Federal Court  Cour fédérale

Date: 20130108

Docket: T-2172-99

Citation: 2013 FC 6

BETWEEN:

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

REASONS FOR JUDGMENT

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PHELAN J.

I. INTRODUCTION

[1] The critical question posed in this litigation is straightforward – Are non-status Indians and Métis [MNSI], identified as "Indians" under s 91(24) of the *Constitution Act, 1867*, 30 & 31 Victoria, c 3 (UK) [the Constitution]? Section 91(24) reads:

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,	**91.** Il sera loisible à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par la présente loi exclusivement assignés aux législatures des provinces; mais, pour plus de garantie, sans toutefois restreindre la généralité des termes ci-haut employés dans le présent article, il est par la présente déclaré que (nonobstant toute disposition contraire énoncée dans la présente loi) l'autorité législative exclusive du parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets ci-dessous énumérés, savoir :
…	…
24. Indians, and Lands reserved for the Indians.	24. Les Indiens et les terres réservées pour les Indiens.

[2] The canvas over which the parties have painted the answer encompasses Canadian history virtually from the time of Champlain in Passamaquoddy Bay in 1603 to the present day. The reach

of time and space makes this case a difficult one, not amenable to the same organization and analysis as has been the case with specific disputes over specific agreements or treaties affecting natives. However, for ease of organization, these Reasons generally follow a chronological framework.

[3] The Plaintiffs ask this Court to issue the following declarations:

(a) that Métis and non-status Indians are "Indians" within the meaning of the expression "Indians and lands reserved for Indians" in s 91(24) of the *Constitution Act, 1867;*

(b) that the Queen (in right of Canada) owes a fiduciary duty to Métis and non-status Indians as Aboriginal people;

(c) that the Métis and non-status Indian peoples of Canada have the right to be consulted and negotiated with, in good faith, by the federal government on a collective basis through representatives of their choice, respecting all their rights, interests and needs as Aboriginal peoples.

[4] In brief and non-exhaustive summary, the Plaintiffs ground their claim on the following basis:

(a) the Métis people in Rupert's Land and Northwest Territories were part of the peoples called "aborigines" and jurisdiction over them was transferred to the federal government. Thereafter, Métis were generally considered part of, although often distinct from, "Indians" and were treated as Indians in legislation and practice.

(b) non-status Indians are Indians to whom, from time to time, the *Indian Act*, RSC 1985, c I-5, did not apply but had either maternal or paternal ancestors who were

Indians, or any person who self-identifies as an Indian and is mutually accepted by an Indian community, or branch or council of an Indian association or organization.

(c) that because of the federal government's refusal to recognize Métis and non-status Indians as Indians pursuant to s 91(24), they have suffered deprivations and discrimination in the nature of: lack of access to health care, education and other benefits available to status Indians; lack of access to material and cultural benefits; being subjected to criminal prosecutions for exercising Aboriginal rights to hunt, trap, fish and gather on public lands; and being deprived of federal government negotiations on matters of Aboriginal rights and agreements.

[5] The Defendants' resist the Plaintiffs' claims on several grounds. The principal grounds are that no declaration can or should issue because there are insufficient facts and grounds for such relief; that Métis are not and were not either in fact or law or practice considered "Indians"; that there is no such group legally known as "non-status Indians"; that the allegations of deprivation and discrimination are denied and that the forms of relief required of rights to consultation and negotiations are either not available to Métis and non-status Indians or in any event, all legal obligations have been met.

[6] This matter came before this Court by way of an action for a declaration by the three individuals (Harry Daniels having died before the case was heard) and the organization named as Plaintiffs. The manner of bringing this case has been an issue between the parties even though the litigation was financed by the very government that opposes even the manner of proceeding.

[7] It is a definitional minefield to use terms such as “Indian” or “Aboriginal” when the purpose of the litigation is to provide some definition of those words which appear in different places and different contexts in the Constitution. The term “native” or “native people” is an effort to find a more neutral term for those first nations peoples and their descendants. In a somewhat similar fashion the Court has used the term “Euro-Canadian” to identify the non-native group of predominantly Caucasian persons fully recognizing that even this effort to avoid the colloquial term “white” is not entirely accurate.

[8] The parties have outlined a somewhat consistent history of early relations between firstly the French government and the native people and then between the British government and the native people particularly in eastern Canada. The parties’ respective perspectives start to drift apart with the lead up to Confederation and thereafter. While most of the actual events are not in dispute, their meaning and significance to the key issue in this case is strongly debated.

[9] The Plaintiffs’ case commenced with a review of the pre- and post-repatriation of the Constitution as it related to the native people. The evidence seemed designed to show the nature of the problem of this unresolved issue, its impact on the people most directly affected, the MNSI, and to some extent the alleged duplicitous dealings by Canada because of the recognition within government that Canada did indeed have jurisdiction over MNSI.

[10] The Plaintiffs’ case was made more difficult by the Defendants’ refusal to admit numerous documents which came from its own archives and departments introduced to show the manner in which these two groups were viewed by government and how these two groups were treated.

