Cross-Examination of Dr. Von Gernet, *Transcript*, June 10, vol. 27, p. 4664.
[384] Cross-Examination of Dr. Von Gernet, *Transcript*, June 9, vol. 26, p. 4597.

226. Dr. Von Gernet further conceded that it is not inconsistent with his conclusions that Parliament should have the power to define those who intermarry with Indians, and their descendants, as Indians:

- It is not inconsistent with Dr. Von Gernet's opinion that Parliament can define Indians that it can define people who intermarry with Indians as Indians or non-Indians.[385]
- It is also not inconsistent that Parliament can define the descendants of non-Indians that marry Indians to be Indians or non-Indians.[386]

227. This would include the Métis, as well as non-status Indians.

(7) Conclusion on Purposes and Scope of s.91(24)

228. As set out above, the larger objects of Confederation, the importance of s.91(24) to those larger objects, the broad purposes of s.91(24) in light of those larger objects and its historical antecedents, the powers required to achieve those purposes, the pre-Confederation treaties, and the pre-Confederation statutes, all point to a broad power over "Indians", however Parliament may choose to define them from time to time. Specifically, these considerations point to a conclusion that the Indian Power is broad enough to encompass laws relating to Métis and non-status Indians.

C. Exercise of Jurisdiction Post-Confederation

(1) Introduction

229. As set out above under "purposive method", in determining the scope of a

[385] Cross-Examination of Dr. Von Gernet, *Transcript*, June 9, vol. 26, pp. 4603-4604.
[386] Cross-Examination of Dr. Von Gernet, *Transcript*, June 9, vol. 26, p. 4604.

head of power it is appropriate to look at the way in which the power has been interpreted in the past. In this particular context, there is little judicial guidance on the scope of s.91(24) prior to *Re Eskimos* in 1939. However, the federal government has legislated and has administered legislation relating to "Indians and lands reserved for Indians" continuously since 1867. That legislation and administrative action provides a body of practice that gives some limited guidance on the scope of s.91(24).

230. There is one caveat. A judicial decision looks at the nature of a head of power, and seeks to determine whether a particular law, or class of people,[387] falls within it. This may well require the court to consider how far the power extends, or otherwise to give definition to the scope of the power. By contrast, a great deal of legislative or government practice simply falls within the power, without defining it. A particular exercise of jurisdiction that is well within the scope of the power tells us nothing about its outer limits. Parliament, or the government, may simply have chosen to exercise its jurisdiction within narrow confines. This does not provide evidence of a narrow or circumscribed power. However, if Parliament or the government has exercised its jurisdiction broadly, without challenge, this may provide strong evidence of a broad power.

231. The Plaintiffs submit that post-Confederation, the federal government has exercised its jurisdiction under s.91(24) in a wide array of circumstances, in a

[387] For example, in *Re Eskimos*, where the Supreme Court was expressly asked whether the federal government had jurisdiction to make laws in relation to Inuit.

variety of ways, for a broad range of Aboriginals including Métis and non-status Indians.

(2) Canada's Undertakings at the Time of Confederation

232. As noted above, the acquisition of Rupert's Land and the Northwest Territories was a central part of the Confederation plan. One of the first acts of the new Dominion Parliament, in December 1867, was to draft a Joint Address of the House of Commons and Senate to the Queen, requesting an Order in Council to authorize the transfer of Rupert's Land to Canada.[388] That address provided *inter alia* as follows:

> And furthermore, upon transfer of [Rupert's Land and the North West Territory] to the Canadian Government, the claims of the Indian Tribes to compensation for lands required for purposes of settlement, will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.[389]

233. On March 22, 1869, Representatives of Canada (including George Etienne Cartier) agreed to terms of the transfer of Rupert's Land with the Hudson's Bay Company, which included the following:

> 8. It is understood that any claims of the Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government, and that the Company shall be relieved of all responsibility in respect of them.[390]

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[388] Jones Report, p. 7.
[389] Joint Address of House of Commons and Senate to the Queen, dated December 16 (House of Commons) and 17 (Senate), 1867, Exhibit P-308.
[390] Memorandum of Agreement re Rupert's Land, March 22, 1869, Exhibit P-309.

234. These terms subsequently became incorporated into the *Rupert's Land and North Western Territory Order* dated June 23, 1870, which transferred Rupert's Land and the Northwest Territories to Canada as of July 15, 1870, and which forms part of the Constitution of Canada.[391] Section 8 above is identical in wording to s.14 of the *Rupert's Land and North Western Territory Order*. The Joint Address of December, 1867 is an Appendix to the *Rupert's Land and North Western Territory Order*.

235. Ms. Jones explained the context of these undertakings. It was critical for the new Canada to create an environment where settlers could come into the area safely and securely, and part of this was extinguishing Indian claims.[392] Canada needed possession of the lands for the financing and construction of major infrastructure like the railway, and for general national development.[393] These facts relate directly to the purposes of s.91(24), as set out above.

(3) Early Post-Confederation Statutes

236. Parliament's first statute relating to "Indians" was the 1868 *Secretary of State Act*, which reorganized Indian Affairs and placed it under the control of the Secretary of State. This Act contains a broad definition of "Indians". Dr. Wicken noted that this Act includes wandering, off-reserve "Half-breed" Aboriginals:

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[391] Schedule to the *Constitution Act, 1982*; *Rupert's Land and North Western Territory Order*, http://www.solon.org/Constitutions/Canada/English/rlo_1870.html.
[392] Examination of Ms. Jones, May 24, vol. 15, p. 2319.
[393] Examination of Ms. Jones, May 24, vol. 15, pp. 2408-2409.

- Parliament's first definition of Indians after Confederation (1868, c.42) includes half-breeds.[394]
- Parliament's first definition of Indians after Confederation includes people living off reserve.[395]

Section 15 of the statute reads:

> For the purpose of determining what persons are entitled to hold, use or enjoy the lands and other immoveable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada, the following persons, and none other, shall be considered as Indians belonging to the tribe, band or body of Indians interested in such lands or immoveable property:
>
> Firstly. All persons of Indian blood, reputed to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property, and their descendants;
>
> 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; And
>
> Thirdly. All women lawfully married to any of the persons included in the several classes hereinbefore designated; the children issue of such marriages, and their descendants.

Section 17 reads:

> No persons other than Indians, or those intermarried with Indians, shall settle, reside upon or occupy any land or road, or allowance for roads running through any lands belonging to or occupied by any tribe, band or body of Indians; and all mortgages or hypothecs given or consented to by any Indians or any persons intermarried with Indians, and all leases, contracts and agreements made or purporting to be made, by any Indians or any person intermarried with Indians, whereby persons other than Indians are permitted to reside upon such lands, shall be absolutely void.

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[394] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1630; Exhibit P-274, *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnanoe Lands,* 31st Vict. 1868, s. 15.

[395] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1630; Exhibit P-274, *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnanoe Lands,* 1868, s. 15.

237. In the following year, Parliament enacted *An Act for the Gradual Enfranchisement of Indians*.[396] This latter statute introduced for the first time (in statutory form) the "marrying out" rule, whereby an Indian woman who married a non-Indian man would lose her Indian status, as would her children.[397] However, the regime for entitlement to annuities was quite different. The Act provides that "in the division among the members of any tribe, band, or body of Indians, of any annuity money, interest or rents", persons of less than one-fourth Indian blood who were born after 1869 could be disentitled, if the Chief gave a certificate to that effect that was sanctioned by the Superintendent.[398] The Act also brings forward and expands upon the "enfranchisement" provisions of pre-Confederation legislation from the Province of Canada.[399] The Act does not contain any general definition of "Indians", but provides that it is to be read together with the 1868 *Secretary of State Act*.[400]

238. Thus, as of 1869, there was no comprehensive Indian Act, and a relatively broad definition of "Indian" was in place under the 1868 *Secretary of State Act*, except for the "marrying out rule" which had been added in 1869, and which was qualified to the extent that those who married out and their descendants could

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[396] 32-33 Vict. (1869), c. VI, Exhibit P-316.
[397] *An Act for the Gradual Enfranchisement of Indians*, s. 6, Exhibit P-316.
[398] *An Act for the Gradual Enfranchisement of Indians*, s. 4. This was a complaints-driven system, that left it up to the Chief whether or not to take issue with the blood quantum of a recipient.
[399] *An Act for the Gradual Enfranchisement of Indians*, s. 13-20 (Exhibit P-316).
[400] *An Act for the Gradual Enfranchisement of Indians*, s. 24 (Exhibit P-316).

still be “Indians” for the purposes of receiving annuities. This legislation was not extended to Manitoba until 1874.[401]

(4) The Varied and Mixed Aboriginal Population of the Northwest

239. By the time of Confederation, there was a varied and mixed Aboriginal population in the Northwest (i.e., present-day Manitoba, Saskatchewan, Alberta, Northwest Territories, Yukon, and parts of Northwestern Ontario), with no clear dividing lines. Ms. Jones testified as follows:

- The Métis at Red River were not homogenous. Some had small farms that they maintained throughout the year, others were out hunting buffalo 4-8 months of the year, still others were engaged in woodland hunting, trapping of small furs;[402]
- There was a wide spectrum of pursuits in the Métis population at Red River, some had lives that differed very little from those the Government calls Indians;[403] There was a similar spectrum of pursuits among those that the Government called Indians – for example, at St. Peter’s Mission in Manitoba, whether “Indian” or “Half-breed”, most were farmers;[404]
- The Six Nations Reserve in Ontario shows that Indians outside of the Northwest were on a similar spectrum. Many on this reserve were educated, and most lived by farming;[405]
- Morris described three classes of Half-breeds in 1876: those with farms and homes, those living with Indians and identifying with them, and those who do not farm but live like Indians by pursuing buffalo;[406]
- M.G. Dickieson described four classes of Half-breeds in 1876: those that follow the customs and habits of Indians, those that have not altogether followed the ways of the Indians, those that followed habits of Whites more than Indians, and those that followed the

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[401] *An Act to amend certain laws respecting Indians, and to extend certain Laws relating to maters connected with Indians to the Provinces of Manitoba and British Columbia*, S.C. 1874, c.21; Von Gernet Report, p. 118.
[402] Examination of Ms. Jones, *Transcript*, May 24, vol. 15, pp. 2383-2384.
[403] Examination of Ms. Jones, *Transcript*, May 24, vol. 15, p. 2387.
[404] Examination of Ms. Jones, *Transcript*, May 24, vol. 15, p. 2406.
[405] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, p. 2530.
[406] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, pp. 2550-2552; Exhibit P-337, Morris, The Treaties of Canada with the Indians of Manitoba and the NW Territories, p. 295.

> habits of Whites and have never been recognized as anything but Half-breeds;[407]

240. Ms. Jones characterized these attempts of Government representatives to classify the "Half-breeds" in the following terms:

> [T]he government, in a typically 19th century way, would like to … be able to divide [Half-breeds] into neat categories, but the remarks of many observers on the ground indicate that this is not a simple task.[408]

241. It may well have been the case that many Métis, at least at Red River, considered themselves to be distinct from some of the "uncivilized" Indians in the Northwest. However, this must be understood in context. As Ms. Jones explained, in a town of 10,000 on the frontier, "of course people are going to make little distinctions"; and "the closer you were considered to being considered white, the higher you were on the social scale."[409]

242. The record in this case is replete with expressions of 19th century attitudes that we would now regard as racist. The typology itself, of "pure-blood" Indians and "Half-breeds", reflects a racial conception of identity that is now

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[407] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, pp. 2558-2561; Exhibit P-338, Department of the Interior, Annual Report, Year ended June 30, 1876.
[408] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, p. 2560.
[409] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, pp. 2527-2528. Wicken supports this analysis in his Reply Report:

> Not all people who had Indian blood would have wanted to be identified in this way. However, regardless of their own attitudes, racial scientific thinking influenced how elites and ordinary people thought about non-whites and made it difficult for people with Indian blood to escape this typology. Indian blood was tainted blood just in the same way and at the same time, 'black' blood in the United States and Canada, tainted people and led to the creation of difference within communities between whites and blacks.

Wicken Reply Report, p. 13 (citations omitted).

discredited.[410] Dr. Patterson conceded in cross-examination that 19th century correspondence relating to the Mi'kmaq featured racist language and attitudes, and that these were typical of 19th century colonial administrators.[411] This language is featured in documents from elsewhere in Canada.[412] In this context, it is not surprising that many individuals would seek to distance themselves from being identified as "Indian". That does not mean, however, that legislation or other government action dealing with them was not an exercise of the Indian Power.

243. Dr. Von Gernet agreed in cross-examination that both "Half-breeds" and "Indians" were varied in terms of their degree of "civilization" and way of life:

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[410] Report of Dr. Grammond, Exhibit P-292, p. 3 [Grammond Report].

[411] This was evident in many documents, in which Mi'kmaq were variously described as a "degenerated race of wanderers" (Exhibit D-149); "abject beings" (Exhibit D-151); assumed to be all or nearly all incapable of owning land because they would sell it for rum; patronized by awarding of medals "like the Boy Scouts" (Exhibit D-174): Cross-examination of Patterson, *Transcript*, June 2, vol. 22, pp. 3790, 3794, 3799-3801, 3809, 3829, 3842-43.

[412] See e.g. Appendices to Bagot Commission Report, Exhibit P-240, pp. 126 of 329: "The Christian religion alone has reformed the habits of the Indians, who, before their conversion, were full of faults of every nature"; p. 140 of 329: "The habits of the half-breeds resemble very much the habits of the lower order of the French Canadians, from whom they are principally descended; the most of them speak French, English, and their native language. I think the half-breeds are a more industrious class than the native Indian, except when the latter is in pursuit of game… They are generally stronger and more capable of enduring violent exercise and fatigue than the native Indian, and for that reason are generally preferred by the traders as canoemen. They are, however, much addicted to the use of *ardent spirits*, and when in a state of intoxication become frequently very insolent and abusive."; p. 166 of 329: "There is [a difference between Indians and half-breeds], the half-breed is more intelligent, more crafty and treacherous, and decidedly a more reckless character."; p. 172 of 329: "The half-breeds, from the circumstance of the most of them being able to speak, read and write the English language, have a decided advantage over the native Indian; hence a more rapid improvement in their minds is observable. Their wish to imitate the whites in dress, manner, &c, appears to be greater than with the native Indian, and laziness is looked upon by them as disgraceful."; p. 187 of 329: "In most cases the half-breed is proud of his being partly white, and not unfrequently despise the Indians, but notwithstanding he is found to possess most of the vices of the white man without the good qualities of the Indians, he is more savage when not under the dread of the law than the Indian; prone to drunkenness, and perhaps less honor or honesty than either of his parents; and the females are generally loose characters."; p. 211 of 329: "The half-breeds are more intelligent [than Indians], and imitate the whites in their mode of living".

- The Pennefather Report included descriptions of the Iroquois of St. Louis. These people maintained an agricultural industry and had stone houses, a church, a school, and met Bishop Taché's description of having a "civilized" lifestyle. Regardless, they still clung to their roving habits, like the Métis of Red River.[413]
- The Report also included a description of the Iroquois of St. Regis. They were all Roman Catholics, contained a number of people of mixed descent, and had substantially built houses, a church, and a school. They were employed as raftsmen and pilots for the HBC. They enjoyed the attributes of civilization and were not entirely unlike the Red River Métis.[414]
- The Report also included a description of the Abenakis of St. Francis. They were Roman Catholic, had an agricultural industry, worked in both Canada and the US, and had stone houses and a school. They bore some of the characteristics of 19th century civilization.[415]
- The Report considered the Hurons of La Jeune Lorette. They were described as all half-breeds, Roman Catholics, had two schools, cultivated gardens, had stone houses, and their band was described as "one of the most advanced in civilization in the whole of Canada."[416]
- Simcoe Kerr was a lawyer and a Six Nations Grand Chief, and also considered to be an Indian.[417]
- Alexander Ross said that some Métis are respectable in their habits while others are as "improvident as the savages themselves"[418]
- Minutes of a meeting of the Governor in Council of Assiniboia in 1869 record Riel as saying that the Métis "were uneducated and only half-civilized and felt if a large immigration were to take place they would be crowded out of a country which they claim as their own, but they knew they were, in a sense, poor and insignificant, that they felt so much as being treated as if they were more insignificant than they, in reality, were."[419]

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[413] Cross-Examination of Dr. Von Gernet, *Transcript*, June 9, vol. 26, pp. 4559-4562; Exhibit P-241, Memorandum: Special Commissioners Pennefather Report, 1858, pp. 19-20.
[414] Cross-Examination of Dr. Von Gernet, *Transcript*, June 9, vol. 26, pp. 4562-4564; Exhibit P-241, Memorandum: Special Commissioners Pennefather Report, 1858, p. 21.
[415] Cross-Examination of Dr. Von Gernet, *Transcript*, June 9, vol. 26, pp. 4565-4567; Exhibit P-241, Memorandum: Special Commissioners Pennefather Report, 1858, p. 26.
[416] Cross-Examination of Dr. Von Gernet, *Transcript*, June 9, vol. 26, pp. 4569-4571; Exhibit P-241, Memorandum: Special Commissioners Pennefather Report, 1858, pp. 29-30.
[417] Cross-Examination of Dr. Von Gernet, *Transcript*, June 9, vol. 26, p. 4568.
[418] Cross-Examination of Dr. Von Gernet, *Transcript*, June 9, vol. 26, p. 4558; Exhibit P-445, Alexander Ross, "Red River Settlement".
[419] Cross-Examination of Dr. Von Gernet, *Transcript*, June 10, vol. 27, pp. 4714-4715; Exhibit P-450, Minutes of a Meeting of the Governor in Council of Assiniboia held in the Court room of Assiniboia on October 25, 1860, p. 3.

- In sum, the "Half-breed" communities varied significantly along the spectrum of civilization, as did the Indians. To the extent that Prof. Wicken refers to diversity in this sense, Dr. Von Gernet agreed.[420]

244. The reality was that Aboriginal population of the Northwest was mixed, varied and interrelated, and it was impossible to draw the line between "Half-breeds" and "Indians".[421] In Manitoba and the Northwest Territories around the time of Confederation, there were very few "pure" Indians and there was a very racially mixed population.[422] As the federal government introduced and implemented policies, individuals reacted in ways that had little to do with their own identity, as will be described below.

(5) The *Manitoba Act, 1870* and the Scrip System

245. When Riel proclaimed a Provisional Government in December 1869 for the "People of Rupert's Land", in response to the federal government's "clumsy" implementation of the Rupert's Land purchase, it took Ottawa by surprise.[423] These events led to negotiations between representatives of Riel's Provisional Government and Ottawa in the spring of 1870, that culminated in the creation of the Province of Manitoba (as a "postage stamp" province, very much smaller than it is today) by the *Manitoba Act, 1870*.[424] That Act included the following provision:

> 31. And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such

[420] Cross-Examination of Dr. Von Gernet, *Transcript*, June 9, vol. 26, p. 4571.
[421] Examination of Ms. Jones, *Transcript*, May 26, vol. 17, pp. 2836, 2838.
[422] Re-Examination of Ms. Jones, *Transcript*, May 27, vol. 18, p. 3045.
[423] Jones Report, p. 35-36; Examination of Ms. Jones, *Transcript*, May 24, vol. 15, p. 2422.
[424] Jones Report, p. 36; Exhibit P-275.

> ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, it is hereby enacted, that, under regulations to be from time to time made by the Governor General in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada, and the same shall be granted to the said children respectively, in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine. [emphasis added]

246. Ms. Jones and Dr. Von Gernet provided different accounts of the context and significance of this provision. For the Plaintiffs, it is not necessary for the present case to decide whether this provision recognized that the Métis of the Red River settlement shared in the "Indian title" to the lands. There are many other indications that the Indian Power is a broad one, many other instances of exercise of federal jurisdiction over Métis and non-status Indians, and many other reasons to conclude that s.91(24) extends to Métis and non-status Indians in the modern context. Nor is it necessary to determine what, precisely, the phrase "Indian title" meant to those who used it – this phrase may or may not have coincided with modern conceptions of Aboriginal title.[425]

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[425] Many of the documents reviewed in this section came before the first major statement in Canadian law on the nature of "Indian title", *St. Catherines Milling & Lumber Co. v. The Queen*, (1888) 14 A.C. 46 (J.C.P.C.). In the Supreme Court of Canada, Strong J. referred to "Indian title" as "usufructurary only": 13 S.C.R. 577, at p. 616; in the Privy Council Lord Watson characterized the Indian interest in land as a "personal and usufructuary right", and less than a "fee simple", but declined to pronounce upon "the precise quality of the Indian right". The term "usufruct" is defined in *The Dictionary of Canadian Law* (2nd Ed.) as "the right to reap the fruits of something belonging to another, without wasting or destroying the subject over which one has that right". Even at the highest levels of the judiciary, there appears to have been uncertainty as to exactly what "Indian title" meant in this era. The modern doctrine of Aboriginal title has developed considerably in cases such as *Delgamuukw v. The Queen*, [1997] 3 S.C.R. 1010, and modern Canadian law has separately developed the concept of "Aboriginal rights", as non-possessory rights to hunt, fish, and harvest specific lands, arguably resembling the concept of "usufruct". Métis have been held to enjoy "Aboriginal rights" in *R. v. Powley*, [2003] 2 S.C.R. 207. These may be characterized as an interest in land.

247. Nevertheless, the weight of the historical evidence strongly supports the conclusion that the "Half-breeds" of the Northwest were understood to have an interest in the land as Aboriginals, and that the federal government acted to extinguish that interest through the issuance of scrip to those who chose this option, pursuant to the undertakings that it had given in connection with the *Rupert's Land and North Western Territory Order*. These were assumptions that were constantly reiterated throughout the entire process of implementation and administration of the scrip system across the West, from 1870 to 1935.

248. Ms. Jones testified that in the negotiations leading to the *Manitoba Act, 1870*, the Canadian government came up with scrip as a policy innovation, as a way of dealing with the claims of the "Half-breeds". The Red River Métis would not have accepted being wards of the state.[426] What Canada did was to decouple or separate the wardship policy then applied to "Indians", from the underlying "Indianness" or "Indian title" that "Half-breeds" shared.[427] Ms. Jones noted that it was not necessary that persons be made wards of the state in order to be treated as "Indians", and she drew an analogy to the earlier land surrenders of Upper Canada, which had simply been economic exchanges in which Indians were paid cash in return for their lands.[428]

249. Ms. Jones disagreed with Dr. Von Gernet's opinion that the idea that "Half-breeds" had or shared an interest in the lands only arose from a "nuance" that

[426] Examination of Ms. Jones, *Transcript*, May 24, vol. 15, p. 2422.
[427] Examination of Ms. Jones, *Transcript*, May 24, vol. 15, pp. 2413-2417, 2425-2426.
[428] Examination of Ms. Jones, *Transcript*, May 24, vol. 15, p. 2412.

appeared for the first time in Ritchot's diary of the 1870 negotiations. She noted the following:

- The "Half-breeds" of the Upper Great Lakes had been recognized as sharing in the Indian title that was surrendered in 1850 in the Robinson-Huron and Robinson-Superior treaties;[429]
- The initial Métis demands in November 1869 had asserted a right to compensation for surrendered lands on account of "the relationship with the Indians";[430]
- They were also looking for an exemption from taxation as other Indians had enjoyed.[431]

250. When the *Manitoba Act, 1870* was debated in the House of Commons in 1870, some opposition members had been confused with the scrip concept, but in Ms. Jones' opinion this was likely because they were used to the idea that Indians had to be wards of the state, which was not at all inevitable or inherent to Indian policy.[432] Macdonald stated twice in the May 2, 1870 debates that the allocation of lands to the "Half-breeds" was "for the purpose of extinguishing the Indian title".[433] He noted that the land could not be handed over to the "present inhabitants" (presumably the Métis), who had sought "possession of the whole country",[434] as it was "of the greatest importance to the Dominion to have possession of it" so that the Pacific Railway could be built.[435] A week later on

[429] Reply Report of Ms. Jones, Exhibit P-303, p. 3 [Jones Reply Report].
[430] Examination of Ms. Jones, *Transcript,* May 24, vol. 15, p. 2390; Letter from John Young B[] to John A. Macdonald dated November 18, 1869.
[431] Examination of Ms. Jones, *Transcript*, May 24, vol. 15, p. 2390.
[432] Examination of Ms. Jones, *Transcript*, May 24, vol. 15, pp. 2410-2416.
[433] House of Commons Debates, May 2, 1870, Exhibit P-318, p. 1292-93.
[434] Métis representatives had sought control over public lands in their various lists of rights: see Flanagan, "The Case Against Métis Aboriginal Rights", Exhibit P-451. Since the Métis (temporarily) constituted a majority in the new Province of Manitoba, if they had been able to secure such control, they might well have considered that they would be able to recognize and provide for their own land rights if this demand had been met.
[435] House of Commons Debates, May 2, 1870, Exhibit P-318, p. 1309.

May 9th, Cartier (one of the Canadian representatives who had negotiated the Rupert's Land Terms of Agreement), stated that "any inhabitant of the Red River country having Indian blood in his veins was considered to be an Indian".[436]

251. Ms. Jones noted that issuance of scrip to extinguish the "Half-breed" interest in land was only one of a range of policy options developed during the period of the numbered treaties and scrip regime. These options varied from group to group and area to area.[437] Other options included the following:

- Accepting treaty and living on-reserve;
- A hybrid, or "midway point" option, whereby an Aboriginal person could accept treaty and 160 acres of land off-reserve.[438] In Treaty 8, for example, individuals could accept treaty and live off-reserve on 160 acres of land held in trust. This option was referred to as "land and severalty",[439] and was also offered as an option in Treaty 10;[440]
- The treatment of the Bobtail Band, who were readmitted to treaty after taking scrip, but with "reduced status";[441]
- The creation of a "Half-breed reserve" at St. Paul-de-Métis, discussed below.

252. In Ms. Jones' opinion, Canada dealt with the varied Aboriginal population of the Northwest in a variety of different ways for a variety of different purposes and broader policy objectives. In so doing, federal authorities consistently acted

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[436] House of Commons Debates, May 9, 1870, Exhibit P-242, p. 1450. This was certainly consistent with the legal opinion of the Office of the Attorney General of Upper Canada in 1858 (when Macdonald was Attorney General) that "it is impossible to contend that the word Indian in the 1850 Act is restricted to Indians of pure blood, and [the Attorney General is] not aware of any legal decision where it is interpreted that way": Exhibit P-315, Letter from Harrison to Pennefather dated July 2, 1858, discussed by Jones in Examination on May 24, vol. 15, pp. 2366-2368.

[437] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, p. 2519.

[438] See e.g. P-341, 1880 Consolidated *Indian Act*; Examination of Ms. Jones, *Transcript*, May 25, vol. 16, pp. 2573-2575.

[439] Examination of Ms. Jones, *Transcript*, May 26, vol. 17, p. 2790; Exhibit P-378, Letter from Pedley to Sifton dated August 17, 1903.

[440] Examination of Ms. Jones, *Transcript*, May 26, vol. 17, pp. 2792, 2801.

[441] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, pp. 2695-2696; Exhibit P-364, "We the undersigned lately of Bobtail Band…".

on the assumption that they had to meet certain legal requirements that they understood they had as the heirs of the Royal Proclamation, to adhere to equitable principles, in particular compensating for Indian title or the Indian interest in lands.[442]

253. The assumption that scrip was issued to extinguish the "Indian title" of the "Half-breeds", pursuant to Canada's obligations, was continuously reiterated over a period of 65 years, by both Conservative and Liberal governments and politicians:

- In 1876, when the *Indian Act* was introduced, Minister David Laird of the Liberal Government of Alexander Mackenzie, explained that "lands had been given to half-breeds in order to extinguish their titles";[443]
- The phrase "the extinguishment of Indian title" as it relates to half-breeds is "repeated again and again in subsequent legislation", including the *Dominion Lands Acts* of 1879 and 1883, and all of the Orders-in-Council establishing scrip commissions, etc.[444]
- Similar language was used in the 1873 Half-Breed Treaty 3 Adhesion, discussed below, which reflected the language of *Manitoba Act* – compensation in exchange for surrender or commutation of Half-breed claims by virtue of their Indian blood;[445]
- The January 1885 Order-in-Council authorizing the enumeration of "Half-breeds" for the purpose of issuing scrip outside of Manitoba, signed by John A. Macdonald, refers back to the date of the Rupert's Land transfer, and uses the language "settling equitably the claims of Half-breeds in Manitoba and the North West territories who would have been entitled to land had they resided in Manitoba at the time of the transfer", which is a reference to Canada's

[442] Examination of Ms. Jones, *Transcript*, May 26, vol. 17, pp. 2871-2872.
[443] Exhibit P-189, House of Commons Debates, March 28, 1876; Examination of Ms. Jones, *Transcript*, May 25, vol. 16, p. 2534.
[444] Examination of Ms. Jones, *Transcript*, May 24, vol. 15, pp. 2423-2424; see *Dominion Lands Act* reference at Examination of Ms. Jones, *Transcript*, May 25, vol. 16, pp. 2568-2569, Exhibit P-339.
[445] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, pp. 2483-2484; Exhibit P-329, Adhesion by Halfbreeds of Rainy River and Lake, signed by Chatelaine…dated September 12, 1875

undertaking in the Joint Address of December 1867 (appended to the *Rupert's Land and North Western Territory Order*.)[446]

- In April 1885, correspondence between W.P.R. Street (Half-breed Commissioner) and David McPherson (Minister of the Interior in the Macdonald government), noted that the practice has been to treat Half-breeds as entitled to more than just ordinary settlers. McPherson agreed to an amendment to the Order-in-Council relating to scrip to ensure that Half-breeds were able to claim land as settlers in addition to the scrip they were entitled to receive in exchange for Indian title.[447] It is clear from this exchange that scrip was intended to compensate for the extinguishment of Indian title.[448]
- The resultant Order-in-Council dated April 17, 1885, signed by John A. Macdonald, specified that scrip was issued to extinguish Indian title.[449]
- According to Ms. Jones, "the subsequent scrip distributions under this framework in the 1880s all used the phrase in the analytical concept of the extinguishment of the Indian title of the half-breeds".[450]
- When Canada established a new commission to issue scrip in 1898, in connection with Treaty 8, the Order-in-Council authorizing the commission referred to the relinquishment of Aboriginal title of half-breeds.[451]
- A subsequent Order-in-council in 1899 indicated of the half-breeds of Athabasca, that "whatever rights they have, they have in virtue of their Indian blood … it is obvious that while differing in degree, Indian and Halfbreed rights in an unceded territory must be co-existent, and should properly be extinguished at the same time."[452] This Order-in-Council also stated that "the claim of the Halfbreeds [elsewhere in the Northwest Territories, who had not received scrip] is well-founded and should be admitted."[453]
- In 1899, in Treaty 8, the federal government dealt with Indians and "Half-breeds" at the same time. This became the pattern for treaties 8, 10 and 11.[454]

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[446] Order-in-Council dated January 26, 1885, Exhibit P-344; Jones, May 25, vol. 16, 2587-2589.
[447] Exhibits P-346, Papers and Correspondence, April 20, 1885, and P-347, Orders in Council, April 17, 1885.
[448] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, p. 2604.
[449] Exhibit P-347, Orders in Council, April 17, 1885.
[450] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, p. 2620.
[451] Examination of Ms. Jones, *Transcript*, May 26, vol. 17, p. 2747, Exhibit P-370, Canada Order in Council 1703, dated June 27, 1898, p.3, signed by Governor General.
[452] Examination of Ms. Jones, *Transcript*, May 26, vol. 17, p. 2760.
[453] Examination of Ms. Jones, *Transcript*, May 26, vol. 17, pp. 2762, 2767; See also Exhibits P-372, Order in Council, Memorandum from Sifton to the Governor General dated April 29, 1899, and P-373, Canada Order in Council 918, dated May 6, 1899 with similar language.
[454] Examination of Ms. Jones, *Transcript*, May 26, vol. 17, p. 2744.

- Liberal Prime Minister Wilfrid Laurier, in a debate in the House of Commons respecting the 1899 amendment to *Dominion Lands Act*, referred to the Indian title of half-breeds being extinguished.[455] Ms. Jones opined that Laurier was relating the right to compensation back to the *Royal Proclamation* and the *Rupert's Land and North Western Territory Order*. Ms. Jones noted that there had been a practice of extinguishing title and this applied to the "Half-breeds", even though they were treated in a different fashion than "Indians".[456]
- Charles Tupper (former Conservative Prime Minister, then leader of the opposition) stated in this debate that he understood that the law recognized the claim of the "Half-breeds" and sought to extinguish it.[457]
- Minister Clifford Sifton in the same debate stated that "I think their claim is perfectly just, and cannot on any logical ground be refused. If the half-breed had any claim at all, it was on account of his Indian blood and his occupation of that territory…"[458]
- The 1899 amendment to the *Dominion Lands Act* refers to satisfaction of claims of half-breeds arising out of the extinguishment of the Indian title.[459]
- In 1921, when Treaty 11 was negotiated and the final Half-breed Scrip Commission was established, the Order-in-Council establishing the Commission, signed by Conservative Prime Minister Arthur Meighen, again noted that scrip is for the extinguishment of the Indian title.[460]

254. Against this evidence, Dr. Von Gernet relied heavily on a statement made to the House by John A. Macdonald in 1885 (originally pointed out by Flanagan, in his article *The Case Against Métis Aboriginal Rights*),[461] that the use of the phrase "extinguishment of Indian title" for "Half-breeds" was "an incorrect one,

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[455] Examination of Ms. Jones, *Transcript*, May 26, vol. 17, pp. 2770-2780.
[456] Exhibit P-374, House of Commons Debates; 62-63 Victoria 1899, dated July 3, 1899; Examination of Ms. Jones, *Transcript*, May 26, vol. 17, p. 2780.
[457] Examination of Ms. Jones, *Transcript*, May 26, vol. 17, p. 2772; Exhibit P-374, House of Commons Debates; 62-63 Victoria 1899, dated July 3, 1899.
[458] Examination of Ms. Jones, *Transcript*, May 26, vol. 17, p. 2774; Exhibit P-374, House of Commons Debates; 62-63 Victoria 1899, dated July 3, 1899.
[459] Examination of Ms. Jones, *Transcript*, May 26, vol. 17, p. 2782; Exhibit P-245, Parliament of the Dominion of Canada passed in the session held in the Sixty-second and sixty-third years of the Reign of Her Majesty Queen Victoria; Fourth session of the Eighth Parliament.
[460] Exhibit P-437, Order in Council dated April 12, 1921.
[461] Cross-Examination of Dr. Von Gernet, *Transcript*, June 10, vol. 27, p. 4736.

because they did not allow themselves to be Indians".[462] This statement, however, must be taken in its context.

255. As noted by Ms. Jones, Macdonald was responding to a motion accusing his government of having caused the 1885 Riel Rebellion by "grave instances of neglect, delay, and mismanagement".[463] The context was that the Rebellion was effectively over, but Riel was still awaiting trial. Opposition Leader Edward Blake, in the course of his 7-hour speech, referred to the delay by the Macdonald government in implementing scrip outside of Manitoba, as had been authorized under the *Dominion Lands Act, 1879*.[464] Macdonald, in his counterattack, repeatedly responded that Blake's attack would provide ammunition to Riel in mounting his defence at trial.[465]

256. In this highly charged context, in the early hours of the morning, Macdonald described the history of scrip in Manitoba. While most of what he said was accurate, there were some statements that were not. Macdonald asserted that "there were very few half-breeds outside of the Province of

[462] House of Commons Debates, July 6, 1885, Exhibit P-348, p. 3114. Flanagan, *The Case Against Métis Aboriginal Rights* (1983), Exhibit P-451. Dr. Von Gernet also relies on a letter by Archibald dated December 27, 1870, expressing the opinion that scrip was "a boon to the half-breeds" because many did not originate from Manitoba. Ms. Jones answers this point in her Reply Report, noting *inter alia* that British practice had always been to deal with Aboriginals who were present on the ground at the time of treaty without attempting to trace the "original inhabitants": Jones Reply Report, p. 4, note 7.
[463] House of Commons Debates, July 6, 1885, Exhibit P-348, p. 3075; Examination of Ms. Jones, *Transcript*, May 25, vol. 16, p. 2615.
[464] House of Commons Debates, July 6, 1885, Exhibit P-348, p. 3076-80.
[465] House of Commons Debates, July 6, 1885, Exhibit P-348, p. 3110.

Manitoba".[466] In fact, this was wrong, as there were many established Métis communities elsewhere in the Northwest Territories at that time.[467] He also stated that "if they are half-breeds they are whites, and they stand in exactly the same relation to… Canada as if they were altogether white", noting that white settlers were allowed to keep lands they had occupied.[468] This too was incorrect, or at least incomplete. "Half-breeds" had received larger grants than white settlers, and Macdonald had himself just signed an Order-in-Council (on April 17, 1885) that would allow "Half-breed" scrip claimants in the Northwest to receive scrip in addition to their claims as settlers.[469]

257. With respect to Macdonald's statement that the phrase "extinguishment of Indian title" was "incorrect", whatever the politics of his speech might have been, the statement is puzzling, since his own government had not only introduced the scrip system, but had repeatedly reaffirmed the principle in subsequent legislation – a point forcefully made by Wilfrid Laurier in the continuation of the debate the following day.[470] As Ms. Jones concluded in her testimony:

> [T]hese remarks [by Macdonald in 1885] are anomalous. The political instruments and the administrative construct, the analyses around which the implementation was organized, [were] all exactly around the idea of extinguishing the Indian title of the Metis. All of the documentation is very consistent to that effect, and this remark that the arrangement in 1870 was not really about extinguishing Indian title is the thing that stands out in isolation. It is the comment that is not congruent with the rest of the documentation, including, of course, other documentation in which

[466] House of Commons Debates, July 6, 1885, Exhibit P-348, p. 3114.
[467] Examination of Ms. Jones, *Transcript,* May 26, vol. 17, p. 2710-2715.
[468] House of Commons Debates, July 6, 1885, Exhibit P-348, p. 3110.
[469] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, pp. 2616-2617; Order-in-Council dated April 17, 1885, Exhibit P-346.
[470] House of Commons Debates, July 6, 1885, Exhibit P-348, p. 3121-24.

> Macdonald would have had responsibility and would have been able to alter wording if he had so chosen.[471]

258. Ms. Jones also confirmed that Macdonald's 1885 statement stands in isolation not only to what went before but what also came after, in the administration of the scrip system through to the 1930s.[472]

259. These later events are instructive. As Ms. Jones testified, in 1921 the President of the Privy Council sought the legal opinion of the Deputy Minister of Justice on whether Manitoba had a valid claim against Canada for the alienation of public lands by issuing half-breed scrip. Deputy Minister Newcombe concluded that Manitoba did not, because scrip had been issued pursuant to Canada's undertaking under s.14 of the *Rupert's Land and North Western Territory Order*, to satisfy "any claims of the Indians to compensation for lands required for purposes of settlement".[473] Newcombe was a highly experienced Deputy Minister, having served in that position for at least 22 years by that point,[474] through a period that encompassed the 1899, 1906 and 1921 Half-breed scrip processes in conjunction with Treaties 8, 10 and 11.

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[471] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, p. 2619.
[472] Examination of Ms. Jones, *Transcript,* May 25, vol. 16, p. 2620
[473] Legal Opinion dated August 20, 1921, Exhibit P-399; Examination of Ms. Jones, *Transcript*, May 26, vol. 17, pp. 2917-2918.
[474] Newcombe was Deputy Minister of Justice in 1899 when he wrote an opinion on whether the Department of Indian Affairs had the right under the Indian Act "to readmit half-breeds discharged from treaty". He concluded that outside of Manitoba, this could be done under special circumstances, and such half-breeds could for some purposes be accounted an Indian, but they could not receive annuities: Letter from Deputy Minister of Justice to Secretary, Department of Indian Affairs dated June 24, 1899, Exhibit D-285. Newcombe subsequently served as a Justice of the Supreme Court of Canada.

260. A similar issue arose in the mid-1930s, when the Dysart Commissions adjudicated upon claims to compensation by Saskatchewan and Alberta from Canada arising out of its control of public lands between 1905, when they became provinces, and 1930, when they assumed control under the *Natural Resources Transfer Agreements*. In that litigation, Canada, represented by lead counsel J. Stewart Macgregor,[475] unambiguously put forward the position that scrip had been issued pursuant to Canada's undertakings in the Joint Address of the House of Commons and Senate of December, 1867, and the *Rupert's Land and North Western Territory Order*.[476] Before the Alberta Commission, Canada also articulated the logical corollary of that position – that the issuance of scrip was an exercise of Canada's jurisdiction under s.91(24) of the *British North America Act*.[477]

261. In summary, five Prime Ministers (Macdonald, Mackenzie,[478] Laurier, Tupper, Meighen) acknowledged that scrip was issued towards the extinguishment of Indian title during the scrip period. Numerous official documents, including legislation and Orders in Council, reflected that position. Canada's internal legal opinion, by a very experienced Deputy Minister of Justice, was that scrip was issued pursuant to Canada's undertaking to satisfy "any claims of the Indians to compensation for lands required for purposes of

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[475] Macgregor was also lead counsel for Canada in *Re Eskimos*: see Exhibit P-100.
[476] Examination of Ms. Jones, *Transcript*, May 26, vol. 17, pp. 2908-2911; Brief to Commission on the Natural Resources of Saskatchewan, Exhibit P-395, pp. 1167-1174; Brief to Alberta Natural Resources Commission, Exhibit P-397, pp. 30-33.
[477] Examination of Ms. Jones, *Transcript*, May 26, vol. 17, pp. 2915; Brief to Alberta Natural Resources Commission, Exhibit P-397, pp. 30-33.
[478] Through his Minister David Laird, in introducing the *Indian Act, 1876*.

settlement" under the *Rupert's Land and North Western Territory Order*. Canada's counsel argued before the Dysart Commissions in 1934 and 1935 that scrip had been issued pursuant to Canada's undertakings in that Order and in the 1867 Joint Address. Finally, Canada expressly articulated the position in 1935 that issuing scrip was an exercise of jurisdiction under s.91(24). This is overwhelming evidence that Canada has always understood that it has jurisdiction over Métis under s.91(24).

(6) Moving "Half-breeds" In and Out of Treaty

262. Even if issuing scrip to extinguish the Indian title of "Half-breeds" is not regarded as an exercise of jurisdiction under the Indian Power, the federal government frequently exercised its jurisdiction over Métis by moving them back and forth between "treaty" (Indian status) and scrip ("Half-breed" status). The federal government did so on both an individual and a group basis.

263. Ms. Jones traced in detail in her report, the lack of any real impediments to "Half-breeds" taking treaty between 1871 and 1877, when Treaties 1 through 7 were concluded.[479] Indeed, they had an incentive to do so, since these treaties were concluded (and annuities distributed) well before any scrip was available.[480] Dr. Von Gernet agreed, noting that there was no process to evaluate eligibility for treaty when annuities were first distributed.[481] She further traced the experience under the later Treaties 8, 10 and 11, between 1899 and 1921, in which treaty

[479] Jones Report, pp. 42-73.
[480] Examination of Ms. Jones, *Transcript*, May 24, vol. 15, pp. 2438, 2440-2441.
[481] Examination of Dr. Von Gernet, *Transcript*, June 9, vol. 26, pp. 4468-4469.

and scrip are offered at the same time, and officials frankly acknowledge that it is a matter of choice which one mixed-ancestry Aboriginals take.[482]

264. Ms. Jones testified that once scrip became available, a great many Aboriginals who had taken treaty wanted to withdraw and take scrip, which was more valuable in the short term, though it often provided little lasting benefit.[483] Again, it was not difficult to do so – many if not most Aboriginals in the Northwest had sufficient mixed ancestry to qualify them for scrip.[484]

265. Ms. Jones provided the example of Christine Munro, who applied for scrip in 1885.[485] Ms. Munro stated in her application (filled out for her by the Half-breed Commissioner, as she was illiterate) that she did not receive annuities, but a subsequent application on behalf of her deceased children indicates that she had been in treaty for a couple of years in the early 1880s.[486] Christine Munro "traversed just about every conceivable category" of her times.[487] She was by no means unique in this respect.[488]

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[482] Jones Report, pp. 124-135; 155-169. See Matheson, G. "Memorandum Half-Breeds", 18th March, 1935, Exhibit P-191: "The distinction between the Indian and the Half-breed, from an official standpoint, is not a matter of blood but of the status they elected to assume at the time of treaty."

[483] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, p. 2586. Scrip often went to speculators who bought it at a fraction of the price: Examination of Ms. Jones, *Transcript*, May 25, vol. 16, pp. 2625, 2642-2643.

[484] Re-Examination of Ms. Jones, *Transcript*, May 27, vol. 18, pp. 3044-3045.

[485] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, pp. 2622-2627.

[486] Examination of Ms. Jones, *Transcript,* May 25, pp. 2624, 2629; Exhibits P-349 and P-350.

[487] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, p. 2629.

[488] Dr. Von Gernet testified about 1909 correspondence relating to a woman married to Francis Janvier, who "belonged to treaty since childhood", but whose father had taken scrip; she then became eligible for treaty again upon marriage to Janvier: Exhibits D-282 (Letter from Francis Jaview to Secretary DIA sated September 27, 1909) and D-283 (Letter from S. Stewart to Francis Javier dated October 13, 1909); Examination of Dr. Von Gernet, *Transcript*, June 8, vol.

266. In this context, Aboriginal people responded to short-term incentives and made individual decisions regarding treaty or scrip based on a number of factors. These decisions were not necessarily based on identity. Jones testified as follows:

- The location of land grants was unknown, making it difficult (and likely unappealing) for individuals to give up work they had done on their properties in the hopes of obtaining a land grant under scrip.[489]
- According to Morris, half-breeds claiming money as Indians likely "were ignorant that they forfeited their own and their childrens' claim to consideration in the allotment of lands to the half-breeds under the Manitoba Act, a claim probably of much more value to them than any annuities or presents they would receive by declaring themselves Indians"[490]
- In Treaty 4, Morris offered eligible individuals immediate payment for treaty while assuring those who identified as half-breeds that "the Queen will deal justly, fairly and generously" with them at some future point.[491] The prospect of immediate payment, rather than the possibility of one in the future, was undoubtedly more appealing to individuals who were eligible for treaty.
- Scrip was often as much as a year's salary for some individuals, and was significantly more "cash" than annuity payments. This fostered an element of "instant gratification" that may have been difficult to resist.[492]
- There were very few scrip applications where individuals could sign their own name;493 most could not read or write.[494]

25, pp. 4442-4446. In more modern times, Dwight Dorey also traversed just about every conceivable category: Examination of Dwight Dorey, *Transcript*, May 3, vol. 2, pp. 118-119.

[489] Examination of Ms. Jones, *Transcript*, May 24, vol. 15, pp. 2440-2441; Exhibit P-320, Letter to Joseph Howe from Wemyss Simpson, dated November 3, 1871; The Stone Fort and Manitoba Post Treaties.

[490] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, pp. 2468-2470; Exhibit P-325 Letter to Mr. Morris from Mr. Laird, dated April 21, 1874 re: February query about the Métis of Treaty Three. The letter goes on to state that half-breeds may not elect to be struck off the band list in 1874.

[491] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, p. 2513; Exhibit P-332, Short hand report by M.G. Dickenson of the Qu'Appelle Treaty discussions dated September 8, 1874.

[492] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, pp. 2642-2643.

[493] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, p. 2626.

[494] Re-Examination of Ms. Jones, *Transcript*, May 27, vol. 18, p. 3044.

267. Conversely, officials who administered the treaty and scrip systems did not make decisions based upon identity, "self-ascription", or "other-ascription" in relation to the Aboriginals of the Northwest. To be blunt, it seems clear that officials had difficulty telling "Indians" and "Half-breeds" apart.[495] Moreover, as Ms. Jones confirmed, "the word 'half-breeds' is used in a fairly indiscriminate way" in the 19th century.[496]

268. The main preoccupation of officials was not whether "Indians" and "Half-breeds" were sorted into the appropriate categories, but rather whether any were "double dipping" by persons claiming both treaty benefits and scrip.[497] This was the policy concern that was reflected in the *Indian Act, 1876*, the first legislation to set out a distinction between "half-breeds" and "Indians". That Act did not say that "half-breeds" could not be accounted an Indian, but only that "no half-breed in Manitoba who has shared in the distribution of half-breed lands" could be accounted an Indian. As noted by Dr. Wicken:

- This Act, which applied to Manitoba, BC, and PEI, defines Indians as including half-breeds[498]
- Parliament's first consolidated *Indian Act* defines Indians as including people living off reserve[499]

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[495] See e.g. M.G. Dickieson letter, Exhibit P-338. John A. Macdonald also acknowledged in the House in 1888 that "that the line between a pure blooded Indian and a half-breed is very indistinct": Examination of Ms. Jones, *Transcript*, May 25, vol. 16, pp. 2700-2701; Exhibit P-365, Commons Debates second session-sixth parliament; 51 Victoria, 1888, VOL XXV. See also *R. v. Mellon* (1900) 7 C.C.C. 179 (NWTSC), where a "half-breed" who was in fact a "treaty Indian" is described as looking like he belongs "to the better class of half-breeds".

[496] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, p. 2576.

[497] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, pp. 2469-2470.

[498] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1633; Exhibit P-265, Chap. 18; An Act to Amend and Consolidate the laws respecting Indians, s.15.

[499] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1633; Exhibit P-265, Chap. 18; An Act to Amend and Consolidate the laws respecting Indians, s.15.

- Some half-breeds in Manitoba were defined as Indians and some were not.[500]
- Half-breeds who received land under s.31 of the *Manitoba Act* could not be considered to be Indians under the Act.[501]
- Half-breed men who are not children who received section 31 lands, who did not have families, and who may have engaged in the buffalo hunt, were still considered Indians. Half-breed women were still considered Indians.[502]

269. Ms. Jones also traced a number of circumstances in which individuals who had taken either treaty or scrip were permitted to change their election:[503]

- In 1874, there was a one-time opportunity for Half-breeds in Treaties 1 and 2 to re-elect either scrip or treaty[504]
- In 1876, Bobtail and his followers took treaty; then in 1886 they withdrew from treaty and took scrip, but they were subsequently readmitted to treaty the following year (though on unfavourable terms)[505]
- In 1884, the *Indian Act* was amended to make it easier to withdraw from treaty, by removing the requirement that annuities be repaid, which had acted as a disincentive to withdrawal.[506]
- Once scrip was introduced in the Northwest Territories in 1885, there was an exodus of "Indians" wanting to withdraw from treaty and take scrip.[507]
- There were many subsequent cases where those who had withdrawn sought to be readmitted, including the Sandy Bay and Cumberland bands.[508]
- Sinclair, acting Deputy Minister for Indian Affairs, noted in 1891 that part of reason for readmitting half-breeds to treaty is "humane motives" because they were destitute and starving;[509]

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[500] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1633; Exhibit P-265, Chap. 18; An Act to Amend and Consolidate the laws respecting Indians, s.15(e).
[501] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1640.
[502] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1643.
[503] Jones Report, pp. 86-114; 136-55.
[504] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, p. 2471; Exhibit P-325, Letter to Mr. Morris from Mr. Laird, dated April 21, 1874 re: February query about the Métis of Treaty Three.
[505] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, pp. 2695-2696; Exhibit P-363, Letter from Office of the Indian Commissioner, June 29, 1887.
[506] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, pp. 2578-2579.
[507] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, p. 2653.
[508] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, p. 2704.
[509] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, pp. 2705-2707; Exhibit P-366, Letter dated March 31, 1891, from Robert Sinclair.

- Duncan Campbell Scott, Accountant of Indian Affairs in 1906 (subsequently Deputy Superintendent General of Indian Affairs), recommended that two half-breed girls be taken into treaty so that they can be funded at a residential school, on grounds of "humanity and expediency", and described other similar cases;[510]
- In 1928, C. Parker, Inspector of Indian Agencies, travelled to the Northwest Territories to report on conditions of people generally. On "Half-breeds", he reported that they were "poor outcasts, victims of most of the most iniquitous schemes ever fostered and maliciously operated, deserving of sympathetic consideration, discriminated against because of a choice to take scrip in the past."[511] This report eventually resulted in some treaty admissions.[512]
- Cumulatively, at least 800 withdrawals from treaty occurred between 1885 and 1926, according to the "Withdrawal Register"; but this presents only a very incomplete view.[513]
- Conversely, "hundreds" of Aboriginals who had taken scrip were admitted or readmitted into treaty.[514]

270. Ms. Jones also traced in detail the various policy objectives pursued by federal authorities in administering the "very indistinct" line between "Indians" and "Half-breeds". These included:

- Fulfilling Canada's undertakings to adhere to "equitable principles" in "dealings with the aborigines" and compensate for "Indian title";
- Ensuring a peaceful and orderly environment for settlers and infrastructure development;
- Cost control;
- Flexibility in allowing Aboriginal people to be compensated outside *Indian Act* legal restrictions;
- "humanity and expediency"; and
- assistance to "destitute persons".[515]

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[510] Examination of Ms. Jones, *Transcript*, May 26, vol. 17, pp. 2840-2847; Memorandum by Scott dated December 11, 1906, Exhibit P-381.
[511] Examination of Ms. Jones, *Transcript*, May 26, vol. 17, p. 2858.
[512] Examination of Ms. Jones, *Transcript*, May 26, vol. 17, p. 2864; Exhibit P-387, Report by Parker dated December 31, 1928.
[513] Jones Report, p. 153.
[514] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, pp. 2704-2705.
[515] Jones Report, p. 181; Examination of Ms. Jones, *Transcript*, May 25, vol. 16, pp. 2706-2707.

271. All of these were undoubtedly exercises of jurisdiction over Métis by the federal government under s.91(24). Métis people were continually included or excluded from Indian status, and reassigned status as circumstances warranted, in pursuit of the federal government's shifting Indian policies.