[11] It was a central theme of the Plaintiffs' case that the historical evidence established that it was the purpose and intent of s 91(24) that non-status Indians (being by description Indians) and Métis were "Indians" and that following Confederation until at least the 1930s the federal government often treated many Métis groups as if they were "Indians" subject to federal jurisdiction. This, the Plaintiffs contend, was done in legislation, regulation and in the practices and policies of the federal government.

[12] The Defendants adopted a more traditional approach to the organization of the case in a chronological format. It was their position that:

(a) historical evidence and cases from the Supreme Court of Canada establish that the word "Indian" in s 91(24) was not meant to include the distinct peoples and communities known as the Métis.

(b) with respect to the question of non-status Indians, the Defendants say that legislation enacted under s 91(24) must draw a line between those who are considered Indians and those who are not. The Plaintiffs claim that trying to determine the natural limits of Parliament's jurisdiction (absent actual or proposed legislation) is an impossible task.

[13] In these Reasons, the Court has dealt with the Defendants' position that this is too difficult a case to decide, that the definitional difficulties of definition of who falls within the term "Indian" in s 91(24) should preclude a remedy. It is the Court's view that there is a live, justiciable issue for which the difficulties, real or otherwise, cannot be a reason to deny people a remedy where

appropriate. In general terms persons have a right to know who has jurisdiction over them and the adage “where there is a right, there is a remedy” is applicable.

[14] It is a central theme of the Defendants’ argument that this Court ought not to decide this matter because, in summary, it is a theoretical matter which will resolve nothing. The Defendants also urge the Court not to exercise its discretion to grant one or more of the declarations requested.

[15] The Defendants’ position is that none of the declarations will do anything but lead to further litigation. It is their thesis that what is at issue between the parties is alleged discrimination as between the treatment of MNSI and status Indians; a matter which should be resolved by Charter or human rights proceedings.

[16] A more complete review of the preliminary issues is canvassed in paragraphs 48-83.

[17] The Plaintiffs put great reliance on the “living tree” doctrine for a purposive approach to be progressively applied to the interpretation of s 91(24). They reject the historical approach said to be prevalent in such cases as in *In the Matter of a Reference as to whether the Term “Indians” in Head 24 of Section 91 of the British North America Act, 1867, includes Eskimo Inhabitants of the Province of Quebec*, [1939] SCR 104, [1939] 2 DLR 417 [*In Re Eskimo Reference*].

[18] The interpretative principles which the Court must apply to these historical facts is made more nuanced than the Plaintiffs concede by the Supreme Court of Canada’s comments in *R v Blais*,

2003 SCC 44, [2003] 2 SCR 236 [*Blais*], at paragraph 40, which suggests a limit on the "living tree", a need to stay anchored in historical context and to avoid "after-the-fact largesse".

> 40 This Court has consistently endorsed the living tree principle as a fundamental tenet of constitutional interpretation. Constitutional provisions are intended to provide "a continuing framework for the legitimate exercise of governmental power": *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 , *per* Dickson J. (as he then was), at p. 155. But at the same time, this Court is not free to invent new obligations foreign to the original purpose of the provision at issue. The analysis must be anchored in the historical context of the provision. As emphasized above, we must heed Dickson J.'s admonition "not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore ... be placed in its proper linguistic, philosophic and historical contexts": *Big M Drug Mart*, *supra*, at p. 344; see Côté, *supra*, at p. 265. Dickson J. was speaking of the *Charter*, but his words apply equally to the task of interpreting the *NRTA*. Similarly, Binnie J. emphasized the need for attentiveness to context when he noted in *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 14, that "'[g]enerous' rules of interpretation should not be confused with a vague sense of after-the-fact largesse." Again the statement, made with respect to the interpretation of a treaty, applies here.

II. COURT SUMMARY

[19] The Plaintiffs' declaratory relief is for a determination of the meaning of a head of power under the Constitution, s 91(24) that the term "Indian", as used in that head of power, encompasses Métis and non-status Indians. This is not a s 35 of the Constitution case nor the interpretation or application of particular rights either under the Constitution or under specific agreements, nor is it about Aboriginal rights.

[20] This is an appropriate circumstance and the Plaintiffs have sufficient standing for this Court to make a declaratory order. The declaration with respect to s 91(24) is granted; the other two declarations, ancillary in nature, are dismissed.

[21] The timeframe covered by this case commences with among the first interactions between French colonial government up to the very near past.

[22] During the colonial era, particularly the British colonial era, people of mixed European and native ancestry were largely considered as Indians. This was furthered by the colonial government's attempt to grant status as Indians to natives – the first efforts at inclusion/exclusion notions through "marrying in – marrying out" provisions. Métis and others of mixed ancestry in the lands administered by the Hudson's Bay Company were also generally classed as natives or Indians and often described as "half breeds".

[23] With Confederation and the take over of responsibility for the lands and people in the areas of the Hudson's Bay Company, it was important to have a broad power over those who were not part of Euro-Canadian society to facilitate expansion and development of the new country. A purposive approach to constitutional interpretation is mandated by the Supreme Court of Canada.

[24] In the absence of any record of debates or discussions concerning this Indian Power, the Court had to rely on what was done just before and for some period after Confederation to give context and meaning to the words of s 91(24).