(7) The Half-breed Adhesion to Treaty 3

272. In 1873, in advance of the Treaty 3 negotiations, Ojibway Chief Maw na do pe nes wrote to Treaty Commissioner Morris to ask whether "fifteen families of half breeds living on Rainy River" could be included in the treaty.[516] These Métis had been enumerated by Dawson (another Treaty Commissioner for Treaty 3) in 1871, when he passed through the area.[517] They were intermarried with, but distinct from, the Ojibway Indians of the area; at least some of them lived in houses in their own settlement on the river, though they may have hunted together with the Ojibway.[518]

273. At the treaty negotiations themselves, a Chief asked about the "Half-breeds that are actually living among us, those that are married to our women", and requested that they should "be counted with us, and have their share of what you have promised", according to the short-hand reporter who was present. Morris promised to refer the question to the government at Ottawa, and to recommend an affirmative response.[519] Morris wrote to Minister of the Interior

[516] Letter dated March 22, 1873, Exhibit P-321.
[517] Dawson Route Pay Lists, Exhibit P-319.
[518] Examination of Ms. Jones, *Transcript*, May 24, vol. 15, p. 2455.
[519] Notes of the shorthand reporter present at North-West Angle Treaty, dated September 30,

Laird early in 1874, and Laird responded by forwarding correspondence by Deputy Minister E.A. Meredith, which stated that there would be "no objection" to allowing "half-breeds who have married Indian women and adopted the habits of Indians" to elect whether to be treated as "Half-breeds" or Indians.[520]

274. Later in 1874, Dawson sent a telegram to Minister Laird, noting that the Rainy River Half-breeds "desire to join the Indians and have elected a Chief. Are they to be treated as an Indian band in the matter of reserves." Again, the response was that there was "no objection to allowing for families of halfbreeds outside of Manitoba who have married Indian women and adopted Indian habits to choose".[521] Early in 1875, the Governor in Council approved a memorandum specifying that "the Halfbreeds in the Rainy River district, numbering about 90 persons have decided on joining the Indians. They will require a Reserve laid out for them next summer".[522] J.S. Dennis, Surveyor General of Dominion Lands, was given the task of surveying the reserve.[523]

275. In September, 1875 Dennis entered into an "adhesion" with the "Half-breeds" of Rainy River, under which they surrendered their Indian title in return for a reserve and other benefits.[524] Dennis surveyed a reserve for them in 1876.

1873, Exhibit P-324.
[520] Letter from Morris to Laird dated February 4, 1874, Exhibit P-323; Letter from Meredith dated April 21, 1874, Exhibit P-325.
[521] Telegram from Dawson to Laird dated October 9, 1874, Exhibit P-326; Telegram from R.W. Scott to Dawson dated October 9, 1874, Exhibit P-330.
[522] Memorandum by Laird dated February 11, 1875, Exhibit P-328, p.6 (summation); endorsed by Governor General February 27, 1875.
[523] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, pp. 2481-2483.
[524] Adhesion by Halfbreeds of Rainy River and Lake dated September 12, 1875, Exhibit P-329.

However, by that time Indian Commissioner Provencher had set out a policy against acknowledging groups of “Half-breeds” as “special Bands, distinct from the Indian Bands which surround them”, apparently out of concern that they would not consider this as a “final decision” on their rights, but would “only be a starting point for them to prefer new claims as issue of the first White settlers of this country”. Also in 1876, the *Indian Act, 1876* was passed, and the Indian Affairs branch took the position that “the Department cannot recognize separate Halfbreeds bands”.[525] In the result, these “Half-breeds” were given their reserve, but were required to join the much smaller Little Eagle Band, for which an adjacent reserve had been surveyed.

276. In his 1875 Report Provencher did acknowledge, however, that the “question of residence” in the 1868 *Secretary of State Act* (which included as Indians “all persons [of Indian ancestry] residing among those Indians”, “has always received a very liberal interpretation”; and that “the law has always been broadly interpreted in the most favourable meaning” to Half-breeds who wished to claim Indian status. Thus, ‘[a]ll those among the Half-breeds wishing to avail themselves of the [1868 *Secretary of State Act*], have all facilities for so doing.”[526] In other words, “living among the Indians” was not applied as any kind of test to limit the ability of “Half-breeds” to take treaty.

277. Again, Ms. Jones and Dr. Von Gernet viewed this historical event

[525] Jones Report, p. 67; Examination of Ms. Jones, *Transcript*, May 25, vol. 16, p. 2504.
[526] Provencher Report to Superintendent General of Indian Affairs, October 30, 1875, Exhibit P-331.

differently. Ms. Jones noted that the idea of a separate reserve for a group of Half-breeds (which she described as an historic Métis community) had apparently received approval at the highest level, the Governor in Council. She further noted that Treaty Commissioner Dawson and Surveyor General Dennis had visited their community, and would have been aware of their distinctness from the Ojibway in the area, though they were interrelated.[527] She acknowledged that there was no record of an Order-in-Council approving the Treaty 3 Adhesion, but it was not clear that this was needed, as this was the first such adhesion to a numbered treaty.[528] When they were required to join Little Eagle's band, this was because of a new policy and legislation that had not existed when the concept of a separate reserve had apparently been approved and the Adhesion signed.[529] For Dr. Von Gernet, this was another anomaly, "among the strangest departures from Indian treaty making in Canadian history", and "not only unprecedented, but unacceptable".[530]

278. With respect, Dr. Von Gernet has missed the point. Canada exercised its jurisdiction by taking an identifiable group of Métis into treaty. High-ranking officials (Treaty Commissioner Dawson and Surveyor General Dennis) knew their

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[527] Examination of Ms. Jones, *Transcript*, May 24, vol. 15, p.2457, May 25, vol. 16, p. 2475.
[528] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, pp. 2489-2490.
[529] Examination of Ms. Jones, *Transcript*, May 25, vol. 16, pp. 2505-2507.
[530] Von Gernet Report, pp. 171, 175. Dr. Von Gernet regards the reference to the Rainy River Half-breeds requiring a Reserve, as "ambiguous". With respect, the more natural reading is that "they will require a Reserve laid out for them next summer" refers to the Half-breeds, not any of the Saulteux whose reserves had already been selected. This is even clearer in the document Dr. Von Gernet cites, Dawson's "Description of Reserves to be set aside for Certain Bands of the Saulteux" dated February 17, 1875, Exhibit P-327 (which contains this same language as in the Laird Memorandum dated February 11, 1875, endorsed by the Governor General February 27, 1875, Exhibit P-328). Dawson's document sets out the various Saulteux reserves in detail, then adds the reference to the Half-breeds and the phrase "they will require a Reserve" at the very end of the document.

circumstances. Whether or not the Adhesion was formally approved, Canada treated this group as having a claim to Indian title, and benefitted from its surrender. Canada lived by the terms of the Adhesion by providing the reserve lands requested by the Métis. After apparently accepting the idea of a separate reserve, federal authorities changed their policy and insisted that the Rainy River Métis be combined with the smaller Little Eagle band, whose reserve was adjacent. Either approach would have been an available policy choice under the broad Indian Power,[531] but in either case Canada exercised jurisdiction over a group of Métis.

(8) The Reserve and Industrial School at St. Paul-de-Métis

279. In 1895, Father Lacombe petitioned for poor "Half-breeds" to get some land on which to settle, as they were destitute. He proposed that a reserve consisting of four townships be established, together with an industrial school so that "Half-breeds" could learn "the different trades of civilized life".[532] Title to the reserve lands would be vested in the Crown, so the Half-breeds could not alienate them.[533] Métis settled on the reserve would have to be reassured that this would "not place them on the same footing as an Indian", because of Métis

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[531] Proposals for separate "Half-breed" reserves persisted. In the 1885 House of Commons Debates, Macdonald described a proposal of Archbishop Taché that Half-breed families in the Northwest Territories be settled on their own reserves in groups of at least 100 families each, and granted land on the condition that it could not be alienated for at least three generations: Exhibit P-348, p. 3116. Subsequently, a reserve was actually established at St. Paul-de-Métis, as set out below.

[532] Indians also had a system of "industrial schools".

[533] Examination of Ms. Jones, *Transcript*, May 26, vol. 17, p. 2885; Exhibit P-228, "A Philanthropic Plan to Redeem the Half-breeds of Manitoba and the Northwest Territories", Exhibit P-393, Appendix to Order-in-Council dated December 28, 1895.

sensitivities, but it would be the functional equivalent to an Indian reserve.[534]

280. Lacombe's proposal was approved, and a reserve and industrial school was established at St. Paul-de-Métis in Alberta. It was not a great success. About ten years later, the school burned down, and take-up of the settlement never did meet expectations. The government abandoned the proposal in 1908, and disposed of the lands.[535]

281. This again represents an exercise of jurisdiction over the Métis under the broad Indian Power. The federal government established a reserve, using Crown lands, exclusively for Métis, and retained title to prevent the lands from being alienated. The federal government also participated in establishing an industrial school exclusively for Métis.[536] In so doing, the government's "Half-breed" policy converged to a large extent with its policy towards "Indians".

(9) Métis and Liquor Policy

282. In 1894, Parliament amended the *Indian Act* to broaden a specific provision that applied in circumstances where a person had sold intoxicating

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[534] Examination of Ms. Jones, *Transcript*, May 26, vol. 17, p. 2885; Exhibit P-229, Memorandum by Deputy Minister of the Interior A.M. Burbidge dated December 12, 1895, Exhibit P-393, Appendix to Order-in-Council dated December 28, 1895.

[535] Examination of Ms. Jones, *Transcript*, May 26, vol. 17, pp. 2894-2897; Order-in-Council dated August 13, 1908, Exhibit P-394. Métis who had occupied lands at the reserve were apparently permitted to keep them.

[536] Métis had also been subject to residential schools along with other Indians: see e.g. Memorandum from Duncan Scott dated December 11, 1906, Exhibit P-381. Dr. Wicken reports that off-reserve Mi'kmaq (which would include those of mixed ancestry) were also subject to being taken to residential schools in Nova Scotia in the 1940s: see the account of Rita Joe in Wicken Reply Report, p. 10-11.

liquor to an “Indian”. This issue arose when officers of the North West Mounted Police experienced difficulties “in distinguishing between Half-breeds and Indians in prosecutions for giving liquor to the latter”.[537] Deputy Superintendent General of Indian Affairs Hayter Reed suggested an amendment adding to the definition of Indian, for the purposes of this offence only, the phrase “and any person of Indian blood who follows the Indian mode of life, and who has not become enfranchised”, which would clearly extend to a great many Métis.[538]

283. In the result, the sale of intoxicating liquor provision was broadened even more than Reed had suggested, adding the phrase “shall extend to and include any person… who follows the Indian mode of life”, without including an Indian blood requirement.[539] This became the subject of correspondence between the Department of Justice and Indian Affairs in 1937, when the Deputy Minister of Justice advised that the section (by then renumbered s.126) could apply “not only to a non-treaty Indian but also… a Half-breed if he follows the Indian mode of life”.[540] In further correspondence, on realizing that the wording could potentially apply to a “white man”, Justice asked if Indian affairs could define “Indian mode of life”.[541] Acting Director of Indian Affairs T.R.L. McInnes replied that the

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[537] Letter from NWMP dated February 22, 1893, Exhibit P-390.
[538] Memorandum by Hayter Reed dated February 9, 1893, Exhibit P-391.
[539] *An Act to Further Amend the Indian Act*, 57-58 Vict. c. 32, s.6, Exhibit P-392. Ms. Jones reviews this issue at Examination of Ms. Jones, *Transcript*, May 26, vol. 17, pp. 2879-2880.
[540] Letter from Deputy Minister of Justice to Director of Indian Affairs, 14 May, 1937, Exhibit P-221.
[541] Letter from P.M. Anderson dated May 25, 1937, Exhibit P-223.

Department had "no information by which to identify the expression 'Indian mode of life'".[542]

284. It is clear from this history that Canada exercised jurisdiction over Métis for the purpose of enforcing liquor prohibitions, regardless of their mixed-ancestry, residence, membership or purported membership in any Indian tribe or band, self-ascription or other-ascription, as long as they followed the "Indian mode of life". However, this too was problematic as a purported test of "Indianness", as is evident from the above correspondence, as well as other sources.[543] Given the enormous diversity of lifestyles of "Indians" in Canada, the rapidity with which such lifestyles may change,[544] and the inherent frailty of such cultural concepts as markers of identity,[545] it is not surprising that "Indian mode of life" did not prove to be a reliable guide.

(10) Legislating for "Half-breeds" Whose Ancestors Took Scrip

285. As noted by Dr. Von Gernet, in the early to mid-20th century there were many instances where "Half-breeds" who had taken scrip, or whose ancestors

[542] Letter from T.R.L. McInnes dated May 27, 1939, Exhibit P-224.
[543] For example, in 1886 Indian Inspector Wadsworth made clear in correspondence that "mode of life" is not a workable standard – nobody answered his questions about the definition of Indian mode of life: Examination of Ms. Jones, *Transcript*, May 25, vol. 16, pp. 2658-2664, May 26, vol. 17, p. 2883; Exhibits P-357, P-358 (Letter July 7, 1886 from the Office of the Indian Commissioner), P-359 (Letter from Hayter Reed to Superintendent General of Indian Affairs dated July 26, 1886), P-360 (Letter from Wadsworth to Dewdney dated July 27, 1886). Likewise, in reviewing annuity paylists for the Robinson treaties in 1899, Inspector of Indian Agencies J.A. McCrae rejected as unworkable and vague the standard of "tribal life" to distinguish proper from improper recipients: "Report on Payments of and Claims to Robinson Treaty Annuity", January 30, 1899, p. 8-9 (summation), Exhibit P-367; Examination of Ms. Jones, *Transcript*, May 26, vol. 17, pp. 2723-2726.
[544] Cross-Examination of Dr. Patterson, *Transcript*, June 1, vol. 21, pp. 3762-3774.
[545] Examination of Dr. Grammond, *Transcript*, May 20, vol. 14, pp. 2176-2179.

had done so, were found to be residing on reserves and receiving treaty annuity payments, despite the general legislative framework that sought to exclude such persons from the statutory definition of "Indian". This was particularly an issue in the Lesser Slave Lake area (Treaty 8, in Alberta), where it led to a Commission of Inquiry before Justice W.A. MacDonald of the Supreme Court of Alberta in 1944.[546]

286. Commissioner MacDonald traced the history of the choice granted to mixed-ancestry Aboriginals at the time Treaty 8 was negotiated, and for a period thereafter, and expressed a broad view of the federal government's powers:

> Ordinarily the issue of scrip to an individual bars his right to treaty. This appears to be the view adopted by the Department for many years. When an Indian or Halfbreed takes scrip his aboriginal rights are extinguished and strictly speaking that is the end of the matter. However, the practice followed in the years immediately following the conclusion of Treaty No. 8 makes it clear that the Government did not take the position that the issue of scrip was an insuperable bar to treaty. A good deal of latitude was allowed in switching from treaty to scrip and vice versa.
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> * * *
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> <u>The authority of the Government to deal with all aspects of Indian Affairs is as ample and complete today as it was in 1899 when Treaty No. 8 was signed.</u> When individuals of mixed blood are admitted to treaty from time to time by the local agent with the approval, either express or implied, of the Department, it seems to me that their status, especially after the lapse of many years, should be held to be fixed and determined. This was the course recommended and approved in the years immediately following the treaty. These individuals acquire rights under the treaty and under the Indian Act, and these rights should not be lightly disturbed. They should have the same security of tenure and the same protection in the enjoyment of property rights… as is accorded any other citizen of the nation.[547] [emphasis added]

[546] Von Gernet Report, pp. 195-204.
[547] Report of Commissioner MacDonald to T.A. Crerar, August 7, 1944, Exhibit P-90, pp. 4, 6.

287. Dr. Von Gernet, in his discussion of this report, noted that Commissioner MacDonald's recommendations were not all followed by the Department. However, with respect, he has drawn the wrong lesson from this fact. The Department chose, as a matter of policy, not to implement these recommendations fully, expressing concern about "the impact that [this] re-definition of "Indian" would have on the administration of Indian affairs".[548] But no doubt was expressed as to the "ample and complete" authority of the federal government "to deal with all aspects of Indian Affairs".

288. In 1958, in an amendment to the *Indian Act*, Parliament adopted precisely the course that MacDonald had recommended, on a system-wide basis. This amendment was first introduced by the Diefenbaker government in early 1958 as Bill 246.[549] This Bill died on the order paper when an election was called, but Diefenbaker won the election and the amendment was passed later that year.[550] When the Bill was reintroduced, a memorandum referred expressly to controversial decisions where Indians whose ancestors had taken scrip had their names deleted from the Band lists, and noted that "[t]he new legislation will prevent similar occurrences".[551] Dr. Von Gernet did not address this amendment,

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[548] Von Gernet Report, p. 203.
[549] Examination of John Leslie, *Transcript*, May 10, vol. 7, pp. 917-921; Exhibit P-95. A Cabinet memorandum dated December 11, 1957, sets out exactly the same rationale for the amendment as is found in Justice MacDonald's report: Exhibit P-94.
[550] Examination of Leslie, *Transcript*, May 11, vol. 8, p. 1176-1179; S.C. 1958, c. 19, *An Act to amend the Indian Act*.
[551] Memorandum re Bill "C", Exhibit P-184, p.3; see also Exhibits P-185 and P-186. The issue is described by Dr. Leslie in "A Historical Survey of Indian-Government Relations 1940-1970", Exhibit P-188, at pp. 26-28.

either because he was unaware of it, or because it did not fit his thesis. Neither possibility inspires confidence in his evidence.

289. As with the general issue of including or excluding “Half-breeds” in treaty in the numbered treaties, the federal government was legislating and acting with respect to Métis whether it chose to exclude them (as it did following the MacDonald report) or include them (as it did in the 1958 amendment to the *Indian Act*.) The 1958 amendment is a clear example of Parliament legislating with respect to Métis as a group or class.

(11) “Red Ticket” Indians and Other Historical Non-Status Indians

290. The federal government also acted throughout the post-Confederation period to create or recognize categories of Indians without status under legislation, define and redefine them, sometimes readmit them to status, and otherwise deal with their rights.

291. One example is “Red Ticket” Indians. These were Indian women who “married out”, and thereby lost their Indian status, but were permitted to continue to draw treaty annuities, or to commute them if they chose. Their unique situation was originally created by the 1869 *Act for the Gradual Enfranchisement of Indians*,[552] which introduced the marrying out rule in statutory form, but allowed women who had married out to continue to draw annuities. This was continued in the *Indian Act, 1876*, and an administrative practice arose of issuing these

[552] Exhibit P-316.

women identity cards known as “red tickets”.[553] They were apparently also permitted in at least some cases to reside on the reserve. However, when the 1951 *Indian Act* was brought in, they were all required to commute their annuities, and forced to leave the reserves.[554] Ultimately, women who married out, together with their first generation descendants, were reinstated to Indian status under Bill C-31 in 1985.

292. A similar pattern emerged in Ontario, in the Robinson treaty areas. In the 1890s, investigations revealed that many persons who had intermarried with the Indians, and their descendants, were residing on the reserves and receiving annuities, despite the fact that their qualification for Indian status under the *Indian Act* was questionable. This was far from a simple issue, because officials in the Department believed that rights could be traced to the Robinson treaties of 1850, when different statutory definitions had applied.[555]

293. Inspector of Indian Agencies J.A. Macrae wrote a series of reports and recommended that several hundred residents of the reserves be assigned to a category of “non-transmissible title”. In his view, these Indians did not have any legal status or entitlement, but he wished to avoid the administrative burden associated with the inevitable petitions if they were struck off the lists, as well as the hardship to “poor people”. Therefore, he recommended that they be

[553] Von Gernet Report, p. 121. See also Letter from M. McCrimmon to G.H. Gooderham dated March 17, 1949, Exhibit P-91.
[554] Examination of Leslie, *Transcript*, May 12, vol. 9, pp. 1192-1196.
[555] Jones Report, pp.117-124.

recognized as having “non-transmissible title”, whereby they could be paid annuities for their lifetimes but not transmit entitlement to their children (similar in concept to s.6(2) Indians under the current *Indian Act*), as a matter of grace and favour.[556] This category was implemented between 1899 and 1917, but eventually abolished as a matter of policy because of the confusion it created, the perception of unfairness among the Indians, and the number of complaints it generated.[557] The transmissible and non-transmissible lists were consolidated, and any eligible children of formerly non-transmissible persons were added to the paylists.

294. In Nova Scotia, the Department acted to deem mixed-ancestry Aboriginals as either having or not having Indian status, according to its shifting policy goals. Dr. Wicken testified that the treatment of the Indian Reserve at New Germany fit this pattern, as did other reserves in the province. By the 1930s, the Department did not favour small reserves. There was pressure to open up reserve land. The Department began the process of getting people to surrender their reserves in rural areas so that timberland could be exploited.[558] In New Germany, the Department chose to define the mixed-ancestry residents as non-Aboriginal, which was inconsistent with the practice applied to larger reserves, where mixed ancestry was not regarded as a bar to recognition as “Indians”.[559] In or about 1910, New Germany was described in census records and elsewhere as having

[556] Examination of Ms. Jones, *Transcript*, May 26, vol. 17, p. 2720.
[557] Jones Report, pp. 122-23.
[558] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1677.
[559] Examination of Dr. Wicken, *Transcript*, May 17, vol. 11, p. 1679-80.

about 60 Indians,[560] but when the surrender was taken in 1933 the Department only recognized two Indians as being necessary to sign the surrender.[561]

295. Other Indians without status under the *Indian Act* included those who enfranchised, whether voluntarily or involuntarily, between the 1869 *Act for the Gradual Enfranchisement of Indians*,[562] and Bill C-31 in 1985, which allowed enfranchised Indians and their first generation descendants to be reinstated to status.[563] Certain Indians of Newfoundland and Labrador, who entered Confederation in 1949 "fully enfranchised",[564] and were not brought under the *Indian Act* until much later, were also non-status Indians. One such group (the Conne River Band) was brought under the *Indian Act* in 1984; [565] other Newfoundland Indians (the Qalipu Band) have entered into an agreement in principle with the federal government to be recognized, as discussed below.[566]

296. In these and many other examples, the federal government has exercised its jurisdiction over a broad range of Indians who do not (or did not) have status under the *Indian Act*, to create, define, and/or exclude non-status Indians, and in many cases reinstate them to status. The government did so under its broad

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[560] Cross-Examination of Dr. Patterson, *Transcript*, June 2, vol. 22, p. 3935.
[561] Letter dated September 12, 1995 re New Germany Reserve Specific Land Claim, Exhibit P-15, p. 2.
[562] Exhibit P-316.
[563] Bill C-31 abolished the concept of enfranchisement and repealed former *Indian Act* provisions ss.9-13 regarding enfranchisement.
[564] Memorandum dated November 29, 1949, Exhibit P-111, pp. 1-2. See generally "Pencilled Out: Newfoundland and Labrador's Native People and Canadian Confederation, 1947-54", Exhibit P-107, pp. 29-37.
[565] Cross-Examination of Dr. Patterson, *Transcript*, June 2, vol. 22, pp. 3938-3941; Order-in-Council dated June 28, 1984, Exhibit P-441.
[566] Examination of Dr. Patterson, *Transcript*, June 2, vol. 22, pp. 3942-3945; Press Release dated November 30, 2007, Exhibit P-442.

Indian Power, consistent with the purposes of s.91(24) identified above.

D. Modern Realities and the Exercise of Jurisdiction in the Modern Era

(1) Post-war Realities and Federal Indian Policies

297. In the modern period, the federal government has had to adapt its policies in the light of new realities, including the following:

- International Human Rights norms, including concepts of equality, self-determination, and self-definition for Indigenous peoples;[567]
- Related developments in Canadian law, including the adoption of s.15 of the Charter and the recognition of aboriginal rights;[568] and
- Demographic shifts in Canada's Indigenous population, including movement away from the reserves[569] and greater intermarriage between Indians and non-Indians.[570]

298. Canada formally abandoned its policy of assimilation following widespread opposition to the now infamous "White Paper" of 1969, which had proposed the repeal of the *Indian Act*, the termination of the treaties, and the end of all legal distinctions between the indigenous peoples and the rest of the Canadian population.[571] Partly as a result of that opposition, and in the wake of international and Canadian legal developments, Canada changed its course and

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[567] Grammond Report, Ex. P-290, paras. 32, 36-37; Examination of Dr. Grammond, *Transcript*, Vol. 14, May 20, p. 2197-2211.
[568] Grammond Report, paras. 34-35.
[569] Examination of I. Cowie, *Transcript*, Vol. 4, May 6, p. 516.
[570] Grammond Report, paras. 48-52; Notes for Remarks by Hon. John C. Munro, September 8, 1982, Ex. P-180, p. 6.
[571] Grammond Report, paras. 33-34; cross-examination of Dr. Patterson, *Transcript*, Vol. 22, June 2, p. 3931-36.

began to adopt policies aimed at recognizing indigenous cultures, land rights and self-determination.[572]

299. These modern realities are reflected in Canada's recent exercises of jurisdiction.

(2) Bills C-47 and C-31: Canada Exercises 91(24) Jurisdiction to Make "Non-Status" Indians Into "Status" Indians

300. In 1981 jurisprudence under international human rights treaties to which Canada was a party suggested that s.12(1)(b) of the *Indian Act* was discriminatory.[573] In the same era, the impending coming into force of s. 15 of the *Canadian Charter of Rights and Freedoms* in 1985[574] focused the Federal Government's attention on the need to remove discrimination from the *Indian Act*.[575]

301. The government considered options for restoring Indian status to Aboriginal women who had lost it by discriminatory *Indian Act* provisions. Canada

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[572] Grammond Report, para. 34.
[573] *Lovelace v. Canada*, Communication No. R.6/24 (29 December 1977), U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981); Ex. P-295.
[574] *Can. Charter of Rights and Freedoms*, s. 32(2).
[575] CR-010959 Ex. P180, p. 7, 9, Standing Committee on Indian Affairs and Northern Development, *House of Commons Debates*, (26 June 1984) at 17:9 (Mr. Munro, Minister of Indian Affairs and Northern Development): "You will recall that Jeannette Lavell argued before the courts that Section 12(1)(b) of the Act was in contravention of the Canadian Bill of Rights. Though she lost her case due to the specific wording of the Bill, the basic integrity of her claim was widely respected within the Indian Community and elsewhere […] The Federal Government's position on the issue is perfectly clear. We are committed to bring in amendments to the Act that will end discrimination based on sex."

considered readmitting or granting status to smaller, medium and larger groups of Non-Status Aboriginal people. [576]

302. One option considered [the "small option"] was to restore Indian status only to those women who had been unfairly enfranchised by the marrying out rule, a group of about 26,000 people.[577]

303. A second option considered [the "medium option"] was to grant status to those who had been unfairly enfranchised by the marrying out rule, and their first generation descendants, a group of about 56,000 - in total about 78,000 people.[578]

304. A third option considered [the "large option"] was to grant status to those who had been unfairly enfranchised, their first descendants and their second generation descendants, a group of about 55,000 - in total about 133,000 people.[579]

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[576] CR-011196, Ex. P429, pp. 9,13.
[577] CR-011196, Ex. 429 - *DIAND brief, "Discrimination in the Indian Act" February 1985*, p.9. See also CR-011184, Ex. P149, and CR-011183, Ex. P148, which estimate this number at 27,000 and 23,600 respectively.
[578] CR-011196, Ex. P429 *DIAND brief, "Discrimination in the Indian Act" February 1985*, p 9. See also CR-011184, Ex. P149. Canada also considered simply changing the law without restoring status to anyone who had unfairly lost it (p.7).
[579] CR-011184 Ex. P149; CR-011184 Ex. P149 - DIAND Brief, "Population Assumptions", January 1985; CR-0011183 Ex. P148; CR-009012 Ex. P177 - Evaluation Directorate, "Alleged Continuing Discrimination", February 23, 1988, approved by Jim Lahey, Director General, p.1.6, estimates that the large option could have granted status to 180,000 to 250,000 people.