[25] The evidence concerning non-status Indians establishes that such persons were considered within the broad class of "Indians". The situation regarding Métis was more complex and in many instances including in the Red River area, Métis leadership rejected any inclusion of Métis as

Indians. Nevertheless, Métis generally and over a greater area were often treated as Indians, experienced the same or similar limitations imposed by the federal government, and suffered the same burdens and discriminations. They were at least treated as a separate group within the broad class of "Indians".

[26] In more recent times those deprivations have been acknowledged by the federal government:

> 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.

[27] In the same vein, the federal government had largely accepted the constitutional jurisdiction over non-status Indians and Métis until the mid 1980s when matters of policy and financial concerns changed that acceptance.

[28] Consistent with past Supreme Court decisions which taught towards a more inclusive interpretation of the term "Indian", such interpretation must stand on its own neither undermined nor supported by s 35. A more inclusive interpretation is consistent with the evidence in this case and facilitates reconciliation with the broad group of native peoples and their descendants.

III. PARTIES

[29] The Plaintiffs consist of three individuals and one organization. Other than the declarations sought, which are to be applicable to all MNSI, the Plaintiffs seek no specific relief for themselves.

A. Gabriel Daniels

[30] Gabriel Daniels is the son of Harry Daniels (now deceased), an original Plaintiff in this action and a recognized advocate for Métis' rights. While raised in Edmonton by his mother, he moved to Ottawa in 1997 to be with his father when he was the president of what is now the Congress of Aboriginal Peoples [CAP].

[31] Gabriel Daniels identifies himself as Métis, as did his father, mother and paternal and maternal grandmothers. He testified to his Métis cultural roots and involvement in Métis gatherings. He is a member of the Manitoba Métis Federation [MMF] and a past member of the Métis National of Alberta [MNA] and the Ontario Métis and Aboriginal Association [OMAA]. Both the MMF and MNA are affiliates of the Métis National Counsel (a split-off from CAP) while the OMAA is an affiliate of CAP.

[32] While identifying as a Métis, Gabriel Daniels spoke to his long involvement in First Nations' activities including pow-wows, sweat lodges and round dances.

[33] Gabriel Daniels' mother, in addition to identifying as a Métis, also applied for registered status under the *Indian Act*. The denial of that request by Indian and Northern Affairs Canada [INAC] is indicative of the complexity of the issue as to who is an Indian and whether Métis are Indians under s 91(24) and the historical problem of categorizing such people.

B. Leah Gardner

[34] Leah Gardner is a non-status Indian from Ontario. Her children are status Indian, as was her late husband. Her father acquired status as a result of s 6(2) amendments to the *Indian Act* known as Bill C-31 (*An Act to Amend the Indian Act*, SC 1985 c 27) [Bill C-31] because he had one parent entitled to registration under s 6(1) of the *Indian Act*.

[35] While Leah Gardner's husband whom she married in 1972 is a status Indian under s 6(2) of the *Indian Act*, she was denied status because, as she explained, "section 6(2) of the *Indian Act* doesn't provide for the registration of non-status wives of Indian men whose marriages took place prior to April 17, 1985. Only the wives of Indian men who are registered or entitled to be registered under section 6(1)*(a)* of the Act are eligible for registration."

[36] Leah Gardner identifies herself as a Métis without status but prefers "Anishanabe without status" – Anishanabe being the Ojibway word for "the original people" or "people of the land". She is active in the OMAA and other aboriginal organizations. She participates in both Métis and Anishinabe cultural events.

C. Terry Joudrey

[37] Terry Joudrey is a non-status Mi'kmaq Indian from Nova Scotia. He lives on the former New Germany reserve. Both his mother and his grandmother were status Indians but his father was not. He is a member of the Native Council of Nova Scotia and he uses his Aboriginal Treaty Rights Association card as if it was a licence to hunt and fish; activities he associates with native traditions.

D. The Minister of Indian Affairs and Northern Development

[38] The Defendant, the Minister of Indian Affairs and Northern Development has the powers, duties and functions including all matters of which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to Indian Affairs.

E. The Attorney General of Canada

[39] The Attorney General of Canada is responsible for 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.

F. Congress of Aboriginal Peoples

[40] CAP is a body corporate that offers representation to Métis and non-Status Indians throughout Canada. Its objectives include "to advance on all occasions the … interest of the Aboriginal people of Canada and to co-ordinate their efforts for the purpose of promoting their common interests through collective action".

[41] CAP has been involved in this litigation for approximately twelve (12) years. It claims to have spent over two million dollars to bring this case to trial.

[42] As indicated in the section "Discretion to Decide", a somewhat unique feature of this litigation is that it has been principally funded by the federal government notwithstanding their numerous efforts to curtail this litigation.

[43] However, the federal government's funding contribution should not be taken to undermine the pivotal role CAP played in advancing this claim – a role that few, if any, individuals falling within the group known as MNSI could do.

[44] CAP has played a key position in the modern day discussions between native groups and the federal government but it is not the only group to speak on behalf of the Métis.

[45] CAP (previously known as the Native Council of Canada or NCC - then sometimes confused with the National Capital Commission) had a serious internal dispute over Métis issues and representation.

[46] In March 1983, the prairie Métis either left or were expelled from the NCC and formed their own organization – the Métis National Council [MNC]. Thereafter, at the various constitutional discussions involving native issues, the MNC were present along with the NCC/CAP.