305. Asked whether officials in Federal Provincial Relations Office, Privy Council Office, Indian Affairs or the Clerk of the Privy Council objected that Parliament was without authority to grant status to these peoples, the Defendants admitted that no record of any such objection could be found.[580]

306. An earlier version of the large option, Bill C-47, was approved by the House of Commons on June 29, 1984.[581] That option died on the order paper when elections were called in 1984.

307. The new Parliament elected in 1984 decided on the medium option.[582] This was a compromise between continuing sexual discrimination and an increased status Indian population that could burden existing Indian communities.

> At the time of passage of Bill C-31, it was recognized by Parliament that it was not feasible to undo all the potentially unfair effects of the former legislation. Bill C-31 was seen as the best possible compromise among all the conflicting values affected. [583]

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[580] Answer to UT #53, Mar 12, 2010.

[581] *Bill C-47*, *An Act to amend the Indian Act*, 2nd Sess., 32nd Parl., 1984, cl. 11(4).
Bill C-47, *An Act to amend the Indian Act*, 2nd Sess., 32nd Parl., 1984, Explanatory Note: "This amendment would also provide for the reinstatement of persons who have lost their entitlement to registration under discriminatory provisions and the registration of their children and, in certain cases. their grandchildren."
Paul Driben, "As Equal as Others" (1985) 6 *Policy Options* 7. Bill C-47 did not limit reinstatement to those who had been unfairly enfranchised and their first generation descendants, as Bill C-31 did. Instead, Bill C-47 included children who had one-quarter Indian blood.

[582] *An Act to Amend the Indian Act*, S.C. 1985, c.27

[583] CR-009012, Ex. P177 – Evaluation Directorate, "Alleged Continuing Discrimination", February 23, 1988, approved by Jim Lahey, Director General, p.2.2. See also p. 1.6: The medium option was chosen because "changes that would have gone further were judged to have the potential to increase the population of many Indian communities so significantly that unacceptable burdens could be placed on the communities… The Department of Justice viewed Bill C-31 as an acceptable compromise that would be defensible in the courts against allegations of continuing sexual discrimination."

308. By choosing the medium option, Parliament decided to leave unregistered about 55,000 MNSI. By choosing the medium option, Parliament also decided to leave unregistered the descendants of these 55,000 people.

309. These are the people who qualified under the larger option (*Bill C-47*) but who did not qualify under the medium option (*Bill C-31*).

(3) *McIvor* and its Aftermath

310. In *McIvor v. Canada*[584] the B.C. Supreme Court recited the plaintiffs' submission:

> [274] The plaintiffs submit that in the case at bar the affected interests in cultural identity and belonging, and in fairness and sex equality, are fundamentally important and go to the heart of human dignity. For the plaintiffs and others, Indian status is a dignity-conferring benefit: see Corbiere at paras. 17-18 and 83-94. The plaintiffs submit that the same stereotype about women and their inability to transmit Indian citizenship status to their children that was embodied in previous versions of the Indian Act, has been maintained in the 1985 Act, as a result of the continuing distinctions drawn based on matrilineal descent and marital status.

The B.C. Supreme Court ruled:

> [286] The record in this case clearly supports the conclusion that registration as an Indian reinforces a sense of identity, cultural heritage, and belonging. A key element of this sense of identity, heritage, and belonging is the ability to pass this heritage to one's children. The evidence of the plaintiffs is that the inability to be registered with full s. 6(1)(a) status because of the sex of one's parents or grandparents is insulting and hurtful and implies that one's female ancestors are deficient or less Indian than their male contemporaries. The implication is that one's lineage is inferior. The implication for an Indian woman is that she is inferior, less worthy of recognition.

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[584] 2007 BCSC 827.

> [287] It is my conclusion that the current registration provisions have been a blow to the dignity of the plaintiffs. Moreover, they would be so to any reasonable person situated in the plaintiffs' position.
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> Conclusion Regarding Discrimination
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> [288] I have concluded that the registration provisions embodied in s. 6 of the 1985 Act continue the very discrimination that the amendments were intended to eliminate. The registration provisions of the 1985 Act continue to prefer descendants who trace their Indian ancestry along the paternal line over those who trace their ancestry through the maternal line. The provisions prefer male Indians and their descendants to female Indians and their descendants. These provisions constitute discrimination, contrary to ss. 15 and 28 of the Charter based on the grounds of sex and marital status.

311. On appeal to the British Columbia Court of Appeal, the Court ruled the legislation discriminatory, but on a narrower basis:

> [165] While I am in agreement with the trial judge that s. 6 of the *Indian Act* infringes the plaintiffs' right to equality under s. 15 of the *Charter* and that the infringement is not justified by s. 1, I reach this conclusion on much narrower grounds than did the trial judge. In particular, I find that the infringement of s. 15 would be saved by s. 1 but for the advantageous treatment that the 1985 legislation accorded those to whom the Double Mother Rule under previous legislation applied.[585]

312. The BC Supreme Court granted a wide ranging, immediate remedy.[586] The BC Court of Appeal struck down ss. 6(1)(a) and 6(1)(c) of the *Indian Act* in their entirety, delaying the remedy for one year to give Parliament time to prepare corrective legislation.[587]

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[585] 2009 BCCA 153.
[586] 2007 BCSC 1732, para 9.
[587] 2009 BCCA 153, para 161.

313. The Supreme Court of Canada denied leave to appeal from the judgment of the BC Court of Appeal.[588]

314. Sharon McIvor announced that she will appeal to the United Nations Human Rights Committee. It is conceivable that this body will approve the wider view of discrimination as found by the BC Supreme Court, or impose some other reality to which Canada will have to respond under its international human rights treaty commitments.

315. Should this happen, Canada may need to resort to its jurisdiction over MNSI to respond as appropriate.

316. All this is part of an unfolding reality driven by new concepts of equality expounded under the *Canadian Charter of Rights and Freedoms* and also under international human rights treaties to which Canada is a party. This reality has driven Canada increasingly to resort to its s. 91(24) power over MNSI to respond.

317. This reality has been present since the U.N. Human Rights Committee suggested Canada was in violation of its treaty commitments by denying Sandra Lovelace the right to live on her ancestral reserve among her people because she had been enfranchised for marrying out.[589] The Plaintiffs say that it is unlikely to be soon exhausted.

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[588] November 5, 2009 (without reasons). S.C.C. Bulletin, 2009, p. 1537

[589] *Lovelace v. Canada*, Communication No. R.6/24 (29 December 1977), U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981).

(4) Canada Exercised Jurisdiction over "Non-Status Indians" in Recognizing the Conne River Band

318. In 1949, when Newfoundland joined confederation, many Indians lived in the province (and many Inuit lived in Labrador). One group in particular was located at the mouth of the Conne River, on the Bay d'Espoir, on the south coast. The Conne River Indians were Mi'kmaq who had crossed over from Cape Breton Island, and had settled in Newfoundland since at least the 1730's.[590]

319. There were detailed discussions regarding responsibility for Newfoundland's Indians between representatives of Newfoundland and Canada at the time of Newfoundland's admission into Canada. There were no band lists for Newfoundland, although departmental correspondence from this time provided census data on the numbers of "Eskimos, Indians and Half-Breeds" in the province and a description of their circumstances.[591] For various reasons, including the facts that Newfoundland Indians had the right to vote and were considered to be enfranchised, it was thought to be a retrograde step to bring them under federal administration.[592] Therefore, Newfoundland and Canada agreed that instead, Canada would provide funding to Newfoundland, which

[590] Memorandum dated September 8, 1982, CA-000899, Ex. P-54, p.3.
[591] Memorandum dated Nov. 29, 1949, P.P. to N.A. Robertson, CA-00759, Exhibit P-111, p.3. The memorandum notes that on the island of Newfoundland there are "a few hundred Indians and half-breeds, all of whom have, I understand, been completely absorbed into the white communities in which they happen to live", and that they have "full civil status, even to the privilege of purchasing liquor".
[592] E. Tomkins, "Pencilled Out: Newfoundland and Labrador's Native People and Confederation, 1947-1954", Report for J. Harris, 1988, CA-000833, Exhibit P-107, p. 23-27.

would continue to administer programs for the Indians. These informal arrangements continued into the 1980s.

320. In or about the early 1980s, the Conne River Indians commenced an action in the Federal Court, seeking *inter alia* a declaration that they were Indians within the meaning of s.91(24), and recognition of their land claims and rights to a reserve.[593] The Corporate Policy group within DIAND prepared an analysis of the claim dated September 8, 1982. This memorandum noted that the Conne River Indians were "Non-Status Indians",[594] and further noted that "the residents of Conne River have been the recipients of special federal funds, directed through the provincial government, notwithstanding their technical legal status of being Non-Status Indians without a Reserve".[595] On the issue of jurisdiction, the memorandum states:

> In general terms, Parliament possesses the power to legislate in relation to Métis and Non-Status Indians by virtue of Section 91(24) of the Constitution Act, 1867 formerly B.N.A. Act, 1867. To date, Parliament has chosen to exercise its power under this head of the Act essentially in respect of Status Indians as defined by Parliament in the present Indian Act. Given this limited occupation of the field, responsibility as between the Federal and Provincial Governments for Métis and Non-Status Indians is equal in most respects to the division of responsibility for the non-native population.[596]

321. In December, 1983, the Deputy Minister of Indian Affairs met with Chief Joe of the Conne River Indians. He was given a briefing note for the meeting,

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[593] Canada's motion to strike part of the claim on jurisdictional grounds is reported as *Conne River Band v. Canada*, [1983] F.C.J. No. 531 (C.A.), affirmed *sub nomine Joe v. Canada*, [1986] 2 S.C.R. 145
[594] Memorandum dated Sept. 8, 1982, CA-000899, Ex. P-54, p.7.
[595] Memorandum dated Sept. 8, 1982, CA-000899, Ex. P-54, p.8.
[596] Memorandum dated Sept. 8, 1982, CA-000899, Ex. P-54, p.7.

which states as follows:

> This department has been advised by the Department of Justice that Conne River wishes to pursue all aspects of its case. Subsequently, Justice has been instructed by this Department, with ministerial approval, to deny each of the allegations in the writ, subject to the concession that some, but not all, of the plaintiffs may be Indians for constitutional purposes…
>
> During the course of the past year, Departmental officials have been meeting with Conne River representatives in order to arrive at a policy solution to this issue. A Cabinet Document recommending registration and creation of a reserve was presented to DMC and returned to Corporate Policy for work on the implications of registration for all Nfld. Indians. Presently, discussions are continuing with Conne River.[597]

322. On June 28, 1984, the Conne River situation was resolved by Canada's recognition of the Conne River Band, thereby creating a community of status Indians out of persons who had previously been non-status Indians (comprising all residents of Conne River of Canadian Indian ancestry).[598]

323. The Order in Council creating the Conne River band is another instance of Canada exercising constitutional jurisdiction over MNSI in response to modern realities.

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[597] Undated Briefing Note for Deputy Minister, re meeting with Chief Joe on December 14, 1983; CA-000898, Ex. P53, and CA-000897, Ex. P115.

[598] Order in Council P.C. 1984-2273, SOR/84-501, 1984 *Canada Gazette* Part II, p. 2935, Exhibit P-441; repealed and replaced by Miawpukek Band Order, P.C. 1989-2206 2 November, 1989, SOR/89-533. The Band Order defines the Band as "that body of Indians comprising every person:

(a) who is of Canadian Indian ancestry;
(b) who is not excluded by the operation of section 7 of the *Indian Act* from entitlement to registration as an Indian; and
(c) who
(i) was ordinarily resident in the community of Conne River, Newfoundland, on June 28, 1984,
(ii) is the child or sibling of a person referred to in subparagraph (i), or
(iii) is the child of a sibling of a person referred to in subparagraph (i)."

(5) Canada Proposes to Exercise Jurisdiction over "Non-Status Indians" by Creating the Qalipu Band

324. The creation of the Conne River band in 1984 did not address the situation of other Non-Status Mi'kmaq indigenous communities on the island of Newfoundland.

325. Those communities, under the umbrella of the Federation of Newfoundland Indians (a CAP affiliate that offers representation to Newfoundland's Non-Status Indians), initiated litigation, based in part on section 15 of the *Canadian Charter of Rights and Freedoms*, seeking to be declared "Indians" within the meaning of section 91(24) of the *Constitution Act, 1867*, and to be recognized as Indian bands.[599]

326. In June 2008, the Defendant and the Federation of Newfoundland Indians concluded an agreement for the constitution of a new Indian band, called the Qalipu band, for the Mi'kmaq of Newfoundland. Unusually, Qualipu will not have a reserve; it will be a "landless" band and it will not enjoy the benefits associated with reserve land such as the tax exemption or regulatory powers with respect to reserve land.[600]

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[599] *Federation of Newfoundland Indians v. Canada* (2003), 231 F.T.R. 140. See also a report commissioned by the Canadian Human Rights Commission: Noel Lyon, *The Mikmaqs of Newfoundland* (1997).

[600] http://www.qalipu.com; Agreement for the Recognition of the Qalipu Mi'kmaq Band, dated November 30, 2007, Ex. P-406; Press Release dated November 30, 2007, Ex. P-442.

E. Credibility of Key Witnesses

327. In assessing the evidence, this Court may be required to weigh the credibility of witnesses whose evidence was in conflict. This section sets out the Plaintiffs' submissions on the credibility of the key witnesses.

Ian Cowie

328. Ian Cowie worked at the highest levels of the federal and provincial governments, and as an advisor to Aboriginal groups.[601] He has no prior association with the Plaintiffs.[602] Cowie's evidence was responsive, precise and forthright. As he stated on cross examination, "I have a fetish for complete accuracy."[603] Cowie's testimony should be believed. Where there is conflict between his evidence and that of the Crown's witnesses, Cowie's testimony should be preferred.

Professor William Wicken

329. Professor William Wicken is highly qualified as an expert. He has testified for Aboriginal groups and for the Crown. He was a forthright, modest witness who was careful to qualify and not to overstate his opinions. He freely admitted errors in cross-examination. He apologized to the court for not signing his report according to *Federal Courts Rules*.[604] For these reasons, where there is conflict

[601] Curriculum Vitae of Ian Cowie, Exhibit P-31, p. 1.
[602] Cross-Examination of Ian Cowie, *Transcript*, May 6, vol. 5, p. 641.
[603] Cross-Examination of Ian Cowie, *Transcript*, May 6, vol. 5, p. 671.
[604] Cross-Examination of William Wicken, *Transcript*, May 17, vol. 11, p. 1724.

between his opinion and that of the Crown's witnesses, his testimony should be preferred.

Gwynneth Jones

330. Gwynneth Jones is very experienced researcher, with a wealth of knowledge about Métis and non-status Indian issues gained from working in this area over the last 25 years. She is an unbiased witness. She has extensive experience researching Aboriginal claims on behalf of provincial governments.[605] She is currently a freelance contract consultant. Approximately one-third of her work in this capacity has been for the federal government, one-third has been for provincial governments, and the remaining third for Aboriginal clients.[606] She has been jointly retained by the federal and provincial governments and an Aboriginal group, and has testified on behalf of both the Crown and Aboriginal groups.[607]

331. Gwynneth Jones's research shows depth and clarity. In addition to the documentation provided to her, she cites approximately 550 documents in her report. The majority of these are primary sources.[608] In conducting the research reflected in her report, she visited La Societé historique de Saint-Boniface, the provincial archives of Alberta, Manitoba, and Ontario, the Hudson's Bay Company Archives, the Library and Archives of Canada, and the Glenbow

[605] Examination of Gwynneth Jones, *Transcript*, May 24, vol. 15, p. 2248.
[606] Examination of Gwynneth Jones, *Transcript*, May 24, vol. 15, p. 2250.
[607] Examination of Gwynneth Jones, *Transcript*, May 24, vol. 15, pp. 2259-61.
[608] Cross-Examination of Alexander Von Gernet, *Transcript*, June 10, vol. 27, p. 4720. These documents are listed at Exhibit P-304.

Archives.[609] Dr. Von Gernet praised her for "the tremendous amount of effort" her report demonstrates.[610] For these reasons, where there is conflict between her opinion and that of the Crown's witnesses, Jones's testimony should be preferred.

Professor Stephen Patterson

332. Professor Stephen Patterson has served as a Crown witness in 23 cases.[611] He has never testified for an Aboriginal group. He testified that he understood his task to be to provide a definition of the terms "Indians" and "lands reserved for Indians" in s. 91(24) as of 1867. In the absence of specific direction, he developed his own strategy for doing so. He stated that he has never provided testimony for a division-of-powers case, nor does he have any familiarity with the methodology used to do so.[612] His exclusive focus on "original intent" was striking in comparison to his acknowledgement that "history is never static".[613]

333. Professor Patterson was unresponsive, and at times even evasive, in cross-examination. He was reminded several times to answer questions directly.[614] Professor Patterson gave contradictory testimony. He stated several times that Nova Scotia entered treaties in the 18th century, but later conceded

[609] Examination of Gwynneth Jones, *Transcript*, May 24, vol. 15, p. 2263.
[610] Examination of Alexander Von Gernet, *Transcript*, June 9, vol. 26, p. 4488.
[611] Cross-Examination of Stephen Patterson, *Transcript*, June 1, vol. 21, p. 3711.
[612] Cross-Examination of Stephen Patterson, *Transcript*, June 1, vol. 21, pp. 3708-13.
[613] Cross-Examination of Dr. Patterson, *Transcript*, June 1, vol. 21, p. 3762.
[614] Cross-Examination of Stephen Patterson, *Transcript*, June 1, vol. 21, pp. 3749, 3755; Cross-Examination of Stephen Patterson, *Transcript*, June 2, vol. 22, p. 3881.

that these treaties were products of the British Crown.[615] He objected to Professor Wicken's implication that the Mi'kmaq communities identified with distinct Nova Scotia counties,[616] but later conceded that he understood Dr. Wicken to be referring to the counties only to determine where the Mi'kmaq lived.[617] He initially questioned whether Sir William Johnson's superintendency over Indian Affairs in Northern British North America applied to Nova Scotia, but later acknowledged that it did.[618] He admitted that he had not seen Dr. Wicken's documents or read his transcript. While he initially took the position that "Indians" in the Atlantic provinces at Confederation would have been understood to mean only members of recognized tribal groups, he conceded in cross-examination that in Nova Scotia most Mi'kmaq were off-reserve, that they may or may not have maintained contact with their communities, and that both pre- and post-Confederation Indian legislation was aimed at individuals.[619] For these reasons, where there is conflict between Patterson's opinion and that of the Plaintiffs' witnesses, his testimony should not be preferred.

Professor Alexander Von Gernet

334. Professor Von Gernet admitted that as a matter of record, he is an expert witness for the Crown.[620] Dr. Von Gernet prepared his report following a limited mandate. He understood his goal to be to provide a historical context for section

[615] Cross-Examination of Stephen Patterson, *Transcript*, June 2, vol. 22, pp. 3890-92.
[616] Cross-Examination of Stephen Patterson, *Transcript*, June 1, vol. 21 at p. 3690.
[617] Cross-Examination of Stephen Patterson, *Transcript*, June 2, vol. 22, p. 3859.
[618] Cross-Examination of Dr. Patterson, *Transcript*, June 2, vol. 22, pp. 3903-3906.
[619] This included the 1859 Nova Scotia *Act Re Indians*, s.10; the 1869 *Act for the Gradual Enfranchisement of Indians*, and Bill C-31 in 1985: Cross-Examination of Dr. Patterson, *Transcript*, June 2, vol. 22, p. 3911.
[620] Cross-Examination of Alexander Von Gernet, *Transcript*, June 6, vol. 23, p. 3982.

91(24) and how the framers of the *Constitution Act, 1867,* would have understood the term "Indians."[621] His analysis focused on the pre-Confederation period.[622] He did not examine the larger objects of Confederation. He did not consider the purposes of including an Indian Affairs power in the Constitution.[623] He did not consider the purposes of Confederation going forward from 1867.[624] He did not consider the Court's method of interpreting the Constitution in a division of powers case.[625]

335. Unlike Gwynneth Jones, Von Gernet relied primarily on the database of documents provided to him by the Crown.[626] The majority of his research beyond the database was secondary material.[627] Von Gernet's reliance on secondary material was exposed in his lack of familiarity with the primary literature. He cited two documents in his report to support his opinions, but admitted to not knowing the context of these documents: their authors, audiences, or purposes.[628] He conceded that understanding the context of these documents would have assisted him in writing his report.[629] However, he did not ask government researchers to identify these documents or to explain how and where they were found.[630]

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[621] Cross-Examination of Alexander Von Gernet, *Transcript*, June 9, vol. 26, p. 4499.
[622] Cross-Examination of Alexander Von Gernet, *Transcript*, June 9, vol. 26, p. 4500.
[623] Cross-Examination of Alexander Von Gernet, *Transcript*, June 9, vol. 26, pp. 4505-4506.
[624] Cross-Examination of Alexander Von Gernet, *Transcript*, June 9, vol. 26, p. 4506.
[625] Cross-Examination of Alexander Von Gernet, *Transcript*, June 9, vol. 26, p. 4507.
[626] Cross-Examination of Alexander Von Gernet, *Transcript*, June 6, vol. 23, p. 3979.
[627] Cross-Examination of Alexander Von Gernet, *Transcript*, June 10, vol. 27, p. 4722.
[628] Cross-Examination of Alexander Von Gernet, *Transcript*, June 9, vol. 26, pp. 4524, 4531-4532.
[629] Cross-Examination of Alexander Von Gernet, *Transcript*, June 9, vol. 26, p. 4523.
[630] Cross-Examination of Alexander Von Gernet, *Transcript*, June 9, vol. 26, pp. 4525-4526.

336. Dr. Von Gernet provided incorrect statements in testimony and in his report. He incorrectly believed there was an official French translation of s.91(24). He referred to this document to support his argument.[631] He did not, however, verify that an official French translation existed.[632] He stated that the 1871 Census corroborated Macdonald's view that there were few "half-breeds" outside of Manitoba.[633] However, the census summary which he cited presents information only for Ontario, Quebec, Nova Scotia, and New Brunswick.[634] The Census indicated that only two "half-breeds" lived in Ontario.[635] Von Gernet conceded that it is inconceivable that there were only two "half-breeds" living in Ontario and that the procedures used to create this tally had shortcomings.[636]

337. Dr. Von Gernet did not admit the frailty of his documents, even when the author, audience, or purpose of his documentation was unknown.[637] He did not concede that the 1871 Census data did not corroborate Macdonald's statement.[638] He did not concede that he should have alerted the Court to the fact that he knew nothing of the author, audience, purpose or context of Exhibit D-190, an unidentified 1859 Report on which he relied. His behaviour showed a lack of forthrightness with the Court.

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[631] Examination of Alexander Von Gernet, *Transcript*, June 6, vol. 23, p. 4024.
[632] Cross-Examination of Alexander Von Gernet, *Transcript*, June 9, vol. 26, p. 4539.
[633] Cross-Examination of Alexander Von Gernet, *Transcript*, June 9, vol. 26, p. 4572.
[634] Cross-Examination of Alexander Von Gernet, *Transcript*, June 9, vol. 26, pp. 4576, 4578; Statistics of Canada Census of 1870-71, Exhibit P-447, p. 332.
[635] Statistics of Canada Census of 1870-71, Exhibit P-444, p. 281.
[636] Cross-Examination of Alexander Von Gernet, *Transcript*, June 9, vol. 26, pp. 4579, 4851.
[637] Cross-Examination of Alexander Von Gernet, *Transcript*, June 9, vol. 26, pp. 4527-4528, 4533.
[638] Cross-Examination of Alexander Von Gernet, *Transcript*, June 9, vol. 26, p. 4583.

338. Dr. Von Gernet claimed that there is no modern consensus about the definition of MNSI, implying that this could create insurmountable problems for the Government.[639] He was unfamiliar with the variety of government documents that provided precise estimates for the MNSI population.[640] This documentation was provided to him.[641] He did not examine any of it in forming his opinion.[642]

339. Dr. Von Gernet's research and conclusions are unoriginal. There are numerous points of similarity between his opinion and Bryan Schwartz's analysis of the Métis and the legal history of section 91(24):

- Von Gernet conceded that both he and Schwartz turned to the census contained in the *HBC Select Committee Report*.[643]
- Both observe that it leads to the same reasonable conclusion that "half-breeds" were not understood to be Indians.[644]
- Both refer to the testimony contained in the report to support that conclusions.[645]
- Both examine a series of historical statutes to support their conclusions.[646]
- Both refer to speeches made by Sir John A. Macdonald in the House of Commons to support their conclusions.[647]

340. There are also numerous points of similarity between Von Gernet's analysis and Thomas Flanagan's article "The Case Against Métis Aboriginal Rights":

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[639] Expert Report of Dr. Von Gernet, Exhibit D-180, p. 209.
[640] Cross-Examination of Alexander Von Gernet, *Transcript*, June 9, vol. 26, pp. 4611-4615; Cross-Examination of Alexander Von Gernet, *Transcript*, June 10, vol. 27, p. 4645.
[641] Cross-Examination of Alexander Von Gernet, *Transcript*, June 10, vol. 27, p. 4643.
[642] Cross-Examination of Alexander Von Gernet, *Transcript*, June 10, vol. 27, p. 4663.
[643] Cross-Examination of Alexander Von Gernet, *Transcript*, June 10, vol. 27, pp. 4675-4676.
[644] Cross-Examination of Alexander Von Gernet, *Transcript*, June 10, vol. 27, pp. 4676-4677.
[645] Cross-Examination of Alexander Von Gernet, *Transcript*, June 10, vol. 27, pp. 4677-4679.
[646] Cross-Examination of Alexander Von Gernet, *Transcript*, June 10, vol. 27, pp. 4682-4687.
[647] Cross-Examination of Alexander Von Gernet, *Transcript*, June 10, vol. 27, pp. 4691-4694.

- Both refer to a list of demands from a letter by John Young [B] to John A. Macdonald.[648]
- Both discuss the multiple lists of rights proposed by the Métis delegates.[649]
- Both refer to the importance of Ritchot's diary in tracing the emergence of Métis Aboriginal rights.[650]
- Both note that the Métis, in claiming the same rights as other Canadians, had "no intention of losing the rights that they had as descendants of Indians", quoting Ritchot.[651]
- Both refer to Macdonald modifying his original position to accommodate "Ritchot's inheritance theory" (Flanagan) or "Ritchot's nuance" (Von Gernet).[652]
- Both state that the *Manitoba Act* bore some traces of Ritchot's theory/nuance.[653]
- Bother refer to the same passage in the 1870 debates in the House of Commons and Macdonald's statements following the introduction of the *Act*.[654]
- Both observe that the Liberals questioned the logic of Macdonald's actions.[655]
- Both note that in 1885 Macdonald declared to the House of Commons that the land grant had been a matter of policy, not of right, referring to the same passage.[656]

These same nine points appear in the same sequence in Von Gernet's report as they do in Flanagan's article.[657]

341. Dr. Von Gernet was not forthright in acknowledging the overlaps of his report with the arguments presented by Schwartz (a lawyer) and Flanagan (a political scientist). He stated that he and Schwartz are responding to Clem

[648] Cross-Examination of Alexander Von Gernet, *Transcript*, June 10, vol. 27, pp. 4723-4724.
[649] Cross-Examination of Alexander Von Gernet, *Transcript*, June 10, vol. 27, p. 4724.
[650] Cross-Examination of Alexander Von Gernet, *Transcript*, June 10, vol. 27, p. 4724.
[651] Cross-Examination of Alexander Von Gernet, *Transcript*, June 10, vol. 27, pp. 4726-4727.
[652] Cross-Examination of Alexander Von Gernet, *Transcript*, June 10, vol. 27, pp. 4727-4728.
[653] Cross-Examination of Alexander Von Gernet, *Transcript*, June 10, vol. 27, p. 4729.
[654] Cross-Examination of Alexander Von Gernet, *Transcript*, June 10, vol. 27, p. 4730.
[655] Cross-Examination of Alexander Von Gernet, *Transcript*, June 10, vol. 27, p. 4731.
[656] Cross-Examination of Alexander Von Gernet, *Transcript*, June 10, vol. 27, p. 4732.
[657] Cross-Examination of Alexander Von Gernet, *Transcript*, June 10, vol. 27, p. 4734.