[47] Although the MNC were not involved in this litigation, the Court is cognizant of the fact that CAP is not the sole recognized voice of Métis.

IV. DISCRETION TO DECIDE

[48] It is a central theme of the Defendants' argument that this Court ought not to decide this matter because, in summary, it is a theoretical matter which will not resolve anything. The Defendants urge the Court not to exercise its discretion to grant one or more of the declarations requested.

[49] The Defendants' position is that none of the declarations will do anything but lead to further litigation. It is their thesis that what is at issue between the parties is alleged discrimination as between the treatment of MNSI and status Indians.

[50] This is not the first time that the Defendants have raised the issue of whether declaratory relief is appropriate. In the many years that this case has been in the Court system (since 1999), the Defendants have brought various proceedings to stop the action proceeding but without success.

[51] Having not succeeded in preventing this action going forward, the Defendants now ask the Court not to make any finding on the merits one way or the other but to simply decline to exercise jurisdiction to decide.

[52] A somewhat unique feature of this action is that, until the recent advance cost order, it has been funded under the Test Case Funding Program [TCFP] administered by the federal government. The TCFP was created to fund important native-related test cases that had the potential to create judicial precedent.

[53] The Defendants' first point is that the first declaration will not resolve the real dispute between the parties because at best it would provoke further litigation or at worse cause confusion. The further litigation is said to be some claim of discrimination between MNSI and status Indians either under s 15 of the *Constitution Act, 1982*, 1982, c 11 (UK) Schedule B (*Charter*) or s 35 of the *Constitution Act, 1982*.

[54] The principal issue in this action is whether the federal government has jurisdiction to make laws in respect of MNSI under s 91(24) of the *Constitution Act, 1867* because they are "Indians". The other two declarations flow from the answer to the first issue.

[55] The record in this action is replete with references to the dispute as to jurisdiction over MNSI and with reasons why the federal government has sometimes taken the position that it does not have such jurisdiction under s 91(24). It should be noted here, that at other times, federal officials acknowledged that the federal government had such jurisdiction even where it did not wish to exercise it.

[56] As early as 1905, Ontario and Canada exchanged correspondence over which level of government was responsible for addressing the claims of half-breeds in respect of Treaty 9. A similar exchange arose in 1930 between Alberta and Canada concerning responsibility for indigent half-breeds with Saskatchewan calling on the federal government to address their needs as "part and parcel of the Indian problem".

[57] There is a real live jurisdictional issue which has been recognized by the Royal Commission on Aboriginal People [RCAP] in its calling for the federal government to bring a reference, particularly in respect of Métis, to decide whether s 91(24) applies to Métis people.

[58] Government documents destined to Cabinet assessing RCAP recommendations concluded that it would be premature to embrace RCAP's recommendation to negotiate Métis claims absent a court decision on, amongst others, the division of federal-provincial liability.

[59] In the absence of any such reference or other proceeding, the Plaintiffs have sought a declaration along the same lines as the RCAP recommendation.

[60] Justice Hugessen summarized the three basic requirements for obtaining declaratory relief and concluded that they had been met. As Justice Hugessen said in respect of one of the Defendants' motions to dismiss this action:

> 6 The fact that the government has the power to raise the same issues which come up in this case and to raise them by way of a reference does not mean that those issues cannot come before the Court in some other way. In my view, the present action is precisely such another way and is legitimate.
>
> 7 The classic three requirements in this and I think in every other Court for obtaining declaratory relief are:
>
> 1. That plaintiff has an interest
>
> 2. That there be a serious contradictor for the claim.
>
> 3. That the issue raised and upon which a declaration is sought is a real and serious one and not merely hypothetical or academic. (*Montana Band of Indians v. Canada*, [1991] 2 F.C. 30 (C.A.), leave to appeal to S.C.C. refused (1991), [1991] S.C.C.A. No. 164, 136 N.R. 421 n).
>
> 8 In my opinion it is certainly not beyond question that those requirements have not been met in the present case. Indeed, I think that they are all met and satisfied.
>
> *Daniels v Canada (Minister of Indian Affairs and Northern Development)*, 2008 FC 823 at paras 6-8, 169 ACWS (3d) 1012 [*Daniels*]

[61] Justice Hugessen's summary is in accord with the following from *Canada v Solosky*, [1980] 1 SCR 821 at paras 11-13, 105 DLR (3d) 745:

> Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a 'real issue' concerning the relative interests of each has been raised and falls to be determined.
>
> The principles which guide the court in exercising jurisdiction to grant declarations have been stated time and again. In the early case of *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.* [[1921] 2 A.C. 438], in which parties to a contract sought assistance in construing it, the Court affirmed that declarations can be granted where real, rather than fictitious or academic, issues are raised. Lord Dunedin set out this test (at p. 448):
>
> > The question must be a real and not a theoretical question, the person raising it must have a real interest to raise it, he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.
>
> In *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [[1958] 1 Q.B. 554], (rev'd [1960] A.C. 260, on other grounds), Lord Denning described the declaration in these general terms (p. 571):
>
> > ... if a substantial question exists which one person has a real interest to raise, and the other to oppose, then the court has a discretion to resolve it by a declaration, which it will exercise if there is good reason for so doing.

[62] The Trial Record's Amended Statement of Claim raises discrimination under s 15 of the *Charter* and s 35 of the *Constitution Act, 1982* but in the context of denial of jurisdiction and refusal or failure to consult in good faith.

[63] The Plaintiffs' prayer for relief makes no reference to discrimination or grounds for a remedy in the usual nature for a discrimination case.

[64] The Defendants have tried to cast the Plaintiffs' case as one of discrimination, the subject of a s 15 proceeding or a question of federal spending power to extend programs and services. However, this is the Plaintiffs' case to frame and it has chosen not to frame it as the Defendants would wish it..

[65] The first declaration will resolve the immediate dispute over jurisdiction. Whether such resolution leads to further litigation or possible political pressure is not a grounds for refusing to hear this matter. The Plaintiffs are not claiming a right to specific legislation or access to specific programs.

[66] It is an accepted right that a plaintiff may frame the action (subject to various rules of pleading) as it wishes. It is not for the Defendants to tell the Plaintiffs what their case is or should be.

[67] The Defendants also argue that these declarations are being advanced in a factual vacuum. The Defendants are correct that there must be a factual foundation upon which to base a determination of rights (see *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 SCR 146; *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713, 35 DLR (4^{th}) 1).

[68] While people *per se* rather than the subject matter do not fall in or out of the division of powers, the Plaintiffs assert the right for MNSI to be included as Indians under s 91(24) and subject to the exclusive jurisdiction of the federal government to make laws in relation to them. The nature of s 91(24) is to confer jurisdiction over a specific group of people. In that regard, it is different than most other powers conferred to either the federal or provincial governments under the Constitution.

[69] It is no answer for the Defendants to say that a case such as this cannot be brought because there is no federal legislation against which to assert an action. There is no such legislation because the federal government denies jurisdiction over MNSI. This is a classic Catch-22 situation. It is a situation for which the declaration proceeding is well-suited to resolve.

[70] It is difficult to sustain any argument that there is a factual vacuum in a case with more than six weeks of evidence, much of it expert and profoundly historical, encompassing approximately 800 exhibits (with few, if any, single page exhibits) extracted from over 15,000 documents. The sweep of the historical evidence ranged from first contact with North American natives to very current Aboriginal-federal government negotiations.

[71] In many regards the type of evidence in this action is similar and sometimes identical to that of *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2010 MBCA 71, [2010] 3 CNLR 233, both at the trial and appellate levels. The type of evidence is also similar in many respects to that in *Blais*, above.

[72] The Defendants argue that this action cannot result in a duty to legislate even if the defined people fall within s 91(24) (see *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 SCR 525, 83 DLR (4th) 297). The Plaintiffs have not sought any order suggesting a duty to legislate or to have access to specific programs; they seek to know whether they fall within that class of people in respect of whom Canada has the exclusive jurisdiction to make laws.

[73] Any uncertainty about provincial laws such as Alberta's *Metis Settlements Act*, RSA 2000, c M-14, can only be removed by a decision on the issue raised whether the Métis are Indians for purposes of s 91(24). The legitimacy of the Alberta legislation does not necessarily preclude federal jurisdiction to legislate in respect of Métis.

[74] There is no question that there are certain definitional difficulties in this action but there is evidence that this can be resolved. Further, the Supreme Court in *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207 [*Powley*], dealing with who are Métis, held that difficulties of definition are not to be exaggerated as a basis for defeating constitutional rights. The principle is particularly apt in this action. Should difficult cases be a grounds for not deciding, and this case has more than enough difficulties, the courts would not be carrying out their constitutional obligations as courts to decide real legal disputes.

[75] The Court has addressed the issue that s 15 of the *Charter* is a better and more appropriate way to proceed. Given the decision in *Lovelace v Ontario*, 2000 SCC 37, [2000] 1 SCR 950 [*Lovelace*] and *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC

37, [2011] 2 SCR 670 [*Cunningham*], there may be significant doubt as to the availability of that remedy.

[76] The Defendants also contend that this action is tantamount to an impermissible private reference. Justice Hugessen has addressed that point fully in *Daniels*, above, at paragraph 6 of his decision.

[77] In addition to the above forming the grounds to reject the Defendants' arguments not to decide, there are additional factors which assist in resolving this issue. In exercising the Court's discretion, the Court must also have considered the practicality and prejudice of declining to decide.

[78] This action has taken over 12 years to get to this point. It has been funded largely by the TCFP, a program which is subject to government policy as to its continuance. The Plaintiffs are already under an advance costs order to ensure that this action could continue to be tried when the TCFP funding cap had been reached which it has. There is no assurance that some other alternate action could be financially sustained by which the Plaintiffs could address the issues they have brought to Court.

[79] Furthermore, the public has already advanced approximately $2 million to the Plaintiffs even with Plaintiffs' counsel's contribution of work at substantially below usual hourly rates. The government of Canada has also had to pay its Justice counsel and their experts. The Court considered the overall financial public investments in the Advance Costs Order (*Daniels v Canada*

(Minister of Indian Affairs and Northern Development), 2011 FC 230, 387 FTR 102) with a rough estimate of $5-6 million.