Chartier's arguments that the Métis are included in section 91(24).[658] He said that his overlap with Flanagan was the product of a standard interpretation of the primary and secondary sources.[659] These explanations lack credibility.

342. Dr. Von Gernet showed a limited or incomplete understanding of the documents he cited. His analysis of the 1857 *HBC Select Committee Report* omitted the following:

- The HBC company exercised criminal jurisdiction only over white people, not over the Indians. Half-breeds were included with the Indians.[660]
- The company had a monopoly over trading skins which did not apply to the Indians. Half-breeds were included with the Indians.[661]
- The Indians were allowed to define their own rights and privileges; the same is true of the Half-breeds.[662]

343. Likewise, his understanding of Archbishop Taché's *Esquisse*, which he had not read in the original French, was flawed:

- "Sauvage," as Taché defined it, referred to wild as opposed to civilized, which was a common kind of dichotomy during this period.[663]
- Von Gernet later admitted that "Taché's typology is somewhat simplistic in the sense that there's a lot more categories and a lot more overlap that occurs."[664]
- The English version of Taché, cited by Von Gernet, uses the word "wild" to describe the Indians. The term "sauvage" is used to indicate there is something wild in their manner of life.[665]

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[658] Cross-Examination of Alexander Von Gernet, *Transcript*, June 10, vol. 27, p. 4678.
[659] Cross-Examination of Alexander Von Gernet, Transcript, June 10, vol. 27, pp. 4725-4731.
[660] Cross-Examination of Dr. Von Gernet, *Transcript*, June 9, vol. 26, pp. 4509-4511; Exhibit P-284, Report from the selection committee for Hudson's Bay Company, pp. 91-92.
[661] Cross-Examination of Dr. Von Gernet, *Transcript*, June 9, vol. 26, p. 4510; Exhibit P-284, Report from the selection committee for Hudson's Bay Company, pp. 91-92.
[662] Cross-Examination of Dr. Von Gernet, *Transcript*, June 9, vol. 26, p. 4510; Exhibit P-284, Report from the selection committee for Hudson's Bay Company, pp. 91-92.
[663] Examination of Dr. Von Gernet, *Transcript*, June 6, vol. 23, p. 4025.
[664] Examination of Dr. Von Gernet, *Transcript*, June 8, vol. 25, p. 4333.

- The original French text uses the word “sauvage” to describe the Indians. The English translation is imprecise this way.[666]
- Taché did not say that the Métis are not wild.[667]
- Instead, Taché, in the French, said “Les Métis semblent posséder naturellement une faculté propre aux sauvage”[668]
- Von Gernet interpreted Taché as emphasizing biology, distinguishing half-breeds from pure Indians because of their mixed origins.[669]
- But Taché did not categorize Indians entirely by biology, rather, he called them uncivilized because they lack laws, governments, and religion.[670]

344. Dr. Von Gernet also appeared at times to “cherry pick” from the evidence. He put forward a sharp distinction between the Métis, who regarded themselves as “civilized men”, and “uncivilized” Indians – relying in particular, and repeatedly, on a single statement from Métis delegate James Ross (taken from a secondary source compilation of *Canada’s Founding Debates*).[671] He did not refer, though he could have, to Riel’s earlier statement to the Council of Assiniboia that the Métis “are uneducated and only half civilized”, or to the large body of evidence, reviewed above, showing that both “Half-breeds” and “Indians” lived in diverse circumstances, on a broad spectrum of “civilization”. For these reasons, where there is conflict between Von Gernet’s opinion and that of the plaintiffs’ witnesses, his testimony should not be preferred.

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[665] Cross-Examination of Dr. Von Gernet, *Transcript*, June 9, vol. 26, p. 4548.
[666] Cross-Examination of Dr. Von Gernet, *Transcript*, June 9, vol. 26, p. 4550; Exhibit P-443, Esquisse sur le nord-Ouest de L’amerique par Monsigneur Tache, p.85.
[667] Cross-Examination of Dr. Von Gernet, *Transcript*, June 9, vol. 26, p. 4551.
[668] Exhibit P-443, Esquisse sur le nord-Ouest de L’amerique par Monsigneur Tache, p.77.
[669] Cross-Examination of Dr. Von Gernet, *Transcript*, June 9, vol. 26, pp. 4552-4553; Exhibit D-180, Von Gernet Report, p. 43.
[670] Cross-Examination of Dr. Von Gernet, *Transcript*, June 9, vol. 26, p. 4555; Exhibit P-443, Esquisse sur le nord-Ouest de L’amerique par Monsigneur Tache, p. 85.
[671] Von Gernet Report, p. 132-33, 149, 154, 221, 223-24, 226, 243; Examination of Dr. Von Gernet, *Transcript*, June 8, vol. 25, pp. 4271, 4274, 4277, 4284, 4315, 4323, 4340, 4341.

PART V - THE LAW

A. The Supreme Court Precedents

(1) *Lavell v. Canada*

345. By the *Constitution Act, 1867*, s. 91(24), the exclusive legislative authority of Parliament extends to all matters coming within the class of subject "Indians and Lands reserved for the Indians."

346. Parliament's legislative jurisdiction at s. 91(24) is broad.[672] It includes the power to define who is an Indian and establish the qualifications necessary for Indian status.[673]

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[672] *Reference re Eskimos*, [1939] S.C.R. 104. At para 35 Chief Justice Duff, for himself, Davis and Hudson JJ. (Crocket J. concurring), referred to the "ample evidence of the broad denotation of the term 'Indian' as employed" in s. 91(24).

At para. 38 Chief Justice Duff, for himself, Davis and Hudson JJ. (Crocket J. concurring), stated: "Nor can I agree that the context (in head no. 24) has the effect of restricting the term 'Indians.' If 'Indians' standing alone in its application to British North America denotes the aborigines, then the fact that there were aborigines for whom lands had not been reserved seems to afford no good reason for limiting the scope of the term 'Indians' itself."

Peter W. Hogg, *The Constitutional Law of Canada* (Scarborough, Ont: Carswell, 2007) at 28.1(b): "These "non-status Indians" … are also undoubtedly "Indians" within the meaning of s.91(24) … [the Métis] are probably "Indians" within the meaning of s.91(24)."

Canada, *Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol. 4 (Ottawa: Supply and Services Canada, 1996) at 209 – 210: s.91(24) was intended to refer to "all the aborigines of the territory and subsequently included in the Dominion."

Lysyk, K.M. "The Unique Constitutional Position of the Canadian Indian" (1967) 45 Can. Bar Rev. 513 at 515: "The meaning on the term "Indian" in particular statutes may, of course, be narrower than the corresponding term in the British North America Act, … It may be too, that a person who was once an Indian for the purposes of the Indian Act, but has lost his status as an Indian under that Act by enfranchisement, may nevertheless continue to be an Indian for the purposes of the British North America Act."

[673] *Lavell v. Canada (Attorney General),* [1974] S.C.R. 1349 [*Lavell*].

347. By s. 91(24), Parliament may tighten or relax the qualifications for Indian status from time to time. Parliament may disqualify from Indian status persons to whom Parliament has granted status,[674] or grant status to persons of Aboriginal ancestry or culture who do not have Indian status.[675]

348. *Lavell v. Canada* was an equality challenge under the *Canadian Bill of Rights* to *Indian Act* provisions that stripped Indian status from Indian women who married non-Indian men.[676] The Supreme Court of Canada upheld these provisions as a valid exercise of Parliament's exclusive legislative authority in relation to matters coming within s. 91(24).[677]

349. The Supreme Court of Canada stated:

> In my opinion the exclusive legislative authority vested in Parliament under s. 91(24) could not have been effectively exercised without enacting laws establishing the qualifications required to entitle persons to status as Indians and to the use and benefit of Crown "lands reserved for Indians". The legislation enacted to this end was, in my view, necessary for the implementation of the authority so vested in Parliament under the Constitution.[678]

Lavell ruled that s. 91(24) grants Parliament authority for "establishing the qualifications required to entitle persons to status as Indians."[679]

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[674] *Lavell,* at pp. 490.
[675] *Canard v. Canada (Attorney General)* [1976] 1 S.C.R. 170 [*Canard*].
[676] *Lavell* at pp 496 referring to s.12(1)(b) of the *Indian Act.*
[677] *Lavell.* at pp 496.
[678] *Lavell* at pp. 490.
[679] *Lavell* at pp. 490.

350. Lavell explicitly approved Parliament's power to remove Indian status from "status Indians".

351. Implicitly, *Lavell* ruled that Parliament has authority to return Indian status to persons who were first classified as status Indians and subsequently reclassified as Indians without status.[680]

(2) *A.G. Canada v. Canard*

352. *Lavell* was examined by the Supreme Court of Canada in *A.G. Canada v. Canard*. Justice Beetz explained that s. 91(24) conferred on Parliament an authority "of a special nature."[681]

353. Parliament's s. 91(24) authority "could not be effectively exercised without the necessarily implied power to define who is and who is not an Indian and how Indian status is acquired or lost."[682]

354. Justice Beetz explained that the word 'Indian' in s. 91(24) "creates a racial classification and refers to a racial group."[683]

355. Justice Beetz observed that s. 91(24) does not define the expression "Indian". He continued, in this critically important passage:

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[680] See paras infra. See also *Lavell* and *Canard* at pp. 573 - 576.
[681] *Canard* at pp. 575.
[682] *Ibid.*
[683] *Ibid.*

> This Parliament can do within constitutional limits by using criteria suited to this purpose but among which it would not appear unreasonable to count marriage and filiation and, unavoidably, intermarriages, in the light of either Indian customs and values which, apparently were not proven in *Lavell*, or of legislative history of which the Court could and did take cognizance.[684]

356. *Lavell* and *Carnard's* statements that s. 91(24) empowers Parliament to set qualifications which narrow or broaden entitlement to Indian status were made without dissent. The statements have never been successfully challenged. There are no exceptions.

357. *Lavell* and *Canard's* statements that s. 91(24) authorizes Parliament to remove Indian status from "status Indians" or to grant Indian status to "Non-Status Indians" are unimpeachable. These statements are crucial to resolution of this case.

358. *Carnard* recognizes that Parliament's s. 91(24) power to grant Indian status to persons who do not have it must be exercised "within constitutional limits". Justice Beetz said that the limits were to be determined by using "suitable criteria". He gave examples of what suitable criteria could be.

359. Among the suitable criteria which define the limits of Parliament's s. 91(24) power Justice Beetz listed:

- Marriage
- Filiation

[684] *Ibid.*

- Intermarriage
- Legislative history

Any of these factors may be sufficient to bring Parliament's exercise of s. 91(24) power within constitutional limits. Professor Hogg observed that intermarriage alone is a sufficient criteria to activate Parliament's s. 91(24) power to transform a white person with no Aboriginal ancestry into an Indian.[685]

360. Justice Beetz used these criteria simply as examples noting that there could be other "suitable criteria" to activate the valid exercise of s.91(24) jurisdiction.

361. "Filiation" is "the fact of being descended or derived or originating from;"[686] - in other words, ancestry.

362. With respect to "intermarriage" Justice Beetz used a broad, flexible concept: marriages recognized by "Indian customs and values".

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[685] Peter W. Hogg, *Constitutional Law of Canada,* looseleaf (Scarborough, Ont: Thomson Carswell, 2004) at 28-4: *Canard* implied "the validity of the provision (repealed in 1985) under which a white woman became an 'instant Indian' on marrying an Indian man."

[686] *The Oxford English Dictionary,* 2d ed., *s.v.* "filiation": the fact of being descended or derived or originating from, descent, transmission from.

Shorter Oxford English Dictionary on Historical Principles (1973), *s.v.* "filiation": descent, transmission from.

In the official French-language version of *Canard*, Justice Beetz uses the term "*la filiation*". *A.G. Canada v. Canard*, [1976] 1 R.C.S. 170 at 207.

La Filiation has the same meaning in French as filiation has in English:
Le Grand Robert de la Langue Francaise, 2d ed., *s.v.* « filiation » : lien de descendance directe entre ceux qui sont issues les uns des autres (descendance, famille, generation, lignee).

363. Reserve residence is not a suitable criterion to discern the limits of Federal jurisdiction.

> The power of Parliament to make laws in relation to Indians is the same whether Indians are on a reserve or off a reserve. It is not reinforced because it is exercised over Indians on a reserve any more than it is weakened because it is exercised over Indians off a reserve.[687]

364. *Lavell* and *Canard's* discussions of Parliament's authority to grant Indian status to persons without Indian status, within constitutional limits as determined by suitable criteria, remain the law today.

365. *Lavell*'s discussion of equality has been overtaken by proclamation of the *Canadian Charter of Rights and Freedoms* and the Charter's equality jurisprudence.[688] This development does not impact on *Lavell*'s discussion of the limits of Parliament's constitutional authority under s. 91(24) to grant Indian status to persons without it.

366. As discussed in Part IV.D *supra*, when international human rights jurisprudence and the impending coming into force of s. 15 of the *Canadian Charter of Rights and Freedoms* suggested that s.12(1)(b) of the *Indian Act* was

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[687] *Four B Manufacturing v. United Garment Workers*, [1980] 1 S.C.R. 1031, 1050.

[688] *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497 at para. 3: a contextual and purposive approach to discrimination analysis under the Charter, and contrasted this preferred approach to the rigid formalism which had characterized this Court's approach under the equality provision in the Canadian Bill of Rights. As he suggested, a flexible and nuanced analysis under s. 15(1) is preferable because it permits evolution and adaptation of equality analysis over time in order to accommodate new or different understandings of equality as well as new issues raised by varying fact situations.

discriminatory, the Federal government began an intensive process to consider how to remove discrimination from the *Indian Act*.[689]

367. Parliament contemplated providing status to the women who were discriminatorily enfranchised, which it calculated at 26,000 people. Parliament also contemplated providing status to the women and their first generation descendants, which it calculated at 78,000 people; and to the women and their first and second generation descendants, which it calculated at 133,000 people.[690]

368. Initially, Parliament proposed to grant status to the larger group of 133,000 MNSI by Bill C-47, a group comprising the Indian women enfranchised by s. 12(1)(b), and their first and second generation descendants.[691]

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[689] CR-010959 Ex. P180, p. 7, 9, Standing Committee on Indian Affairs and Northern Development, *House of Commons Debates*, (26 June 1984) at 17:9 (Mr. Munro, Minister of Indian Affairs and Northern Development): "You will recall that Jeannette Lavell argued before the courts that Section 12(1)(b) of the Act was in contravention of the Canadian Bill of Rights. Though she lost her case due to the specific wording of the Bill, the basic integrity of her claim was widely respected within the Indian Community and elsewhere […] The Federal Government's position on the issue is perfectly clear. We are committed to bring in amendments to the Act that will end discrimination based on sex."

[690] CR-011196, Ex. P429, *DIAND brief, "Discrimination in the Indian Act" February 1985*, p 9, 13. See also CR-011184, Ex. P149. Canada also considered simply changing the law without restoring status to anyone who had unfairly lost it (p.7).

[691] See *supra*, Part IV.D. *Bill C-47*, *An Act to amend the Indian Act*, 2nd Sess., 32nd Parl., 1984, cl. 11(4).

Bill C-47, *An Act to amend the Indian Act*, 2nd Sess., 32nd Parl., 1984, Explanatory Note: "This amendment would also provide for the reinstatement of persons who have lost their entitlement to registration under discriminatory provisions and the registration of their children and, in certain cases. their grandchildren."

Paul Driben, "As Equal as Others" (1985) 6 *Policy Options* 7. Bill C-47 did not limit reinstatement to those who had been unfairly enfranchised and their first generation descendants, as Bill C-31 did. Instead, Bill C-47 included children who had one-quarter Indian blood.

369. *Canard* shows that *Bill C-47's* proposal to grant status to MNSI who were discriminatorily enfranchised and their first and second generation descendants was within the constitutional limits of Parliament`s s. 91(24) power delineated by the Supreme Court. Bill C-47 was legislation which defined Indians on the basis of filiation, ancestry and descent – criteria Justice Beetz specifically approved in *Canard*.

370. Ultimately, following elections, Parliament provided status to the medium group of 78,000 MNSI by *Bill C-31*, a group comprising the Indian women enfranchised by s. 12-1-b, and their first generation descendants.[692]

371. Parliament's choice in *Bill C-31* to grant Indian status to 78,000 Non-Status Indians and their first generations descendants was also a choice to leave unregistered about 55,000 MNSI who would have qualified under the larger option (*Bill C-47*). Parliament's decision also meant that the descendants of these 55,000 people would not have status under the *Indian Act*.

372. Parliament clearly considered these 55,000 MNSI as "Indians" within its power at s. 91(24). That follows from the approval, without opposition on constitutional grounds, of Bill C-47 by the House of Commons in 1984. *Lavell* and *Canard* show that Parliament was correct to consider these 55,000 MNSI as

[692] *An Act to Amend the Indian Act*, S.C. 1985, c.27.

Indians within s. 91(24) in the sense that Parliament could chose (or not) to define them as Indians based on filiation, ancestry or descent.

373. These 55,000 people and their descendants form a significant portion of the MNSI on whose behalf this law suit is brought.

374. The plaintiff, Leah Gardner, is among the 55,000 Non-Status Indians to whom Parliament first considered granting Indian status in *Bill C-47*. Gardner's father is registered under s. 6(2) of the *Indian Act* and he has one parent registered under s. 6(1) of the *Indian Act*.[693] It is this combination of circumstances that makes Gardner one of the Non-Status Indians to whom Parliament ultimately decided not to grant Indian status by *Bill C-31*.[694]

375. *Lavell* and *Canard* show that Parliament's decision to return status to the medium group was a constitutionally valid exercise of Parliament's s. 91(24) power in that Parliament defined who was an Indian for the purpose of registration by using the constitutionally valid criteria of intermarriage, filiation, ancestry and descent to which Justice Beetz referred in those cases.

376. *Lavell* and *Canard* also show that Parliament's proposal in *Bill C-47* to return status to the larger group of 133,000 Non-Status Indians, including Leah Gardner, would have been a constitutionally valid exercise of Parliament's s.

[693] Examination of Leah Gardner, *Transcript*, May 9, vol. 6, p. 800-01.
[694] Examination of Leah Gardner, *Transcript*, May 9, vol. 6, p. 801, Ex. P76.

91(24) power. Parliament's proposal would have defined Indian status by the constitutionally valid criteria of intermarriage, filiation, ancestry and descent Justice Beetz referred to in those cases.

377. The two Supreme Court cases show Parliament's s. 91(24) power is broad enough to make Leah Gardner, and people similarly situated to Leah Gardner, into status Indians.

378. In this sense, *Lavell* and *Carnard* show that Leah Gardner and people similarly situated to her, including the 55,000 Non Status Indians included in Bill C-47 and left out by Bill C-31 (and their descendants), are "Indians" in the sense of *Constitution Act, 1867*, s. 91(24), even though Parliament has decided not to include them as entitled to registration under the *Indian Act*.

379. The logic of *Lavell* and *Canard* show that Métis and Non-Status Indians, being persons of aboriginal ancestry or persons who were enfranchised through various schemes, are Indians in the sense of s.91(24) even though they are not Indians within the meaning of the *Indian Act*.

380. To state this point in the familiar language of the constitutional jurisprudence: Parliament may make laws in relation to the matter of the Indian status of MNSI, including laws modelled on *Bills C-47* and *C-31* as a matter that comes within Parliament's legislative power in relation to "Indians" at s. 91(24).

381. By this logic, the declaration requested in paragraph 27(a) of the Fresh as Amended Statement of Claim should be granted.

(3) *Re Eskimos*

382. *Lavell* and *Canard* lead to the conclusion that Parliament's legislative authority at s. 91(24) justifies legislation that transforms Métis and Non-Status Indians into status Indians. Stated otherwise, Métis and Non-Status Indians are Indians in the sense of s. 91(24).

383. This conclusion gathers strength from *Re Eskimos.*[695] In this earlier case the Supreme Court of Canada considered whether the Inuit in Quebec and Labrador were "Indians" within the meaning of s. 91(24).

384. The Court limited its analysis to the meaning of the terms "Indian" as this word was used in dictionaries and in various official and unofficial documents around the time of Confederation.[696]

385. The Court did not use the purposive, progressive method mandated in the modern jurisprudence.[697] Even on this outdated approach to constitutional

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[695] *Re Eskimos*, [1939] S.C.R. 104.
[696] The Court considered the meaning of these terms in Hudson's Bay Company records, correspondence between Sir John A. Macdonald and Sir Hector Langevin, reports and proclamations by Governors of Quebec and Newfoundland, correspondence of missionaries and clergy, and dictionary definitions.
[697] reviewed supra in Part I(C) of this Brief.

interpretation,[698] the Court ruled that s. 91(24) was wide enough to vest in Parliament exclusive legislative jurisdiction in relation to "*all* aborigines"; and accordingly that Eskimo were "Indians" within s. 91(24).

386. Canada argued that "The 'Indians' referred to in the said head 24 are precisely the same type or class of aborigines as described in that [Royal] Proclamation as the 'several nations or tribes of Indians with whom We are connected and who live under Our protection.'"[699] The Court rejected this submission:

> I cannot give my adherence to the principle of interpretation of the *British North America Act* which, in face of the ample evidence of the broad denotation of the term "Indian" as employed to designate the aborigines of Labrador and the Hudson's Bay territories as evidenced by the documents referred to, would impose upon that term in the *British North America Act* a narrower interpretation by reference to the recitals of and the events leading up to the Proclamation of 1763; (p 10, *per* Duff, C.J.C.)

To the argument that "Eskimos" were excluded from certain lists of Indians found in the historical documents, Chief Justice Duff stated:

> For analogous reasons I am unable to accept the list of Indian tribes attached to the instructions to Sir Guy Carleton as controlling the scope of the term "Indians" in the *British North America Act*. Here it may be observed parenthetically that if this list of tribes does not include Eskimo, as apparently it does not, neither does it appear to include the Montagnais Indians inhabiting the north shore of the St. Lawrence east of the Saguenay or the Blackfeet or the Cree or the Indians of the Pacific Coast; (p 10).

387. Canada also argued that Inuit could not come within s. 91(24), because they did not live in tribes, have a reserve system, or have land rights. Canada

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[698] In *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 at 136 (P.C.), decided nine years before *Re Eskimos,* the Court rejected a "narrow and technical construction" in favour of "a large and liberal interpretation…within certain fixed limits".

[699] Canada's Factum, CA-000166, Ex. P100, p. 16-17 and p.23 et seq.

submitted that federal jurisdiction was confined to those aborigines that lived in recognizable nations or tribes, signed treaties, had "claims or grievances in respect of encroachments upon their hunting grounds", and surrendered their rights in exchange for reserves.[700]

388. The Supreme Court expressly rejected all of these arguments.

389. The three written opinions differed only in the relative weight they assigned to the historical evidence.

390. Duff C.J.C, (Davis, Hudson and Crockett JJ., concurring), relied on Hudson's Bay Company documents, documents from Newfoundland governors, naval officers, ecclesiastics and traders. Included in this was

- a Report of Judge Pinsent referring to "300 Indians and half breeds of the Esquimault and Mountaineer races" (p 8);
- a Report from the Bishop of Newfoundland that referred to, at the Venison Islands, "the Indians (Esquimaux or mountaineer), or half Indians" (p 8); at the Seal Islands, the "Indians (Esquimaux) and half Indians, who live together" (p 9); and "the race of mixed blood, or Anglo-Esquimaux" where "the Indian characteristics very much disappear, and the children are both lively and comely;" (p 9).

391. Chief Justice Duff said that the Bishop of Newfoundland's Report exemplified "in a remarkable way the use of the term Indian, as designating the Eskimo inhabitants of Labrador as well as other classes of Indians there;" (p 8). From these documents Chief Justice Duff concluded:

[700] Canada's Factum, CA-000166, Ex. P100, p. 16-17 and p.23 et seq. ; Chief Justice Duff referred to these arguments in his opinion before rejecting them" [1939] S.C.R. 104.

> Thus it appears that, through all the territories of British North America in which there were Eskimo, the term "Indian" was employed by well established usage as including these as well as the other aborigines; and I repeat the *British North America Act*, in so far as it deals with the subject of Indians, must, in my opinion, be taken to contemplate the Indians of British North America as a whole; (p 10).

392. Cannon J. (Crockett J concurring), emphasized the use of the French term “sauvages” in the French translation of the Quebec resolutions, "Les Sauvages et les terres réservées pour les Sauvages." From this Justice Cannon concluded:

> This, I think, disposes of the very able argument on behalf of the Dominion that the word "Indians" in the *British North America Act* must be taken in a restricted sense. The Upper and Lower Houses of Upper and Lower Canada petitioners to the Queen, understood that the English word "Indians" was equivalent to or equated the French word "Sauvages" and included all the present and future aborigines native subjects of the proposed Confederation of British North America, which at the time was intended to include Newfoundland; (p 12, emphasis added).

393. Earlier in his reasons Justice Cannon referred to correspondence between Sir John MacDonald and Sir Hector Langevin. From this correspondence Justice Cannon concluded that the term ‘sauvages’ included “*all* aborigines living within the territories in North America under British authority, whether Imperial, Colonial, or subject to the administrative powers of the Hudson’s Bay Company;”[701] (p 11, emphasis in the original).

394. Kerwin J. (Cannon and Crockett JJ. concurring), considered dictionary definitions, correspondence between Sir John A. Macdonald and Sir Hector Langevin, and Hudson’s Bay Company documents, to arrive at the same

[701] *Re Eskimos* [1939] S.C.R. 104 at para. 43, per Cannon J (Crocket J concurring).

conclusion as Duff C.J.C and Cannon J. In particular, Justice Kerwin stated with respect to s. 91:24: “the intention was to allocate to it authority over all the aborigines within the territory to be included in the confederation;” (p 13).

395. The ruling referred to documents, including the Bishop of Newfoundland’s Report, which explicitly stated that the Labrador Eskimo communities included “half Indians.”

396. Professor Wicken and Dr. Von Gernet confirmed that these communities included mixed ancestry people. Professor Wicken gave uncontradicted evidence that these communities were not settled, but wandered in very small groups in search of food.[702]

397. The wandering Inuit “half Indians” were within the Hudson’s Bay territory Canada intended to acquire by s. 146 of the Constitution Act, 1867. They were therefore under British authority in the sense stated by Justice Cannon in *Re Eskimos*.