[80] There has been significant time, and millions of public funds invested in this action which would be wasted if the Court declined to decide this matter. It would not be in the public interest to exercise the Court's discretion to not decide the matter in addition to all the other reasons cited above.

[81] Returning to the basic principles underlying the right to seek a declaration from a court, the Supreme Court of Canada has again recently affirmed the basic principles applicable to such cases. In *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44 at paragraph 46, the Supreme Court said:

> In this case, the evidentiary uncertainties, the limitations of the Court's institutional competence, and the need to respect the prerogative powers of the executive, lead us to conclude that the proper remedy is declaratory relief. A declaration of unconstitutionality is a discretionary remedy: *Operation Dismantle*, at p. 481, citing *Solosky v. The Queen*, [1980] 1 S.C.R. 821. It has been recognized by this Court as "an effective and flexible remedy for the settlement of real disputes": *R. v. Gamble*, [1988] 2 S.C.R. 595, at p. 649. A court can properly issue a declaratory remedy so long as it has the jurisdiction over the issue at bar, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it. Such is the case here.

[82] This Court has jurisdiction over the case, the question before the Court is real, and the persons raising the issues have a real interest to raise it.

[83] Therefore, the Court cannot accept the Defendants' invitation to decline to decide this matter.

V. NATURE OF THE PROBLEM

[84] The circumstances which the Plaintiffs claim to have given rise to this litigation is well described in a memorandum to Cabinet from the Secretary of State dated July 6, 1972:

> 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.

[85] The Métis and non-status Indians have been described similarly in various other documents in evidence in this case.

[86] From the Métis perspective, they see the provincial governments as treating the Métis as "political footballs". The federal government denies that they have responsibility for Métis; the provinces take the opposite position and see the matter as a funding issue for which the federal government is primarily, if not exclusively, responsible.

[87] The essential feature of this perspective – the jurisdictional avoidance feature – was confirmed by Ian Cowie, a senior official in the Department of Indian and Northern Affairs (as it was known) who had significant experience in aboriginal affairs and who possessed the corporate policy history of the Department. The result was that services to MNSI just were not supplied while governments fought about jurisdiction – principally a fight about who bore financial responsibility.

[88] In an Interim Report from the Consultative Group on MNSI Socioeconomic Development in 1979 (a federal government report developed to outline future consultation strategies with provincial MNSI associations and the Native Council of Canada), federal officials point out:

(a) the impact of changing the criteria for Indian registration (a matter that goes to the root of the non-status Indian issue);

(b) the federal government has restricted its special powers and obligations (under the Constitution) to status Indians and land reserved for Indians whereas the provinces have recognized no special obligations to native people other than those imposed by treaty or in the Prairie provinces, *The Natural Resources Transfer Act* (1930). Neither level of government recognizes any special legal obligation for people of Indian ancestry other than status Indians.

(c) while neither the federal nor provincial level of government officially recognizes any special obligation to MNSI, there are some joint federal-provincial programs which seem to be the only type of help on the horizon.

[89] In addition to the discussion of federal provincial positions in respect of MNSI, the paper gave a useful synopsis of some of the historical factors affecting MNSI; none of which are in serious disagreement with the expert opinions that were put before the Court.

[90] The process of recording the history of native people in Canada is an activity that will be ongoing well into the future. Although over-simplification of such a massive subject is fraught with danger, a brief explanation of certain historical elements is necessary as background to an

understanding of present conditions concerning the legal status, geographic location and current circumstances of native people.

[91] The Department of Indian Affairs and Northern Development [DIAND] paper of August 1978 entitled "The Historical Development of the Indian Act" indicates that one of the first legislative provisions to differentiate between "status" and "non-status" Indians was an 1851 amendment (*An Act to repeal in part and to amend an Act, intituled, An Act for the better protection of the Lands and property of the Indians in Lower Canada*, 14 & 15 Vict, c 59) to the *Upper Canada Indian Protection Act* of 1850 (*An Act for the Protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass or injury*, 13 & 14 Vict, c 74). This amendment was made to clarify the definition of an "Indian" in relation to the legislative purpose of securing Indian Land from "white" encroachment. Through the definition of "Indian", the 1851 amendment indirectly excluded "whites" living among Indians and non-Indian males married to Indian women from obtaining legal status as "Indians". On the other hand, the definition of "Indian" included:

> All women, now or hereafter to be lawfully married to any of the persons included in the several classes hereinbefore designated, the children issued of such marriages, and their descendants.

Thus started one of the discriminatory practices based on sex that was destined to be carried throughout the evolution of the *Indian Act* to the present day. Those practices have of course had a major influence on the composition of the group called non-status Indians.

[92] A few years later, on June 10, 1857, an "*Act for the Gradual Civilization of the Indian Tribes in the Canadas*", 20 Vict, c 25-26, contained a preamble indicating that the government favoured integration of Indians rather than additional legislative exclusions. The preamble said this:

> Whereas it is desirable to encourage the progress of Civilization among the Indian Tribes in this Province, and the gradual removal of all legal distinctions between them and her Majesty's other Canadian Subjects, and to facilitate the acquisition of property and of the rights accompanying it, by such individual Members of the said Tribes as shall be found to desire such encouragement and to have deserved it …

This 1857 Act started the process of enfranchisement for "deserving Indians" – another practice that was destined to be continued throughout the evolution of the *Indian Act* and to contribute substantial numbers to the ranks of the non-status Indians.