398. In *Labrador Metis Nation v. Newfoundland*, Justice Fowler stated:

> The fact that the Labrador Metis people do not occupy a single fixed community should not be surprising considering that the lifestyles of the early Inuit was not one of settlement, but migratory in the sense that the people followed the animals, fish, and plant life on a seasonal basis. The Europeans with whom they eventually mixed also were scattered along the harsh coast of Labrador in small numbers necessary for the

[702] Evidence of William Wicken, Transcript, May 16, pp. 1537-38, 1577-8. Evidence of Dr. Von Gernet, June 9 pp. 4516-17.

> prosecution of the fishery. However, in order to survive in the harsh Labrador climate they soon adopted the Inuit means of survival off the land. This resulted in a regional identification of settlement such as the "straits" area of southern Labrador or the "Belle Isle" area or the "South Coast" area. This is not, I would suggest, dissimilar to the Metis concept of community which the Supreme Court of Canada in *Powley* (supra) accepted as having emerged in the upper Great Lakes region, that is, it was regional in nature.[703]

399. Professor Wicken was read this part of Justice Fowler decision. “Speaking as a professional historian” he commented that it was a “fair assessment”.[704]

400. Subsequent to the Supreme Court decision in *Re Eskimos*, the Defendants treated these people as “Indians” within the meaning of s. 91(24).[705]

401. Following *Re Eskimos*, the Supreme Court of Canada said of the Inuit of Quebec:

> They are not Indians under the *Indian Act*, but they are Indians within the contemplation of s. 91(24) of the Constitution: *Re Eskimos*, [1939] S.C.R. 104.[706]

402. Chief Justice Duff ruled expressly that the half breed Inuit, referred to in the Bishop of Newfoundland’s Report as “half Indians,” were Indians within the meaning of the *British North America Act, 1867*.

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[703] *Labrador Metis Nation v. Newfoundland and Labrador (Minister of Transportation and Works)*, [2006] 4 C.N.L.R. 94 (S.C.), para 50.
[704] Evidence of William Wicken, Transcript May 16, pp. 1579-80.
[705] *Wicken Report*, pp. 67 ff.
[706] *Canadian Pioneer Management Ltd. v. Labour Relations Board of Sask.*, [1980] 1 S.C.R. 433, 469.

403. Factually and legally, these Labrador Inuit "half Indians" are impressively similar to the Métis buffalo hunters of the Northwest under consideration here. Both were mixed ancestry; both wandered over large territories in search of food; both were under the administrative authority of the Hudson's Bay Company; both were contemplated to, and did come under Canadian jurisdiction through the constitutional instruments that transferred the HBC territories to Canada.

404. In this sense, *Re Eskimos* supports the conclusion that both Labrador and Northwest half breeds are Indians within the meaning of *Constitution Act, 1867*, s. 91(24).

(i) *Re Eskimos* and the Purposive, Progressive Approach to Constitutional Interpretation

405. In *Re Eskimos* the Supreme Court reached its conclusion through use of an older, original intent approach to constitutional interpretation.

406. The *Re Eskimos* ruling must be appreciated in light of the purposive, progressive approach to constitutional interpretation mandated by the modern jurisprudence of the Supreme Court of Canada.[707] To recapitulate and sum up this approach:

- the "broad, purposive analysis … interprets specific provisions of a constitutional document in the light of its larger objects."[708]

[707] *Re Employment Insurance Act*, 2005 SCC 56 at para. 9; *Canadian Western Bank v. Alberta* 2007 SCC 22 at para 23. See Part I(C) of this Brief, supra.
[708] *Hunter v. Southam*, [1984] 2 S.C.R. 145, 156.

- The purposive approach must be progressively applied to "ensure that Confederation can be adapted to new social realities."[709]

407. Professor Wicken explained as an expert historian that the larger objects of Confederation were those stated by the Supreme Court in *Black v. Law Society of Alberta*.[710] He elaborated these larger objects as expansion, settlement, building of a railway, and development of a national economy.[711]

408. He explained that s. 91(24) was essential to achieve these larger objects of Confederation.[712] Ms. Jones corroborated Professor Wicken on this point.[713] Neither Professor Patterson nor Dr. Von Gernet considered these points, and accordingly left them uncontradicted.

409. Professor Wicken explained how the framers, and particularly Sir John A. MacDonald, understood these purposes and built them into the Indian Power when the framers crafted it at the Quebec Conference in 1864.

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[709] *Re Employment Insurance Act*, 2005 SCC 56 at para. 9; *Confédération des syndicats nationaux v. Canada (Attorney General)*, 2008 SCC 68, paras 27, 29-32; *Same-Sex Marriage Reference*, [2004] 3 S.C.R. 698 at paras. 22-30 ("our Constitution is a living tree which, by progressive interpretation, accommodates and addresses the realities of modern life"); *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145 at 155 ("A constitution…is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power.)"; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 at 136 (P.C.) ("narrow and technical construction" rejected in favour of "a large and liberal interpretation…within certain fixed limits"; Constitution as "a living tree capable of growth and expansion within its natural limits"); *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at paras. 79-82 (unwritten constitutional principles which animate constitutional interpretation include protection of minorities, specifically the aboriginal peoples).

[710] *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591

[711] Examination of Dr. Wicken, *Transcript*, May 16, Vol. 10, p. 1486.

[712] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1446.

[713] Expert Report of Ms. Jones, Exhibit P-302, p. 6 [Jones Report].

410. The framers' big purposes required a big Indian Power to control all Aboriginal people in the territories into which the new Dominion intended to expand. In particular, the framers' purposes included controlling roving bands hunting the buffalo in the Northwest. It was inconsistent with the framers' larger objects -- to expand, settle and build a railway into this area -- that the Indian power would leave them without authority in this regard.[714]

411. Professor Wicken testified specifically that Sir John A. Macdonald would have thought it nonsensical to allow the "Half-breeds" to roam over the plains to hunt buffalo in the face of his plan of expansion and settlement. This population had to be controlled and assimilated; doing so was necessary to ensure the orderly progression of expansion, settlement and development.[715]

412. The Plaintiffs say that it is the relation of s. 91(24) to these larger objects of Confederation which invites a decision that MNSI are within Parliament's power to legislate in relation to "Indians" at s. 91(24). The framers' larger objects of expansion into the Northwest (and elsewhere), and settling and developing that territory could not have been achieved unless Parliament were given power to deal with the half breed buffalo hunters and others then roaming freely across the territory in 1864 when the Indian power was cast at the Quebec conference.

[714] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, pp. 1461, 1481.
[715] Examination of Dr. Wicken, *Transcript*, May 16, vol. 10, p. 1483.

413. Nor did the *Re Eskimos* Court consider how s. 91(24) evolved in light of modern day realities.[716]

414. As explained above, from the early 1980s Parliament has been confronted with the reality that the *Indian Act* was discriminatory in stripping Indian status from an Indian woman and her children on marriage to a non-Indian man.

415. Parliament responded to this reality in 1984 with *Bill C-47* by proposing to grant Indian status to more than 133,000 MNSI.[717]

416. Parliament responded to this reality in 1985 with Bill C-31, which granted Indian status to approximately 78,000 MNSI.

417. As explained above, in *McIvor v. Canada*,[718] the B.C. Supreme Court and the B.C. Court of Appeal ruled aspects of Bill-C-31 discriminatory -- in a broad sense (Supreme Court) and in a narrow sense (Court of Appeal).

418. Parliament responded to the reality pointed out by the Courts with the *Gender Equity in Indian Registration Act* [Bill C-3] in 2010.[719] The Defendants

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[716] *Re Employment Insurance Act*, 2005 SCC 56 at paras. 10 and 46-7.
[717] *An Act to Amend the Indian Act* (Bill C-47), 1984.
[718] *McIvor v. Canada (Registrar Indian and Northern Affairs),* 2007 BCSC 827; *McIvor v. Canada (Registrar Indian and Northern Affairs),* 2009 BCCA 153.
[719] Assented to Dec 15, 2010.

estimate that that this legislation will add 45,000 registrants to the Indian register.[720]

419. As explained above, the Defendants found it necessary or desirable to respond to the realities following Newfoundland's entry into confederation by creation of the Conne River Band.[721]

420. Also, as explained above, the Defendants found it necessary or desirable to respond to the realities following Newfoundland's entry into confederation by creation of a landless Band the Qualipu Band.[722]

421. In *Misquadis v. Canada*, this Court observed:

> 26 In 1995, HRDC [Human Resources Development Canada] undertook a review of Pathways [a labour market training program for Aboriginal people]. At pages 597 and 600 of the applicants' record, the following extract from structural review is found:
>
> > The Aboriginal population in Canada is not homogenous. Government policy initiatives based solely on the assumption of such homogeneity are likely to result in unproductive wrangling and ineffectiveness, deflecting energy from much higher priorities. Effective policies must take count of the reality of First Nation Metis, Inuit and urban Aboriginal populations. Policies must be sensitive to the widest regional variation of existing Aboriginal communities, governments, institutions and inter-governmental relationships.

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[720] Ex. P-440, Explanatory Paper, "Discussion Paper on Need for Changes to the Indian Act Affecting Indian Registration and Band Membership McIvor v. Canada" ("the Department of Indian Affairs and Northern Development believes that the total number of persons newly entitled to registration under the Indian Act resulting from such an amendment would number in the range of 45,000").

[721] *Order Declaring a Body of Indians at Conne River, Newfoundland, to be a Band of Indians for Purposes of the Act*, SOR/84-501 (1984) 118 Canada Gazette I 2935; *Miawpukek Band Order*, SOR/89-533 (1989) 123 Canada Gazette 4692, Ex. P-441.

[722] Ex. P-406.

> The diversity of Aboriginal communities that deliver services should be community based, through a wide variety of Aboriginal jurisdictions, development institutions and related authorities. The cutting edge of programs must be designed, managed and implemented by Aboriginal people in their communities;[723] (emphasis added).

422. In time, Parliament may find it necessary or desirable to take other actions in relation to MNSI as part of the on-going process of constitutional development in relation to Canada's aboriginal people.

423. These modern realities are part of the reason why all appellate Courts that have considered s.; 91(24) require that it be give a broad interpretation, consistent with the language, structure and underlying principles of the Constitution. Constitutional interpretation must allow Parliament to respond, within appropriate limits, to the realities and necessities that experience teaches will from time to time arise.

424. *Re Eskimos, Lavell* and *Canard* are consistent in ruling that s. 91(24) is a broad power. All three cases suggest that when presented with the reality that exclusion of certain MNSI from registered status under the Indian Act is discriminatory, Parliament has adequate power to respond as necessary, as Parliament has done in the modern era.

[723] [2003] 1 C.N.L.R. 67, [2002] F.C.J. No. 1427 (Lemieux J), aff'd [2004] 2 C.N.L.R. 118 (F.C.A.].

425. There is no appellate case in which the power of Parliament pursuant to s. 91(24) has been cut down. If this court now were to take that unprecedented step, Indian legislation of the past 30 years would become constitutionally suspect. With that, the status of hundreds of thousands of aboriginal people granted status under that legislation, and that of their descendants, would be thrown into doubt. No legislature would have power to correct these problems.

426. Constitutional law neither requires such a ruling, nor would such a ruling be in the public interest.

(4) *Delgamuukw* and the "Core" of s. 91(24)

427. This conclusion is supported by the Supreme Court of Canada's opinions in *Delgamuukw* v. *British Columbia*.[724]

428. *Delgamuukw* considered whether provinces have constitutional jurisdiction to extinguish Aboriginal rights. The Supreme Court ruled that provincial governments are without constitutional power to extinguish Aboriginal rights. The Court reasoned that "s. 91(24) protects a 'core' of Indianness from provincial intrusion" and that the "core" of s. 91(24) "encompasses Aboriginal rights including the rights that are recognized and affirmed by s. 35(1)" of the *Constitution Act, 1982*.[725]

[724] *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 at para. 177.
[725] *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 at para. 178.

429. Under this ruling:

(a) "the whole range of Aboriginal rights that are protected by s.35 (1)" are within the "core of Indianness that lies at the heart of s. 91 (24)"; and

(b) because s. 35(1) Aboriginal rights are within the core of s. 91(24) those rights are within federal jurisdiction exclusively and "provincial governments are prevented from legislating in relation to [them]".[726]

430. The Supreme Court of Canada reaffirmed *Delgamuukw* on this point in *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*.[727] Citing the above, McLachlin, CJ and Fish J (Binnie J concurring) observed in a concurring opinion that "[t]here is no dispute the power over Indians under s. 91(24) has been held to contain a protected core of federal competency that provincial legislation cannot touch;" (para. 55). They then clarified that:

> the core, or "basic, minimum and unassailable content" of the federal power over "Indians" in s. 91(24) is defined as matters that go to the status and rights of Indians. Where their status and rights are concerned, Indians are federal "persons", regulated by federal law: see *Canadian Western Bank*, at para. 60; (para 70).

431. *Delgamuukw* made another seminal point about s. 91(24). The Court pointed out the desirability of having *identity of jurisdiction* over Indians and the interests Indians have in their lands. The Court reasoned that the government

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[726] *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 at ¶178
[727] 2010 SCC 45

that has authority to protect Indians must also have the means to carry out that responsibility. The Court explained:

> … separating federal jurisdiction over Indians from jurisdiction over their lands would have a most unfortunate result – the government vested with primary constitutional responsibility for securing the welfare of Canada's aboriginal peoples would find itself unable to safeguard one of the most central of native interests – their interest in their lands..[728]

432. The point is *identity of jurisdiction*. The Court observed clearly that if the Federal government has s. 91(24) jurisdiction over Indians, it should also have jurisdiction over rights in Indian lands.

433. Logically, the *identity of jurisdiction* point must work in reverse. If it is clearly established that Parliament has s. 91(24) jurisdiction over aboriginal rights in land, the Court's *identity of jurisdiction* point must mean that Parliament should also have jurisdiction over the Aboriginal people who hold those rights. The reason is stated by the *Delgamuukw* Court: if there were not *identity of jurisdiction*, the government vested with authority to protect Aboriginal peoples would lack the means to do so.

434. This point is relevant to the central issue before this Court – whether Métis and Non-Status Indians are within federal jurisdiction at s. 91(24). In *Powley*[729] the Supreme Court of Canada recognized and elaborated an Aboriginal right for Métis people to hunt for food. The Court explained that this Métis right is

[728] *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 at para. 176.
[729] *R. v. Powley*, [2003] 2 S.C.R. 207.

recognized and affirmed by s. 35(1).[730] As such, Métis Aboriginal rights to hunt for food are within the core of s. 91(24) because, as *Delgamuukw* explained, the core of s. 91(24) includes all Aboriginal rights recognized and affirmed by s. 35(1).[731]

435. The *identity of jurisdiction* point elaborated by the Supreme Court of Canada in *Delgamuukw* means that as the Métis Aboriginal rights elaborated in *Powley* are embraced by s. 91(24), so too must the Métis people and communities who hold those rights fall within s. 91(24). There should be *identity of jurisdiction*. Federal jurisdiction over the Aboriginal rights in land and the people holding those rights should be in the same government. As *Delgamuukw* made clear that Métis Aboriginal rights are within the core of s. 91(24), it also showed why Métis peoples who possess Métis Aboriginal rights must fall within s. 91(24) – so that the same government that has to protect Métis Aboriginal people has the means to do so.

436. This logic also answers the question whether Non-Status Indians are embraced by Federal jurisdiction at s. 91(24). The cases establish that Non-Status Indians have Aboriginal and Treaty rights derivable from their Aboriginal ancestry where a "sufficient connection" with the First Nation that signed the

[730] *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 at para. 178.
[731] *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 at para. 178: provincial governments are prohibited from legislating with respect to both kinds of Aboriginal rights that fall within the core of s.91(24).

Treaty is manifest.[732] Non status Indians have established Aboriginal and treaty rights to land which are protected by s. 35(1) of the *Constitution Act, 1982*.[733] As *Delgamuukw* explained, these rights lie at the core of s. 91(24). The *identity of jurisdiction* point elaborated in *Delgamuukw*[734] must mean that Non-Status Indians possessing these Aboriginal and Treaty rights should also fall within Federal jurisdiction at s. 91(24) and for the same reason.[735]

437. Section 91(24) places jurisdiction over Aboriginal land rights belonging to Non-Status Indians with the federal government. If *identity of jurisdiction* is to be maintained, the federal government must also have coordinate authority to protect the Non-Status Indians themselves, which means that Non-Status Indians must be embraced by federal jurisdiction at s. 91(24).

438. As defined by the Supreme Court in *Delgamuukw*, the core of s. 91(24) is wide. The core includes Aboriginal land rights that belong to both Métis and Non-Status Indians and other Aboriginal rights pertaining to Métis and Non-Status Indians that are not tied to land.

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[732] *R. v. Simon*, [1985] 2 S.C.R. 387, p. 407.
[733] *R. v. Lavigne*, 2007 NBQB 171. <http://www.canlii.org/en/nb/nbqb/doc/2007/2007nbqb171/2007nbqb171.html>; *R. v. Fowler* (1993), 134 N.B.R. (2d) 361; *R. v. Harquail* (1993), 144 N.B.R. (2d) 146.
[734] *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 at para. 178.
[735] *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 at para. 176.

439. As the definition of the Aboriginal rights falling within the core of s. 91(24) is widely conceived by the Supreme Court, so too must there be a broad conception of the categories of Aboriginal people who hold these rights.

440. Whether deducible from that broad interpretation principle, or from the fact that Métis and Non-Status Indians have clearly established Aboriginal and Treaty rights in the courts (rights that are protected by s. 35(1) and thus lie at the core of s. 91(24), they should, as Aboriginal people, come within federal jurisdiction at s. 91(24).

(i) Defining Non Status "Indians" Exhaustively is not Necessary to Determine whether Non Status Indians Come Within s. 91(24) Jurisdiction

441. Quebec argued in *Re Eskimos* that "Eskimos belong the racial group which is called Indians".[736] Quebec filed substantial ethnographic evidence to establish who the Inuit were, and that they had ancestral connections with the Indians.[737]

442. The Court did not consider whether the Inuit had ancestral connections to other Aboriginal people. Nor did the Court attempt to identify or define Inuit or Indian people. Justice Kerwin specifically held that the ethnographic evidence

[736] CA-000165, Ex. P-434, the Factum on behalf of the Attorney General of the Province of Quebec, page 2.
[737] CA-000165, Ex. P-434, see the Factum on behalf of the Attorney General of the Province of Quebec, pages 1-25.

was irrelevant to determining the scope of s. 91(24) jurisdiction.[738]

443. The Court answered the question whether Inuit were Indians within s. 91(24) without considering exhaustively the issue "who are the Eskimos". The Court instead focussed on whether the framers of the Constitution intended the scope of s. 91(24) jurisdiction to be wide enough to encompass the Inuit.

444. This approach to interpreting constitutional powers is in keeping with the Supreme Court of Canada's recent decision in *Canadian Western Bank v. Alberta.*[739] In that case, the Court emphasized the value of an incremental, case-by-case approach to interpreting the powers enumerated in ss. 91 and 92, noting that "[s]ince the time of Confederation, courts have refrained from trying to define the possible scope of such powers in advance and for all time".[740]

445. This approach is in keeping with the evolving meanings of the terms "Métis" and "Indians", as used in the *Constitution Act, 1982*, s. 35(2). Courts have recognized that the significance of these terms must be developed on a case by

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[738] *Re Eskimos* [1939] S.C.R. 104 at para 52 per Kerwin J: "And whether the Eskimos as now known emigrated directly from Asia or inhabited the interior of America (originally coming from Asia) and subsequently migrated north, matters not, however interesting it may be to follow the opinions of those who have devoted time and study to that question". The only reference to the ancestors of the Inuit is at para 3, per Duff CJ: "… the question we have to determine is whether these Eskimo, whose ancestors were aborigines of Rupert's Land in 1867 and at the time of annexation to Canada, are Indians in the sense mentioned".

[739] *Canadian Western Bank v. Alberta* 2007 SCC 22.

[740] *Canadian Western Bank v. Alberta* 2007 SCC 22 at para 43: "It was by proceeding with caution on a case-by-case basis that the courts were gradually able to define the content of the heads of power of Parliament and the legislatures, without denying the unavoidable interplay between them, always having regard to the evolution of the problems for which the division of legislative powers must now provide solutions". At para 85 the Court was able to consider whether a challenged matter came within the essential core of Parliament's Banking power without finding it necessary to delve deeply into the meaning of banks and banking.

case basis.[741] Although these terms lack precision, courts nevertheless attribute constitutionally protected entitlements to “Métis” and “Indian” communities.

446. The Court is not asked in this case to provide some abstract ultimate meaning of the word “Indians” as used in *Constitution Act, 1867*, sec 91(24). As the Supreme Court observed in *Canadian Western Bank*, “the requirement to develop an abstract definition of a “core” is not compatible, generally speaking, with the tradition of Canadian constitutional interpretation, which favours an incremental approach.”[742]

447. Incrementalism appreciates that s. 91(24) contains terms of evolving meaning, sensitive to realities which appear from time to time. Courts must be careful not to restrict s. 91(24) so as to create vacuums or to make the interpenetration of jurisdictions rigid, instead of flexible.

448. What is here defended is a broad, flexible approach to s. 91(24), an approach that justifies what Parliament has from time to time done in adding Non- Status Indians and Métis persons to treaty, granting status to Non-Status Indians and Métis persons from time to time, including at the present day, and as perhaps will become necessary in light of the realities which appear in the future.

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[741] See for example *Newfoundland and Labrador v. The Labrador Métis Nation,* 2007 NLCA 75, where the Court of Appeal found that the Labrador Métis Nation (LMN) did not have to specify whether their claim to fishing rights was based on Inuit or Métis rights in order to trigger the Crown’s duty to consult. The Court did not attempt to resolve the complex question of whether the LMN are the beneficiaries of Inuit or Métis rights before it became necessary.

[742] *Canadian Western Bank v. Alberta* 2007 SCC 22 at para. 43.

449. Under the case by case approach, Courts have ruled that Non-Status Indians are entitled to treaty rights protected by s. 35(1) in certain circumstances. In these cases, courts consider the claimant's ancestry, to determine whether the claimant has a "substantial connection" to a community that signed a treaty.[743] By considering the claimant's ancestry, courts apply the "filiation" criteria identified by Justice Beetz in *Canard* to determine the scope of the terms "Métis" and "Indian" in the *Constitution Act, 1982*, s. 35(2). The attribution of jurisdiction in respect of these communities presents no greater challenge.

450. Parliament's action from time to time in moving MNSI back and forth from Treaty, in granting scrip, in extending Indian status to enfranchised people is the backdrop of historical implementation and modern realities the Court is mandated to consider under the purposive, progressive approach. These assist the court to the evolve meaning of the words used in s. 91(24) in light of historical and present day realities.

451. The constitution is meant to evolve in light of these realities. It is fundamental constitutional doctrine that Parliament cannot conclusively define the limits of its s. 91(24) legislation for itself, in legislation or otherwise. The Supreme Court stated:

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[743] In *R. v. Fowler*, [1993] N.B.J. No. 85, the Court ruled that Mr. Fowler was an "Indian" within the meaning of s. 35(2), and entitled to treaty protections. Though he was not a status Indian, the Court considered evidence given by his family members, as well as anthropological and genealogical experts to find that he had a substantial connection with the tribe that was the signatory of the treaty in question. See also *R. c. Harquail* [1993] N.B.J. No. 629.

> [W]hile s. 416(1) of the *Bank Act* allows bank corporations to engage in some insurance activities, it recognizes insurance as a business separate from banking. Section 416(1) reads: "A bank shall not undertake the business of insurance except to the extent permitted by this Act or the regulations." Parliament itself appears not to consider the promotion of insurance to be "the business of banking". While Parliament cannot unilaterally define the scope of its powers, the fact is that Parliament has always treated insurance and banking as distinct and continues to do so.[744]

(5) *R. v. Blais*

452. In *R. v. Blais*, the Supreme Court of Canada stated:

> The *Manitoba Act, 1870* used the term "half-breed" to refer to the Métis, and set aside land specifically for their use: *Manitoba Act, 1870*, S.C. 1870, c. 3, s. 31 (reprinted in R.S.C. 1985, App. II, No. 8). While s. 31 states that this land is being set aside "towards the extinguishment of the Indian Title to the lands in the Province", this was expressly recognized at the time as being an inaccurate description. Sir John A. Macdonald explained in 1885:
>
> > Whether they [the Métis] had any right to those lands or not was not so much the question as it was a question of policy to make an arrangement with the inhabitants of that Province . . . 1,400,000 acres would be quite sufficient for the purpose of compensating these men for what was called the extinguishment of the Indian title. That phrase was an incorrect one, the half-breeds did not allow themselves to be Indians.[745]

453. The Court applied these comments to the interpretation of paragraph 13 of the *Natural Resources Transfer Agreement* (an agreement between the Federal and Manitoba Governments). The Court noted that this agreement:

> … is not the only source of the Crown's or the Province's obligations towards Aboriginal peoples. Other constitutional and statutory provisions are better suited, and were actually intended, to fulfill this more wide-ranging purpose.[746]

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[744] *Canadian Western Bank v. Alberta*, 2007 SCC 22, para 91.
[745] *R. v. Blais* 2004 SCC 44 at para. 22 [Blais].
[746] *R. v. Blais* 2004 SCC 44 at para. 26.

454. The Court did not make any decision about the meaning of the *Manitoba Act, 1870*. The Court specifically refrained from applying Macdonald's comments to the question now before this Court -- whether Métis peoples are Indians within the meaning of s.91(24). The Supreme Court specifically left that question open:

> We emphasize that we leave open for another day the question of whether the term "Indians" in s. 91(24) of the *Constitution Act, 1867* includes the Métis -- an issue not before us in this appeal.[747]

455. Sir John A. Macdonald's 1885 comments contradict a statement he made to the House of Commons earlier that year:

> The *Indian Act* contains provisions by which half-breeds desiring to do so, and being otherwise qualified, might have become enrolled as Indians. The *Dominion Lands Act* enables those who were not enrolled as Indians to obtain entries for homesteads and pre-emption, the same as white men. Indian agents and agents of Dominion Lands have standing instructions to explain the provisions of the law to all concerned. In many instances, half-breeds have been enrolled as Indians, and in many instances half-breeds have obtained entries for homesteads and pre-emption. The Government never learned from any source that they were dissatisfied with these provisions of the law. The scrip to be issued is in extinguishment of the Indian title of those who have not been enrolled as Indians.[748]

456. On July 7, the day after Sir John A. Macdonald made the statements cited in *Blais*, Sir Wilfred Laurier recognized that Métis held Indian title:

> …the half-breeds should get their grant of lands in extinguishment of the Indian title, and then be at liberty to settle on the lands in the North-West. That principle … is the very principle which has been admitted in our Statute Books ever since 1870. According to the Act of 1870, and the Act of 1874, which completed it, an allotment of land was made to the half-breeds simply in extinguishment of the Indian title … I say, the policy of the Government, as indicated in the Statute Book, has been that the half-

[747] *R. v. Blais* 2004 SCC 44 at para. 36.
[748] Canada, House of Commons debates, May 4, 1885, p.1567 (Speech of the Prime Minister of Canada, Sir John A. Macdonald). (CR-007702, Ex. P-237).

> breeds were entitled, just as much as the Indians, to the extinguishment of the Indian title, but, as white men, instead of taking compensation for their Indian title collectively, they were allowed to take it individually, and that is the only difference between them and the Indians, so far as the extinguishment Indian title was concerned.[749]

457. The comments relied on by the Court in *Blais* were made fifteen years after s. 31 of the *Manitoba Act* was enacted. They are at odds with what Macdonald said in 1870, when the *Manitoba Bill* was before Parliament.

458. On May 2, 1870, Sir John A. Macdonald introduced the *Manitoba Act*, *1870* 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.[750]

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...[751] [Emphasis added.]

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[749] CR-004654, Ex. P3-48, Canada, House of Commons debates, July 7, 1885, p.3124 (Speech of the Member of Parliament, Wilfred Laurier).

[750] CR-009619, Ex. P318, Canada, House of Commons debates, 2 May 1870 (Speech of the Prime Minister of Canada, Sir John A. Macdonald, introducing the *Manitoba Act, 1870*).

[751] CR-009621, Ex. P-242; Canada, House of Commons debates, 2 May 1870, pp. 1292-3

459. Although Métis and Indians may have been seen as separate groups,[752] Prime Minister Macdonald recognized the need to extinguish the Indian interest in lands Métis held as people descended from Indians. Referring to clauses contained in the surrender of Rupert's land by the Hudson's Bay Company, he stated:

> Those clauses referred to the land for half-breeds, and go towards extinguishing Indian title. If those half-breeds were not pure-blooded Indians, they were their descendants … Those half-breeds had a strong claim to the lands, in consequence of their extraction, as well as from being settlers. The Government therefore proposed for the purpose of settling those claims, this reserve of 1,400,000 acres.[753] [Emphasis added.]

460. 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.[754]

461. Subsequent governments also recognized that Métis peoples had interest

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(Speech of the Prime Minister of Canada, Sir John A. Macdonald, introducing the *Manitoba Act, 1870*).

[752] The Court in *Blais* noted that "government actors and the Métis themselves viewed the Indians as a separate group with different historical entitlements." *Blais*, para 21.

[753] CR-009624, Ex. P431, Canada, House of Commons Debates, 4 May 1870, pp.1355 (Speech of the Prime Minister of Canada, Sir John A. Macdonald). See also pp. 1320: "... 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.]

[754] Canada, House of Commons debates, 9 May 1870, pp.1491.

in lands as people descended from Indians; this was the rationale for the half-breed land grants. On July 3, 1899, Sir Wilfred Laurier addressed the House of Commons. Reflecting on the *Manitoba Act, 1870*, he stated:

> Any man who has been in the North-West Territories and met this class of people knows that they pretend to be the first occupants of the soil, and to have a direct right in it, so that they should not be dispossessed without compensation.[755]

462. The Minister of the Interior, Clifford Sifton, also addressed the House that day:

> If the half-breed had any claim at all, it was on account of his Indian blood, and his occupation of that territory, and because the Government of the Dominion, in taking possession of the territory, was bound to recognize his position and extinguish his title, as was done in the province of Manitoba. … [The half-breeds] are intelligent men and citizens and they do not consider that they are getting any charity or favour from the Government. They say that they were in that country before us, and perfectly able to take care of themselves, and that we came and took possession, and they want what they claim as their just rights.[756]

463. As the evidence has shown, it was the consistent policy of the government to extinguish the Indian title of mixed-ancestry Aboriginals. As early as 1818 Williiam McGillivray wrote to Gen. J.C. Sherbrooke on the subject of half breed nationalism, that:

> It is absurd to consider them [the Métis] 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.

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[755] CR-009900, Ex. P374, Canada, House of Commons Debates, 3 July 1899, pp. 6407-6408 (Speech of the Prime Minister of Canada, Sir Wilfred Laurier).
[756] CR-009900, Ex. P-374, Canada, House of Commons Debates, 3 July 1899, pp. 6413-6414 (Speech of the Minister of the Interior, Clifford Sifton).

> 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.]

This policy was repeatedly adopted in Canada's Constitution, legislation and administrative schemes.[757]

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[757] CR-003144, Ex. P-432, U.K, Colonial Office, *Papers Relating to the Red River Settlement* (1819) Letter of William McGillivray to J.C. Sherbrooke, March 14, 1818, in on Half Breed Nationalism. Constitution: *Manitoba Act, 1870, 33 Vict., c.3, s.31:* Section 31 provided land to mixed-ancestry Aboriginals in satisfaction of their Indian title: "And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands … and divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada…" Legislation: see *Dominion Lands, Manitoba, 37 Vict., c.20, preamble*: In 1874, Parliament again recognized the need to extinguish the Indian title of mixed-ancestry Aboriginals by enacting *An Act respecting the appropriation of certain Dominion Lands in Manitoba*. The *Manitoba Act, 1870* had only extinguished the Indian title of the children of half-breed families, so the purpose of this act was to extinguish the Indian title of their parents.

"Whereas by the thirty-first section of the Act thirty-third Victoria chapter three, it was enacted as expedient towards the extinguishment of the Indian title to the lands in the Province of Manitoba to appropriate one million four hundred thousand acres of such land for the benefit of the children of the half-breed heads of families residing in the Province at the time of the transfer thereof to Canada;

And whereas no provision has been made for extinguishing the Indian title to such lands as respects the said half-breed heads of families residing in the Province at the period named;
And whereas it is expedient to make such a provision…"

Dominion Lands Act, 1883, s.81(e):
"The following powers are hereby delegated to the Governor in Council:
e. To satisfy any claims existing in connection with the extinguishment of the Indian title preferred by half-breeds resident in the North-West Territories outside of the limits of Manitoba….".

Administrative schemes: CR-009836, Ex. P244, *Dominion Lands Act, 1886*, 49 Vict. c.54, s.90:
"The Governor in Council may -
(f) Grant lands in satisfaction of any claims existing in connection with the extinguishment of the Indian title, preferred by half-breeds resident in the North-West Territories, outside the limits of Manitoba, previous to the fifteenth day of July, one thousand eight hundred and seventy, to such persons, to such extent, and on such terms and conditions as are deemed expedient".

This was later amended by (CR-009904, Ex. P245) *An Act to further amend the Dominion Lands Act,* S.C. 1899, c.16, s.4, so that s.90(f) simply read "Grant lands in satisfaction of claims of half-breeds arising out of the extinguishment of the Indian title".

CR-004815, Ex. P236 - Memo from J.A.McKenna, First Class Clerk of the Department of Indian Affairs, to the Minister of the Interior C. Sifton (14 April 1899), p.3: "It is, therefore, clear that

464. The Court in *Blais* did not have the benefit of argument or materials explaining the context and surrounding circumstances of Sir John A. Macdonald's statement in 1985. The context is revealing.

465. On July 6, 1885, Prime Minister Macdonald came under attack from

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whatever rights the halfbreeds have, they have in virtue of their Indian blood. Indian and halfbreed rights differ in degree, they are obviously coexistent. Halfbreed rights must exist until the Indian title is extinguished, and they should properly be extinguished at the same time. The principle underlying the Government's policy respecting Indians, as embodied in various treaties, may be thus stated: - when changing conditions incident to advancing settlement interfere with their mode of life and ordinary means of livelihood it is politic and equitable – apart altogether from any title which they may have in the land – to offer them some degree of compensation. The same principle is, and should be, the basis of its halfbreed policy. When the Indian rights in a certain territory are extinguished the halfbreed rights should be extinguished; and if the Government fails as it failed in the past to pursue such a policy then the halfbreed right should be held to exist up to the date at which it is extinguished."

CR-09898, Ex. P433, *Canada, House of Commons Debates, 13 June 1899, p.4894* (Speech of the Minister of the Interior, Clifford Sifton, introducing a revision to the *Dominion Land Act*): "The next amendment relates to the law authorizing the Government to deal with the half-breeds of the North-West with regard to the issue of scrip … There is a large number of half-breeds in that territory and it is beyond question that they will require to be settled with, at or about the same time as the Indians are dealt with, and that no treaty can be successfully negotiated with the Indians unless that is done."

CR-009919, Ex. P246, *Report of Commissioners Cote and McLeod, Canada, Sessional Papers, Annual Report of the Department of the Interior for the Year 1900-1901, 1902, No 25, pp. 5*: "We have the honour to report that in conformity with the commission issued to us bearing the date March 21, 1900, and the order in council of the 2nd of the same month, as amended by subsequent orders in council, vesting in us the power to investigate and adjudicate upon the claims to land or scrip arising out of the extinguishment of the Indian title, preferred by or on behalf of half-breeds born between July 15, 1870, and the end of the year 1885…".

CR-009939, Ex. P247, *John J. McGee, Clerk of the Privy Council, Report of the Committee of the Privy Council (20 July 1906),* stating that "the Aboriginal title has not been extinguished" in northern Saskatchewan and part of Alberta, and recommending that "the whole of the territory should be relieved of the claims of the aborigines" by issuing scrip to Half-breeds and making a treaty with the Indians.

CR-009982 Ex. P248, *E.J. Lemaire, Clerk of the Privy Council, Minute of a Meeting of the Committee of the Privy Council (26 March 1924*): "The committee of the Privy Council have before them a report, dated the 15th of March, 1924, from the Minister of the Interior, submitting that by Order in Council of the 12th April, 1921 (P.C 1172), authority was granted to deal with the claims arising out of the extinguishment of the Indian Title of Halfbreeds resident within the Mackenzie River District … the Order in Council provides that 'halfbreeds, whose right arising out of the extinguishment of the Indian Title has not been otherwise extinguished … shall be entitled to a grant of two hundred and forty dollars in satisfaction of their claims arising out of the extinguishment of the Indian title.'"

Edward Blake, the Leader of the Opposition in the House of Commons for indirectly causing the North-West Rebellion. Mr. Blake told the House:

> I have already stated my view of the nature and extent of the responsibility of the Government in connection with North-West affairs. I have already pointed out that the Government, in view of the late events, is really on the defensive, and is bound to vindicate itself, being *prima facie* responsible for such occurrences as have taken place in a self-governing community.[758]

466. Mr. Blake went on to state that Prime Minister Macdonald's government was guilty of ignoring the Métis claims for Indian title. He listed many examples of ignored claims,[759] and explained that the government's mismanagement of these claims had aggravated the grievances of the North-West Métis.

> I rise to charge upon the Government, in their administration of affairs in the North-West, grave instances of neglect, delay and mismanagement, prior to the recent outbreak, in matters deeply affecting the peace, welfare and good government of this country.[760]

467. In response to Mr. Blake's accusations, Prime Minister Macdonald defended his government. He stated that the substance of Riel's defense will be Blake's speech,[761] and dismissed Métis claims by saying:

> The claims of the half-breeds are a mere pretext, and the real desire is that that country should sever its connection with the Dominion of Canada, should become independent in some way.[762]

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[758] (CR-009823, Ex.) House of Commons debates, July 6, 1885 at 3076.
[759] For example (CR-009823, Ex. P243) House of Commons debates, July 6, 1885 at 3080, speech by Mr. Blake explaining the grievance of the Métis at Manitoba Village, North-West Territories: "And whereas the half-breed heads of families, and the children of the same, born in or resident in the Territories … have not yet had their claims to equal rights and privileges with their brethren in the Province of Manitoba, investigated … and whereas the continued delay in ascertaining and investigating said claims is creating great and general dissatisfaction throughout the Territories."
[760] (CR-009823, Ex. P243) House of Commons debates, July 6, 1885 at 3075.
[761] (CR-009823, Ex. P243) House of Commons debates, July 6, 1885 at 3110.
[762] (CR-009823, Ex. P243) House of Commons debates, July 6, 1885 at 3112.

This wily and admired politician was speaking extemporaneously, responding to the cut and thrust of debate. While fending off the opposition's attack in the heat of the debate, Prime Minister Macdonald replied to Mr. Blake's argument that Macdonald's government was guilty of ignoring the Métis claims for Indian title.

468. Prime Minister Macdonald's extemporaneous argument is unique in the Parliamentary debates on the subject. It contradicts his earlier parliamentary statements on the matter. It contradicts Sir George Etienne Cartier's parliamentary statements on the subject. It contradicts Prime Minister Laurier's subsequent parliamentary statements on the subject. It contradicts consistent Federal government policy to extinguish the Half breed claims to Indian title. It runs counter to the text of the *Manitoba Act, 1870*, which is part of the Constitution of Canada. It is contrary to the text of the *Dominions Land Act*. It is contrary to continuous and long-standing government policy.

469. Macdonald's comments are the result of political posturing in response to an opposition attack about the government's responsibility for the recent North-West rebellion. The comments contradict what the government actually did and continued to do into the 1950s, and what the Constitution of Canada and Federal legislation says it did. Macdonald's comments are not determinative of the question whether Métis are Indians within s. 91(24), nor did the Supreme Court of Canada, which had those comments before it, did not consider the comments as determinate of that question. Rather, the Supreme Court left that question

open for this Court to decide.

470. Prime Minister Macdonald's comments relate to whether government, as a matter of policy, should have given Métis discretionary entitlements to receive Manitoba lands; not whether Parliament could have made that choice as a matter of constitutional jurisdiction under s. 91(24). This case is about the second issue -- constitutional authority. In *R. v. Blais* the Court used an original intent approach to interpret the *Manitoba Natural Resources Transfer Agreement*, an agreement between Manitoba and Canada, which was scheduled to the *Constitution Act, 1930*. In *Reference re Same Sex Marriage* counsel submitted that "the intention of the framers should be determinative in interpreting the scope of the heads of power enumerated in ss. 91 and 92 given the decision in *R. v. Blais*, [2003] 2 S.C.R. 236".

471. To that argument, the Supreme Court of Canada replied:

> [T]hat case [Blais] considered the interpretive question in relation to a particular constitutional agreement, as opposed to a head of power which must continually adapt to cover new realities. It is therefore distinguishable and does not apply here.[763]

472. Unlike *Blais*, this case considers a head of power, not a constitutional agreement. Accordingly, the *Blais* original intent method may not be used. A purposive, progressive analysis which continually adapts the constitution to cover

[763] [2004] S.C.R. 698, para 30.

new realities is required. Neither Blais' method, nor its conclusion, are relevant to interpretation of s. 91(24) which is the Court's task here.

B. Legal Commentators

473. Most commentators agree that MNSI are embraced by 91(24).[764] Canada was acutely aware of this.[765]

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[764]Henri Brun et Guy Tremblay, *Droit Constitutionnel,* 3ed (Cowansville : Les Éditions Yvon Blais Inc., 1997) at 529 : « Normalement, il appartient aux tribunaux de déterminer la portée du terme « Indiens » dans le paragraphe 91(24) de la Loi de 1987. Ainsi fut-il jugé que les Inuits sont des Indiens au sens de cetter disposition : *Renvoi sur les Esquimaux* ... Cependant, comme pour les citoyens et les éstrangers, le fédéral peut définir les conditions précises permettant de savoir qui est un Indien et qui ne pas aux fins de ses interventions législatives. ... et les Indiens au sens de cette Loi ont tourjours compris les non-Indiennes ayant marié des Indiens. Voir *P.G. Canada c. Canard* ... ».

Canada, *Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol. 4 (Ottawa: Supply and Services Canada, 1996) at 209 – 210: "We are convinced that all Métis people, whether or not they are members of full-fledged Aboriginal nations, are covered by section 91(24). … For greater certainty, a new provision should be added to the Constitution Act, 1867 to ensure that Section 91(24) applies to all Aboriginal peoples." RCAP's conclusion that s.91(24) encompasses Métis is based on a number of factors: the use of the term "Indian" included Metis at the time of Confederation; the Supreme Court of Canada position, found in *Re Eskimos* that s. 91(24) refers to "all the aborigines of the territory subsequently included in the dominion"; the majority of academic commentators hold this position; and in 1991 the Aboriginal Justice Inquiry in Manitoba reached the same conclusion.

Clem Chartier, "'Indian': An Analysis of the Term as Used in s.91(24) of the *BNA Act*", (1978-79) 43 Sask. L. Rev. 37 at 68: "…would favour an interpretation that the half-breeds were, in fact, considered to be "Indians," for the purposes of the *British North America Act, 1867*." Chartier arrives at this conclusion by applying the original intent interpretation method used by the Supreme Court in *Re Eskimos* to half breeds. To do Chartier considers a number of historical documents, including the Select Committee Reports of the House of Commons and Imperial Parliament debates, concluding they show that at the time of confederation the term "Indians" would have included half breeds.

Peter W. Hogg, *Constitutional Law of Canada,* looseleaf (Scarborough, Ont: Carswell, 2007) at 28-4: "These "non-status Indians" … are also undoubtedly "Indians" within the meaning of s.91(24) … [Métis] are probably "Indians" within the meaning of s.91(24)."

Lysk, K.M. "The Unique Constitutional Position of the Canadian Indian" (1967) 45 Can. Bar Rev. 513 at 515: "The meaning on the term "Indian" in particular statutes may, of course, be narrower than the corresponding term in the British North America Act, … It may be too, that a person who was once an Indian for the purposes of the Indian Act, but has lost his status as an Indian under that Act by enfranchisement, may nevertheless continue to be an Indian for the purposes of the British North America Act."

Manitoba, Public Inquiry Into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba*, Vol. 1 (Manitoba: Province of Manitoba, 1991) at 200: "In our view, Metis people and non-status Indians fall within the constitutional definition of "Indians" for the purposes of section 91(24) of the *Constitution Act, 1867* and fall within primary federal jurisdiction." This position is derived from the fact that the Métis: have a share in Indian title, have been included elsewhere in the constitution; and are a distinct and founding people. Including non-status Indians in the definition of "Indian" is based on: the non-status Indians were created by the various iterations of the *Indian Act* and have been reinstated and are included in section 35(2) of the *Constitution Act, 1982*. The Report of the Public Inquiry also indicates concern over the unfairness of letting these jurisdictional squabbles continue.
Patrick J. Monahan, *Constitutional Law,* 3rd ed. (Toronto: Irwin Law, 2006) at 454: "Thus it is evident that significant numbers of Aboriginal persons – those who are "non-status Indians" as well as Metis – are also probably included within the term "Indians" for the purposes of s.91(24) of the *Consitution Act, 1867*, even though Parliament has chosen not to include them within the *Indian Act*." Monahan bases his position on two facts. First, "Indians" for the purposes of s.91(24)includes, "but is not limited to the definition adopted from time to time for purposes of the *Indian Act."* Second, section 25 of the *Constitution Act, 1982* defines the term "aboriginal peoples" as include the Inuit and Métis people of Canada.

Bradford W. Morse and John Giokas, "Do the Metis Fall Within Section 91(24) of the Constitution Act, 1867?" in *For Seven Generations: An Information Legacy on the Royal Commission on Aboriginal Peoples* (Ottawa : Libraxus, 1997) CD – ROM: " … it is logical and sensible to consider persons of mixed ancestry of all kinds to be within section 91(24) jurisdiction". Morse and Giokas base their position on "the balance of historical probabilities, practical convenience, and legal and constitutional logic, and that this interpretation is necessary to maintain the honour of the Crown".

Don S. McMahon, "The Metis and 91(24): Is Inclusion the Issue?" in *For Seven Generations: An Information Legacy on the Royal Commission on Aboriginal Peoples* (Ottawa : Libraxus, 1997) CD – ROM. McMahon relies on a number of factors to conclude that there is a legal basis for recognizing Metis as 'Indians' in s.91(24) including: the Supreme Court of Canada's ruling in *Re Eskimos;* the fact that the statutory and constitutional definitions of "Indian" are not equivalent; a purposive interpretation of section 35 of the *Constitution Act, 1982*; and the fact that such an amendment was proposed during the Charlottetown Accord.

William Pentney, *The Aboriginal Rights Provisions in the Constitution Act, 1982* (Saskatchewan: Native Law Center, 1987) at p 86: "With respect to the term "Indian" in sub-section 91(24) of the *Constitution Act, 1867* … it is possible to identify the class of persons called the Metis who could have been contemplated by the framers of the documents. Other historical evidence than that cited in *Re Eskimos* can be referred to in support of the assertion that the term "Indian" does encompass the Metis." After presenting some illustrative historical examples, Pentney concludes that "it is clear that the class of persons circumscribed by sub-section 91(24) might be identical to that defined by sub-section 35(2) of the *Constitution Act, 1982*" (emphasis in original).

Douglas Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada," in Beck and Bernier (eds.), *Canada and the New Constitution* (1983), vol. 1 225- 279 at 256: "It is logical for the courts, in defining the term "Indian" for constitutional purposes, to allow it to encompass virtually all descendants of the aboriginal population." Sanders argues s. 91(24) includes non-status Indians because "the constitutional category cannot be limited by the legislative category in the Indian Act". Sanders finds that Métis are also included in this constitutional category. "The exclusion of 'Half-Breeds' or Métis from the constitutional category of 'Indians' would seem contrary to the Manitoba Act, contrary to early practice, and disruptive of well established patterns of Indian policy" (at p. 255).

C. Fiduciary Obligation

474. The Royal Commission on Aboriginal Peoples reported that:

> Aboriginal peoples…have a special relationship with the Canadian Crown, which the courts have described as *sui generis* or one of a kind. This relationship traces its origins to the treaties and other links formed over the centuries and to the inter-societal law and custom that underpinned them. By virtue of this relationship, the Crown acts as the protector of the sovereignty of Aboriginal peoples within Canada and as guarantor of their Aboriginal and treaty rights. This fiduciary relationship is a fundamental feature of the constitution of Canada.[766]

475. The Supreme Court of Canada explained that the fiduciary relationship between the Crown and Aboriginal peoples was incorporated into s. 35 of the *Constitution Act, 1982*:f

> *Guerin*, together with *R. v. Taylor* and *Williams* (1981), 62 C.C.C. (2d) 227, 34 O.R. (2d) 360 (C.A.), ground a general guiding principle for section 35(1). That is, the government has the responsibility to act in a fiduciary capacity in respect to Aboriginal peoples. The relationship is trust-like, rather than adversarial, and contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historic relationship….
>
> [W]e find that the words "recognition and affirmation" [in s. 35(1)] incorporate the fiduciary relationship referred to earlier...[767]

476. Earlier in *Sparrow* the Supreme Court stated:

Jack Woodward, *Native Law*, looseleaf (Toronto: Carswell, 1989-) at 1-14: "The commentaries suggest that Métis are probably "Indians" within the meaning of s.91(24)". The Supreme Court of Canada's decision in *Re Eskimos* and the RCAP report form the basis of this conclusion. At 1-75 Woodward notes : "… most commentators say that "non-status Indians" are also "Indians" within the meaning of s.91(24) of the *Constitution Act*, *1867*." Woodward relies on Hogg and Lysyk, both cited above, for this position. He also notes that many non-status Indians are in fact full-blooded Indians who were erroneously classified by the Federal government at some point in history.

[765] CR-008761 Ex. P126 - "Background to the 1985 First Minister Conference on the Constitution" prepared by Constitutional Affairs Directorate, DIAND, December 1984 – p. 73: "The majority of legal opinion, however, affirms that most of the Métis are included in the meaning of the term "Indian" under section 91(24)".

[766] Canada, Royal Commission on Aboriginal Peoples, *Report*: *Restructuring the Relationship*, vol. 5, "Renewal: A Twenty Year Commitment" (Ottawa: Minister of Supply and Services, 1996) [emphasis added].

[767] *R. v. Sparrow,* [1990] 1 S.C.R. 1075 at paras. 59 and 62 [emphasis added].

> It is important to note that the provision [s. 35] applies to the Indians, the Inuit and the Métis…[768]

477. In Wewaykum Indian Band v. Canada, Binnie J. wrote:

> The "historic powers and responsibility assumed by the Crown" in relation to Indian rights, although spoken of in Sparrow, at p. 1108, as a "general guiding principle for s. 35(1)", is of broader importance. All members of the Court accepted in *Ross River* that potential relief by way of fiduciary remedies is not limited to the s. 35 rights (Sparrow) or existing reserves (Guerin). The fiduciary duty, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples. As Professor Slattery commented:
>
> > The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a "weaker" or "primitive" people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help.
> >
> > (B. Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 753)[769]

478. *Wewaykum* reaffirmed the fiduciary relationship between Aboriginal peoples and the Crown. *Wewaykum* also recorded the potential for a justiciable fiduciary duty to arise from this relationship as outlined by Dickson C.J.C. in *Sparrow.*

479. *Wewaykum* clarified that the general principles of fiduciary law applied to the fiduciary relationship between the Crown and Aboriginal peoples. This meant that while the fiduciary relationship could give rise to a justiciable fiduciary duty:

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[768] Para 53.
[769] [2002] 4 S.C.R. 245, para. 79.

> … not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature (Lac Minerals, supra, at p. 597) … this principle applies to the relationship between the Crown and Aboriginal peoples.[770]

480. The Supreme Court explained that a justiciable fiduciary duty would arise only where the Crown assumed "discretionary control [of a particular Aboriginal interest] sufficient to ground a fiduciary obligation".[771] In these cases, breach of the fiduciary duty could give rise to actionable damages.

481. *Haida Nation* reaffirmed the importance of the fiduciary relationship itself to the finding of a fiduciary duty. The *Haida* Court did this in its discussion of *Wewaykum* and the criteria required to find a fiduciary duty that is justiciable and may lead to damages.[772]

482. Other post-*Wewaykum* cases reaffirmed the importance of the fiduciary relationship between the Crown and Aboriginal peoples to the finding of a fiduciary duty.

483. In *Gladstone,* Major J. for the Supreme Court held that a fiduciary duty is not owed to an Aboriginal person because they are an Aboriginal person, but it will be owed because of the nature of the relationship between the Crown and the Aboriginal group:

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[770] *Ibid.* at para 83 [emphasis added].
[771] *Ibid.* at para. 83.
[772] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at para. 18.

> Although the Crown in many instances does owe a fiduciary duty to aboriginal people, it is the nature of the relationship, not the specific category of actor involved, that gives rise to a fiduciary duty. Not every situation involving aboriginal people and the Crown gives rise to a fiduciary relationship. See Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, 2004 SCC 73, at para. 18, per McLachlin C.J. The provisions of the Fisheries Act dealing with the return of things seized are of general application. I agree with the trial judge and the Court of Appeal that the respondents' aboriginal ancestry alone is insufficient to create the duty in these circumstances.[773]

484. The Supreme Court of Canada has been consistent and unequivocal in its modern aboriginal rights jurisprudence:

> The Crown has a fiduciary obligation to aboriginal peoples with the result that in dealings between the government and aboriginals the honour of the Crown is at stake.[774]

485. The Plaintiffs rely on *MMF v. Canada and Manitoba*,[775] paras. 429-443. The Manitoba Court of Appeal ruled:

> 429 The relationship between the Crown and the Aboriginal peoples of Canada has been recognized as being fiduciary in nature, but not every aspect of the relationship gives rise to a fiduciary duty….
>
> 431 The concept of a fiduciary relationship is therefore distinct from that of a fiduciary obligation (which is also called a fiduciary duty)…
>
> 432 The trial judge found that there was no fiduciary relationship between the Métis and Canada, but he did so without considering that the relationship between the Crown and Aboriginal peoples has been consistently recognized as a fiduciary one. He also erred by using the factors upon which fiduciary obligations have been found to arise in previous decisions as a test for determining whether a fiduciary relationship existed in the present case. Instead of recognizing that there is an ongoing Crown-Aboriginal fiduciary relationship and asking if the Métis are part of that relationship, the trial judge looked at facts surrounding the administration of the *Act* and case law addressing the existence of specific fiduciary obligations….