[93] While these actions of government in the Canadas were setting the legislative course for the future division of status Indians and other people of native ancestry, which was later extended to all provinces, events in the vast territory of the Hudson's Bay Company were continuing to recognize another group referred to as "Métis". The term, originally restricted to the offspring of French and Indian parents, later Scottish and Indian parents and predominantly west of southern Ontario, has gradually been broadened in common usage to include all people of mixed Indian and other ancestry who are not status Indians but who claim a culture distinction. However, amongst the native people it still carries a connotation somewhat different than the term non-status Indian, and relates principally to the mixed ancestry descendants of the fur trade era who did not become registered as Indians during the treaty-making and registration processes.

[94] The cumulative effects over time of these parentage relations and legislative and administrative events produced, by evolution, a group called Métis and non-status Indians. Because of their community of interest as people of Indian ancestry, their grievances against government, and their adverse social and economic circumstances, the group has been able to maintain its identity and form national, provincial and regional associations claiming a potential membership of approximately 1,000,000 people.

[95] The geographic distribution to these people today strongly reflects their historical origins and social evolution. In central and eastern Canada, where native Euro-Canadian inter-relationships and integrative forces have been operative for a comparatively long time, people of some native ancestry, other than status Indians living on reserves, are generally distributed throughout the population. There are some communities, often near reserves, where groups of inter-related families of native ancestry constitute a recognized portion of the community. But throughout the Maritimes, and the southern portions of Ontario and Quebec, there are few communities considered to be primarily Métis or non-status Indian in character.

[96] In contrast, throughout the mid-northern region of Canada, and particularly in the vast reaches of the former territory of the Hudson's Bay Company, stretching from western Quebec to the Rockies, Métis and non-status Indians make up a large percentage of the population of many communities. Most of these communities began as fur trading posts and now commonly consist of a mixture of status Indians living on reserve land, Métis living on adjacent Crown land and a small enclave of "white" public servants and merchants. In the prairie provinces the Métis communities tend to be concentrated along the agricultural-forest fringe, frequently again in close proximity to

Indian reserves. In large measure, this concentration is a reflection of the administration of lands during the home-steading era on the Prairies. These historical influences on the distribution of native people throughout Canada have been tempered in more recent times by the growing migration to cities.

[97] The present location of native people in relation to the general population of Canada and the main stream of economic activity has major consequences in terms of their present circumstances and their developmental opportunities. In a Department of Regional Economic Expansion publication of February 10, 1977, entitled "Special ARDA in Relation to the Future Direction of Native Socio-economic Development", Canada was divided into four main "socio-economic regimes" for purposes of describing the diversity of current circumstances and opportunities of native people. The divisions selected were: metropolitan centres; developed rural areas; mid-north and coastal regions; and the arctic region. The differences in social and economic conditions amongst these "regions" are critical to the formulation of policies and programs aimed at developmental assistance.

[98] The native population of Canada is young. In recent years, a number of factors have combined to produce a native population which has a much higher percentage of children and youth than the Canadian population as a whole. It is estimated that 56% of the present native population is under the age of 20. This compares with 36% in the total population. In Saskatchewan, where the native population is estimated at about 12% of the total, the proportion of native people in the school age population is considered to be over 20%. This age distribution has major implications for

the educational system, future entrants to the labour force and, of course, the design of policies and programs for developmental assistance. (All percentages are approximate.)

[99] The DIAND document of 1980, "*Natives and the Constitution*" Background and Discussion Paper [1980 DIAND Paper] was a document which formed part of Cabinet documents and has been reviewed for and considered by the highest level of government. The views expressed represented prevailing views of the highest levels of the bureaucracy and the political structure. The federal position was described (and continues to be):

> 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.

[100] The provincial position is described as:

> Most provinces support the position that Section 91(24) of the BNA Act imposes on the federal government total (financial) responsibility for Indian people --- responsibility which, in the provinces' view, has been increasingly derogated, particularly in the off-reserve context. Many of the provinces are of the opinion that the federal government must reassume its "total" constitutional responsibility in this area, and subsequently reimburse them for the cost of providing service to all status Indians.

[101] Although this paper was written as part of the lead up to the repatriation of the Constitution, the respective governmental positions have only changed marginally until the mid 1980s as later described.

[102] It was noted that the provincial position on the future status and responsibilities for Métis and non-status Indians was less clear.

[103] What was clear is that the native community was divided. Status Indians were generally not in favour of any broadening of the *Indian Act* definition and indeed may wish to have it narrowed. However, the Métis and non-status Indians would maintain that they are "Indians" within the meaning of the terms of the *BNA Act*. It was anticipated that in the repatriation negotiations with the natives, the MNSI would claim that the federal government should assume a greater measure of responsibility for the provision of services to the MNSI. Indeed that happened and the failure of the federal government is part of the problem to which this litigation is directed.

[104] Another problem that the 1980 DIAND Paper highlighted and a central theme of this litigation is that s 91(24) can encompass non-status and many Métis as well as others:

> 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*) definition of "Indian".