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[773] *Gladstone v. Canada*, [2005] 1 S.C.R. 325, [2005] 1 R.C.S. 325, 251 D.L.R. (4th) 1, 332 N.R. 182, [2005] 6 W.W.R. 401 at paras. 23 & 27 [emphasis added].
[774] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 24 [emphasis added].
[775] 2010 MBCA 71

> 439 At the same time, there is no doubt that the Métis also fit into the concept of the Crown-Aboriginal fiduciary relationship described by Professor Slattery….
>
> 442 When the court in *Powley* applied the justification test, it found that the infringement of the established Aboriginal right was not justified. By applying the Sparrow justification test unmodified to the Métis Aboriginal rights-holders in *Powley*, the Supreme Court of Canada recognized that the Métis are one of the beneficiaries within the Crown-Aboriginal fiduciary relationship.
>
> 443 I conclude that both precedent and principle demonstrate that the Métis are part of the sui generis fiduciary relationship between the Crown and the Aboriginal peoples of Canada.

486. The legal position was summed up by the Ontario Superior Court:

> The Federal Crown has exclusive jurisdiction in respect of Aboriginal persons, under: s.91(24) of the *Constitution Act, 1867* ("Indians, and Lands Reserved for the Indians"); s.35(1) of the *Constitution Act, 1982*; and the common law. From this jurisdiction emerges a fiduciary relationship between the Federal Crown and Canada's Aboriginal peoples.[776]

487. The following exchange took place at the meetings in which the Kelowna Accord was negotiated and signed:

> Mr. BILL CAREY: My question is for the Prime Minister.
> Premier Klein was saying that you have agreed here at this meeting that Ottawa is constitutionally responsible for all Aboriginals, including those off-reserve, the Métis and the non-status.
>
> So first of all, did you agree to this change in the federal position?
> Secondly, what do you think this will mean for the urban Aboriginals who say they predict they will continue to be left out of some of these programs because of jurisdictional fighting between Ottawa and the provinces?
>
> RT. HON. PAUL MARTIN: Ottawa has the prime fiduciary responsibility for Aboriginals. These either arise out of the treaties signed by the Crown or in fact, they arise out of the overall responsibility.[777]

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[776] *Brown v. Canada*, [2007] O.R. (3d) 493, para 121
[777] Transcript of Meeting in Kelowna, B.C., November 24, 2005, CA-000688, Ex. P216, p. 173.

488. Paragraph 27(b) of the Statement of Claim requests a declaration that the Crown owes a fiduciary duty to MNSI as aboriginal people. Paragraph 27(b) does not request damages; paragraph 27(b) does not claim that any justiciable duty has been breached.

489. Paragraph 27(b) requests what was decided in of *MMF v. Canada and Manitoba*, at para 443: that MNSI "are part of the sui generis fiduciary relationship between the Crown and the Aboriginal peoples of Canada."

490. In the words of Dwight Dorey: ""[Fiduciary duty is] a duty for the federal government to accept and recognize that Non-Status and Métis people are Aboriginal in regard to section 91(24) of the *BNA Act*. … It's recognition. Acceptance."[778]

D. Duty to Negotiate

491. The Royal Commission on Aboriginal Peoples reported that negotiation between government and Aboriginal peoples "is central to the constitutional recognition and affirmation of Aboriginal rights" mandated by the *Constitution Act, 1982*, section 35:

> The courts can be only one part of a larger political process of negotiation and reconciliation. As noted in a recent report by a task force of the Canadian Bar Association, "While the courts may be useful to decide

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See also p. 148.
[778] Evidence of Dwight Dorey, Transcript, May 3, vol. 2, p. 273 (in cross).

> some native issues or to bring pressure on the parties to settle by some other means, it appears clear that judicial adjudication will not provide all of the answers to the issues surrounding native claims"….
>
> Negotiations are clearly preferable to court-imposed solutions. Litigation is expensive and time-consuming. Negotiation permits parties to address each other's real needs and make complex and mutually agreeable trade-offs. A negotiated agreement is more likely to achieve legitimacy than a court-ordered solution, if only because the parties participate more directly and constructively in its creation. Negotiation also mirrors the nation-to-nation relationship that underpins the law of Aboriginal title and structures relations between Aboriginal nations and the Crown.[779]

492. The Supreme Court of Canada agreed with the RCAP. In *Delgamuukw,* Justice La Forest referred with approval to the Royal Commission's observations and said:

> I wish to emphasize that the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake. This point was made by Lambert J.A. in the Court of Appeal, [1993] 5 W.W.R. 97, at pp. 379-80:
>
> > So, in the end, the legal rights of the Indian people will have to be accommodated within our total society by political compromises and accommodations based in the first instance on negotiation and agreement and ultimately in accordance with the sovereign will of the community as a whole. The legal rights of the Gitksan and Wet'suwet'en peoples, to which this law suit is confined, and which allow no room for an approach other than the application of the law itself, and the legal rights of all aboriginal peoples throughout British Columbia, form only one factor in the ultimate determination of what kind of community we are going to have in British Columbia and throughout Canada in the years ahead.
> >
> > (See also *Report of the Royal Commission on Aboriginal Peoples* (1996), vol. 2 (Restructuring the Relationship), Part 2, at pp. 561-62.) [780]

493. Justice Lamer stated specifically that:

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[779] Canada, Royal Commission on Aboriginal Peoples, *Report*: *Restructuring the Relationship* vol. 2, Part II, chapter 4, 6.2 (Ottawa: Minister of Supply and Services, 1996).
[780] *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 at para. 207 [emphasis added].

> The Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith.[781]

494. The context for Justice Lamer's opinion related to the overriding purpose of s. 35 – reconciliation between the Crown and aboriginal peoples.

> By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in *Sparrow*, at p. 1105, s. 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place". Those negotiations should also include other aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, *supra*, at para. 31, to be a basic purpose of s. 35(1) -- "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay.[782]

495. In *Haida Nation*, Chief Justice McLachlin stated that the honour of the Crown is always at stake in its dealings with Aboriginal peoples,[783] and that the honour of the Crown gives rise to different duties in different circumstances.[784]

496. The honour of the Crown combined with s.35's promise of rights recognition create a duty to negotiate the determination of Aboriginal rights:

> 20 … Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" (Badger, supra, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate...

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[781] *Ibid.* at para. 86.
[782] *Ibid.*
[783] *Haida Nation v. British Columbia,* 2004 SCC 73, [2004] 3 S.C.R.511 at para. 16.
[784] *Ibid.* at para. 18.

> 25 Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation.[785]

497. In *Canada (Information Commissioner) v. Canada (Minister of Industry)*, this Court considered whether the Defendant had a duty to release census records in its possession to assist aboriginal claimants to prove rights protected by s. 35. The Court relied upon *Haida Nation*. It reasoned that the defendant had such an obligation, which arose out of its duty to negotiate:

> the Crown's duty to act honourably with respect to the Algonquin Bands' land claim in this case requires that the Crown disclose the census records in its possession which may prove continuity of occupation between present and pre-sovereignty occupation, one of the proofs required for Aboriginal land title.
>
> The Court is also of the view that the honour of the Crown gives rise to a fiduciary duty with respect to these census records being kept by the Crown. This duty requires that the Crown act with reference to the Aboriginal bands' best interests and disclose these census records which relate to the Aboriginal rights in the territories at stake.
>
> It is also the Court's view that the honour of the Crown requires good faith negotiations leading to a just settlement of the Aboriginal claims. This duty to negotiate in good faith, which is an implied part of section 35, means that the Crown disclose census records in the possession of the Crown which are relevant to the proof of Aboriginal title.
>
> It would be absurd and wrong if the Crown had the evidence the Aboriginal people required to prove their land claim, but the Government was entitled to suppress it. This would be inconsistent with section 35 of the Constitution Act, 1982.[786]

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[785] *Ibid.* at paras. 16, 18, 20, 25 [emphasis added].

[786] *Canada (Information Commissioner) v. Canada (Minister of Industry),* [2006] F.C. 132, 4 F.C.R. 241 at paras. 43-46 (per Kelen J., emphasis added).

498. The Supreme Court's elaboration of a duty to negotiate is not unique to *Delgamuukw*[787] or the aboriginal context. In *Reference re Secession of Quebec* the Court explained that the right combination of circumstances can create a positive duty to negotiate.[788]

499. In *Reference re Secession of Quebec*, the court considered the implications a clear expression of the desire to pursue secession of a majority in Quebec. The Court ruled that the federalism principle in conjunction with the democratic principle would then "give rise to a reciprocal obligation on all parties to negotiate constitutional changes to respond to that desire."[789]

> The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed.[790]

500. The circumstances of the *Secession Reference* gave rise to a non-justiciable duty to negotiate in specific circumstances. In other circumstances, in the context of Crown dealings with Aboriginal peoples, courts have explained that a justiciable duty to negotiate can and will arise.

501. As recognized in *Powley* and its progeny, depending on their histories and circumstances, Métis peoples have aboriginal rights that are constitutionally

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[787] *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 at para. 186.
[788] *Reference Re Secession of Quebec,* [1998] 2 S.C.R. 217 at para. 84.
[789] *Ibid.*
[790] *Ibid.*

protected under s. 35(1).[791] Most of these rights are at present unknown as to whom is entitled to exercise them, what is their content, and to what geographic area they pertain.

502. Similarly, the cases recognize that Non-Status Indians have treaty rights that are constitutionally protected under s. 35(1).[792] Treaty entitlement requires that a treaty claimant show “sufficient connection" with the Indian nation that signed the relevant treaty.[793] Treaty entitlement does not require registration under the *Indian Act*.[794]

503. Like the constitutionally protected aboriginal rights of the Métis, many treaty rights of the Non-Status Indians are at present unknown as to whom is entitled to exercise them, what is their content, and where is their geographic extent.

504. The uncertainty concerning MNSI aboriginal and treaty rights exposes a constitutional gap. Within this gap, MNSI across Canada are subjected to

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[791] *R. v. Powley,* [2003] 2 S.C.R. 207. Cases in which Métis have been found to have hunting and harvesting rights: *R. v Goodon*, 2009 CarswellMan 18, 234 Man. R. (2d) 278, 2008 MBPC 59 (Man. Prov. Ct. Jan 08, 2009) [right to hunt for food]; *R. v Belhumeur*, 301 Sask. R. 292, 2007 CarswellSask 598, [2008] 2 C.N.L.R. 311, 2007 SKPC 114 (Sask. Prov. Oct 18, 2007) [aboriginal right to fish for food]; *R. v Laviolette*, 267 Sask. R. 291, 2005 CarswellSask 483, [2005] 3 C.N.L.R. 202, 2005 SKPC 70 (Sask. Prov. Jul 15, 2005) [aboriginal right to fish for food].

[792] *R. v. Fowler* (1993), 134 N.B.R. (2d) 361 (Prov. Ct.); *R. v. Harquail* (1993), 144 N.B.R. (2d) 146 (Prov. Ct.); *R. v Lavigne*, 319 N.B.R. (2d) 261, 2007 CarswellNB 632, 823 A.P.R. 261, [2007] 4 C.N.L.R. 268, 74 W.C.B. (2d) 176, 2007 NBQB 171, [2007] N.B.J. No. 169 (N.B. Q.B. May 17, 2007).

[793] *R. v. Simon*, [1985] 2 S.C.R. 387 at 407.

[794] *R. v. Simon*, [1985] 2 S.C.R. 387; *R. v. Marshall*, [1999] 3 S.C.R. 456; P. Palmater, "An Empty Shell of a Treaty Promise: R. v. Marshall and the Rights of Non-Status Indians" (2000), Dalhousie L. J. 102 at 102.

criminal prosecution when they try to exercise their constitutional rights.[795]

505. Courts have required negotiation to fill in this constitutional gap.

506. Justice O'Neil stated in *Powley* at para. 93:

> I consider that meaningful content cannot be given to s. 35(1), nor can the rule of law flourish, in an environment where, given the trust-like relationship between aboriginal peoples and the government…the aboriginal peoples are required, absent a failure of negotiations or mediations entered into and conducted in good faith, to defend themselves against the blunt instrument of the criminal or quasi-criminal process, or to litigate against the Crown through every level of court, in a multitude of cases involving a multitude of issues….
>
> The search for a just settlement of the s. 35 rights of the aboriginal peoples of this province, must lead us to a process of good faith negotiations…[796]

507. At the remedial stage, a unanimous Court of Appeal granted a one year stay, commenting:

> A stay should facilitate consultation and negotiation between the government and the aboriginal community. Both the trial judge and the Superior Court judge urged the government and representatives of the Métis peoples to enter good faith negotiations with a view to resolving s. 35 claims. I endorse their suggestion. It is my hope that this judgment in favour of the respondents, together with the stay requested by the appellant, will together serve as an incentive to the parties to embark upon negotiations.[797]

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[795] See generally, *R. v. Powley,* [2003] 2 S.C.R. 207; *R. v Goodon*, 2009 CarswellMan 18, 234 Man. R. (2d) 278, 2008 MBPC 59 (Man. Prov. Ct. Jan 08, 2009); *R. v Belhumeur*, 301 Sask. R. 292, 2007 CarswellSask 598, [2008] 2 C.N.L.R. 311, 2007 SKPC 114 (Sask. Prov. Oct 18, 2007); *R. v Laviolette*, 267 Sask. R. 291, 2005 CarswellSask 483, [2005] 3 C.N.L.R. 202, 2005 SKPC 70 (Sask. Prov. Jul 15, 2005); *R. v. Fowler* (1993), 134 N.B.R. (2d) 361 (Prov. Ct.); *R. v. Harquail* (1993), 144 N.B.R. (2d) 146 (Prov. Ct.); *R. v Lavigne*, 319 N.B.R. (2d) 261, 2007 CarswellNB 632, 823 A.P.R. 261, [2007] 4 C.N.L.R. 268, 74 W.C.B. (2d) 176, 2007 NBQB 171, [2007] N.B.J. No. 169 (N.B. Q.B. May 17, 2007).

[796] *R. v. Powley*, [2000] 47 O.R. (3d) 30, [2000] O.T.C. 49, [2000] 2 C.N.L.R. 233, 45 W.C.B. (2d) 173 at para. 93.

[797] *R. v. Powley,* [2001] 53 O.R. (3d) 35 at para. 177.

508. Decisions from lower courts have built upon Supreme Court opinions stating that aboriginal peoples should be negotiated with as to their rights and needs in the interests of reconciliation:

- In *Nunavik Inuit v. Canada,* Richard J. outlined the court's preference for negotiation:

> The Federal Government through its Comprehensive Claims Policies, the courts, including the Supreme Court of Canada, and the Royal Commission on Aboriginal Peoples, have all acknowledged that judicial determination is not the sole and unique way in which to have Aboriginal and treaty rights recognized and affirmed; indeed it may not be the preferred manner of doing so.[798]

- In *Paul v. Canada*, the Court stated:

> Chief Justice Lamer in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 stressed the importance of negotiations building on the obligation established in R. v. Sparrow, [1990] 1 S.C.R. 1075 to consult Aboriginal peoples when their rights were involved.[799]

- In *MacMillan Bloedel*, the BC Court of Appeal stated:

> It fair to say that, in the end, the public anticipates that the claims will be resolved by negotiation and by settlement. This judicial proceeding is but a small part of the whole between governments and the Indian nations."[800]

- In *Canada (Information Commissioner) v. Canada (Minister of Industry)*, the Federal Court stated:

> It is also the Court's view that the honour of the Crown requires good faith negotiations leading to a just settlement of the Aboriginal claims. This duty to negotiate in good faith, which is an implied part of section 35, means that the Crown disclose census records in the possession of the Crown which are relevant to the proof of Aboriginal title.[801]

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[798] *Nunavik Inuit v. Canada,* [1998] 4 C.N.L.R. 68 (F.C.T.D.) at para. 40.
[799] *Paul v. Canada,* [2003] 1 C.N.L.R. 1907 at para. 112.
[800] *MacMillan Bloedel,* [1985] 2 C.N.L.R. 58.
[801] *Canada (Information Commissioner) v. Canada (Minister of Industry)*, [2006] 4 F.C.R 241, at para. 45.

509. Professor Noel Lyon wrote:

> Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown….
>
> Section 35 is a solemn commitment to honour the just land claims of aboriginal peoples, fulfil treaty obligations, and respect those rights of aboriginal peoples, which the *Charter,* aided by international law, recognizes their fundamental rights and freedoms.[802]

(1) *Constitution Act, 1982*, sec. 35

510. Section 35 recognizes and affirms the Aboriginal and treaty rights of the Aboriginal people of Canada.

511. "The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions."[803]

512. Section 35 provides a constitutional framework for reconciliation.[804]

513. Aboriginal and treaty rights, and their objective of reconciliation, predate s. 35.[805]

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[802] Noel Lyon, "An Essay on Constitutional Interpretation" (1988) 26 Osgoode Hall L.J. 95 at 100.
[803] *Mikisew Cree FN v. Canada*, [2005] 3 S.C.R. 388, para 1.
[804] *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para. 42 ("s. 35(1) provides the constitutional framework for reconciliation of the pre-existence of distinctive aboriginal societies occupying the land with Crown sovereignty"); *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 at para. 81.
[805] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at paras. 28-9: "In identifying the basis for the recognition and affirmation of aboriginal rights it must be remembered that s. 35(1) did not create the legal doctrine of aboriginal rights; aboriginal rights existed and were recognized under the common law…The pre-existence of aboriginal rights is relevant to the analysis of s. 35(1) because it indicates that aboriginal rights have a stature and existence prior to the

514. As the RCAP pointed out, the objective of reconciliation is a "fundamental feature of the constitution of Canada" (supra, para. 1).

515. Reconciliation had constitutional status prior to entrenchment in s. 35 of the *Constitution Act, 1982* because reconciliation is an underlying principle of Canada's Constitution.

(2) *Constitution Act, 1982*, sections 37, 37.1

516. The rights recognized and affirmed in s. 35 were in the nature of "an empty box". A process was necessary to fill up this box to clarify the Aboriginal and treaty rights of the Aboriginal peoples of Canada:

> Although the *Constitution Act, 1982* recognizes and affirms existing aboriginal and treaty rights, it does not define them. That is one of the tasks of the upcoming constitutional conference.[806]

517. Section 37 of the *Constitution Act, 1982* set out a process to pour content into s. 35's "empty box". The process was a constitutionally required First Ministers' Conference with an agenda that included "an item respecting the constitutional matters that directly affect the aboriginal peoples of Canada, including <u>the identification and definition of the rights of those people to be included in the constitution of Canada…</u>"[807]

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constitutionalization of those rights and sheds light on the reasons for protecting those rights".

[806] Norman K. Zlotkin, "Unfinished Business: Aboriginal Peoples and the 1983 Constitutional Conference" Institute of Intergovernmental Relations: Institute Discussion Paper 15 (Institute of Intergovernmental Relations Queen's University Kingston, Ontario, Copyright 1983) at 9.

[807] *Constitution Act, 1982*, c. 11 , Schedule B (U.K.) reprinted in R.S.C. 1985, App. II, No. 44,

518. Prime Minister Trudeau confirmed in his opening statement to the Constitutional Conference of First Ministers on the Rights of Aboriginal Peoples that the federal government intended to identify and define Aboriginal and treaty rights after their entrenchment in the Constitution in 1982:

> We started in 1982 by inserting in our Constitution section 35, in which aboriginal and treaty rights were recognized and affirmed. We were aware at the time that these rights needed to be identified and further defined through a constitutional process… We will find appropriate formulations for inclusion in the Constitution when they have emerged with some precision from our ongoing discussions [at this conference]… We seek constitutional provisions which have practical meaning and benefit for the people whom they concern."[808]

519. One of the issues which the conferences intended to clarify was constitutional jurisdiction over the Metis. As Mark Stevenson observed:

> Section 37.1 (formerly section 37) established a process to help clarify the rights of Aboriginal peoples. One of the items on the agenda for the section 37 process was the issue of jurisdiction over the Métis.[809]

520. The First Ministers' Conference required by s. 37 was held in 1983. It ended in failure. The First Ministers failed to reach agreement to identify and define the rights of the Aboriginal peoples of Canada, including those of the MNSI.

Schedule B at s. 37(2) [emphasis added].

[808] The Honourable Pierre Elliott Trudeau, "Opening Statement by the Prime Minister of Canada The Right Honourable Pierre Elliott Trudeau to the Constitutional Conference of First Ministers on the Rights of Aboriginal Peoples Ottawa, March 8, 1984" (Government of Canada: Ottawa, 1984) at 3 - 5.

[809] Mark Stevenson, "Section 91(24) and Canada's Legislative Jurisdiction with Respect to the Métis" (2002) 1 *Indigenous L. J.*, 237, para 6.

521. An amendment to the Constitution of Canada was made on June 21, 1984 requiring that two further First Ministers' conferences "shall be convened" by 1987.[810] These conferences were also constitutionally required to include agenda items dealing with the rights of the Aboriginal peoples.[811]

522. These conferences were held in 1984, 1985 and 1987. They failed to identify and define and define the rights of the Aboriginal peoples of Canada, including those of the MNSI.

(3) Underlying Constitutional Principles

523. The structure of the constitutional provisions proclaimed as sections 35, 37 and 37.1 in 1982 and 1983 create a process to identify and define the rights of the Aboriginal peoples of Canada.

524. The process of constitutionally mandated First Ministers' conferences to identify and define the rights of the aboriginal peoples was a unique method to discharge the more general obligation of rights identification and definition that the reconciliation principle requires.

525. The obligation to identify and define the rights of the aboriginal peoples of Canada does not arise from section 37 and section 37.1. The obligation to

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[810] *Ibid.*

[811] Amendment to the Constitution of Canada, June 21, 1984, Part IV.1 s. 37.1 (2) includes that "Each conference convened under subsection (1) shall have included in its agenda constitutional matters that directly affect the aboriginal peoples of Canada…"

identify the aboriginal and treaty rights arises from the underlying principles of the constitution. It is embedded in the underlying constitutional principle of reconciliation.

526. As the obligation to identify and define the aboriginal and treaty rights does not arise from the s. 37 process, the obligation is not spent with the failure of the s. 37 process.

527. The failure of the First Ministers' conferences process to identify and define the rights of the Aboriginal peoples of Canada merely brings the constitutional process to an end.

528. The obligation to identify and define the rights of the aboriginal peoples of Canada remains outstanding. The obligation gives rise to the more general duty to negotiate those rights with the duly authorized representatives of the aboriginal peoples of Canada, including the plaintiff, CAP.

529. In R. v. *Van der Peet* the Supreme Court of Canada explained:

> the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples <u>were already here</u>, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.
>
> More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is

> acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.[812]

(4) The Alternative: Criminal Prosecution

530. Government's duty to identify and define the rights of the Aboriginal peoples of Canada cannot be discharged by criminal prosecution of Aboriginal people for attempting to exercise their rights. These prosecutions lead to "a multitude of smaller grievances" that are "destructive of the process of reconciliation."[813]

531. As stated in *Powley*:

- When people have rights they have to be able to exercise them;[814]
- People should not be prosecuted for exercising their rights;[815]
- Rights recognition, affirmation, implementation, and protection are fundamental to the reconciliation of Aboriginal peoples with the sovereignty of the Crown.[816]

(5) CAP - Canada Political Accords

532. On February 28, 1994, the Plaintiff and the Defendant signed a "Political Accord." The Accord was reaffirmed in 1998, is still in effect and has been continuously in effect from the date of original signature.[817]

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[812] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at paras. 30 & 31.
[813] *Mikisew Cree First Nation v. Canada*, [2005] 3 S.C.R. 388 at para 1.
[814] *R. v. Powley*, [2000] 47 O.R. (3d) 30, [2000] O.T.C. 49, [2000] 2 C.N.L.R. 233, 45 W.C.B. (2d) 173 at para. 75.
[815] *Ibid.* at paras. 73 & 87.
[816] *Ibid.* at para. 16.
[817] CR-011844, Ex. P-27, *Political Accord,* between The Native Council of Canada and Her Majesty the Queen in Right of Canada, signed at Ottawa the 28th day of February, 1994; CR-

533. The salient features of the Accord are: recognition of a special relationship between the Government of Canada and MNSI; maintenance of the federal fiduciary responsibility; the establishment of fora in which Ministers of the Government of Canada discuss with the Congress of Aboriginal Peoples inter alia, rights, interests and needs of MNSI.[818]

534. The 1994 Political Accord acknowledges that Canada has a fiduciary responsibility to Aboriginal peoples. The second priority in the Accord is "… maintaining the federal fiduciary responsibility."[819]

535. The Accord expressly provides for a consultation process, an agenda that outlines priorities for consultation, and an agreed upon method of implementation.[820]

536. In *Nunavik Inuit v. Canada*, the government and the Nunavik Inuit expressly undertook to negotiate a comprehensive land claims agreement in a Framework Agreement. The Court held that in entering the Framework

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011977, Ex. P-28, *Political Accord*, between The Congress of Aboriginal Peoples and Her Majesty the Queen in Right of Canada, signed at Ottawa the 16th day of June 1998.

[818] *Ibid.* The Government and the plaintiff agreed to negotiate in s. 2.1 of the 1994 Accord: creating opportunity including the inherent right to self government, the winding down of DIAND, Aboriginal justice issues and a secure land and resource base. In s. 2.1 of the 1998 the parties agreed to negotiate renewing the partnership; strengthening Aboriginal governance including the enumeration of the Métis and Aboriginal justice issues; developing a new fiscal relationship; and support for strong communities, peoples and economies including health initiatives.

[819] CR-011843 *Political Accord,* between The Native Council of Canada and Her Majesty the Queen in Right of Canada, signed at Ottawa the 28th day of February, 1994, Beg Doc No. 095415.

[820] *Ibid.*

Agreement the Government had a duty to consult and negotiate the claims of the Nunavik Inuit in good faith.[821]

537. *Nunavik Inuit v. Canada* demonstrates that a clear expression of a fiduciary obligation coupled with an agreement to negotiate gives rise to a duty to negotiate in good faith.[822]

538. As in *Nunavik Inuit*, Canada's agreement by the political accord to negotiate the Plaintiff's rights interests and needs as aboriginal peoples serves as an additional, independent source of the Defendant's duty to negotiate.

[821] *Nunavik Inuit v. Canada* [1998] 4 C.N.L.R. 68 (F.C.T.D.) at para. 128.
[822] *Ibid.*

PART VI - ORDERS REQUESTED

539. Plaintiffs respectfully request:

(a) A declaration that Métis and Non-Status Indians are “Indians” within the meaning of *Constitution Act, 1867*, s. 91(24);

(b) A declaration that the Crown in right of Canada owes a fiduciary duty to MNSI as Aboriginal peoples;

(c) A declaration that Canada must negotiate and consult with MNSI, on a collective basis through representatives of their choice, with respect to their rights, interests and needs as Aboriginal peoples;

(d) An order for their costs; and

(e) Such further or other relief as to this Court seems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: June 23, 2011

“Joseph Magnet”
Joseph E. Magnet

“Andrew Lokan”
Andrew K. Lokan

Lawyers for the Plaintiffs

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