[105] One of the important feature of this Paper is that it captured themes that ran through the Modern Era section of this litigation. It was a precursor of the issues. It can be described as "plus ça change, plus c'est la même chose".

[106] The provincial position has been that the federal government is responsible for the costs of MNSI as they are for status Indians. Only Alberta has taken a step in recognizing provincial

jurisdiction in respect of Métis under the *Metis Settlement Act*. The Supreme Court of Canada has recently affirmed that legislation in *Cunningham*, above.

[107] One of the results of the positions taken by the federal and provincial governments and the "political football – buck passing" practices is that financially MNSI have been deprived of significant funding for their affairs. In 1982-1983, of moneys spent for natives, 79% of federal moneys and 88% of provincial moneys went to status Indians despite the fact that the MNSI population (even with its definitional issues) exceeds the status Indian population - 1995 – 238,500 Status, 404,200 non-status Indians and 191,800 Métis. These figures vary with time and definition but provide a useful order of magnitude to the issues between the native/Métis communities and the federal government.

[108] As the Defendants' documents reveal and will be addressed more fully in these Reasons under Modern Era, the political/policy wrangling between the federal and provincial governments has produced a large population of collaterally damaged MNSI. They are deprived of programs, services and intangible benefits recognized by all governments as needed. The MNSI proponents claim that their identity and sense of belonging to their communities is pressured; that they suffer undevelopment as peoples; that they cannot reach their full potential in Canadian society.

[109] The Defendants' documents show that the service deficit problem is expected to continue as the MNSI population grows. The adverse impact on the MNSI communities across Canada will also increase.

[110] The resolution of constitutional responsibility has the potential to bring clarity to the respective responsibilities of the different levels of government.

VI. PROBLEM OF DEFINITION

[111] One of the more difficult issues in this matter is the question of what is meant by non-status Indians and Métis for purposes of the interpretation of s 91(24). There is a clear difference of opinion as to the composition and geographic base within the Métis community. The term "non-status Indian" must mean something other than any person not having status under the *Indian Act* as that would cover almost everyone in Canada whether they had native connections or not.

[112] The Defendants appear to suggest in their Memorandum of Law that the federal government can define for constitutional purposes who is "an Indian" by its own legislation. That proposition would allow the federal government to expand and contract their constitutional jurisdictions over Indians unilaterally.

[113] It is a settled constitutional principle that no level of government can expand its constitutional jurisdiction by actions or legislation *Reference Re Securities Act*, 2011 SCC 66, [2011] 3 SCR 837. The federal government may wish to limit the number of Indians for which it will grant recognition under the *Indian Act* or other legislation but that does not necessarily disqualify such other Indians from being Indians under the Constitution.

[114] The Supreme Court in *Canard v Canada (Attorney General)*, [1976] 1 SCR 170, 52 DLR (3d) 548, (Pigeon J) [*Canard*], held that the object of s 91(24) is to enable Parliament to make

legislation applicable only to Indians as such. However, Beetz J., at paragraph 79, went on to expand the point, recognizing that the section creates a racial classification and refers to a racial group.

> The *British North America Act, 1867*, under the authority of which the *Canadian Bill of Rights* was enacted, by using the word "Indians" in s. 91(24), creates a racial classification and refers to a racial group for whom it contemplates the possibility of a special treatment. It does not 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 of which the Court could and did take cognizance.

[115] Some of the situations which created non-status Indians were problems recording names during the treaty process and fear of the process itself. The result was that names were not recorded. Another major cause was that many Indians (primarily women) lost status or simply gave it up. Marrying out provisions whereby the native woman lost her status upon marrying a non-Indian commenced formally about 1851.

A. Non-status Indians

[116] Non-status Indians as a group must have two essential qualities by definition; they have no status under the *Indian Act* and they are Indians. The name itself suggests the resolution of this point in this litigation.

[117] In the modern era, the difficulty of definition in part has been addressed. As indicated earlier, the government in 1980 defined the core group of MNSI as a group of native people who maintained a strong affinity for their Indian heritage without possessing Indian status. Their

"Indianness" was based on self identification and group recognition. That group was estimated at between 300,000 and 450,000.

[118] By 1995 the government was able to estimate that the non-status Indians constituted 404,200 people (those living south of 60°).

[119] It is clear that the non-status Indians description is based on substantial connection, both subjectively and objectively, to Indian ancestry. Degrees of "blood purity" have generally disappeared as a criterion; as it must in a modern setting. Racial or blood purity laws have a discordance in Canada reflective of other places and times when such blood criterion lead to horrific events (Germany 1933-1945 and South Africa's apartheid as examples). These are but two examples of why Canadian law does not emphasize this blood/racial purity concept.

[120] In the preparation for Bill C-31, the federal government was further able to identify the number of non-status Indians who would be impacted by the legislation.

[121] In *Powley*, above, in identifying who is a "Métis", the Court did not set out a rigid test or explore the outer limits of the definition but outlined a method of determining the question on an individual basis. This Court will not try, in defining non-status Indians, to do more than the Supreme Court did with Métis.

[122] The group of people characterized as "non-status Indians" are those to whom status could be granted by federal legislation. They would be people who had ancestral connection not necessarily

genetic to those considered as “Indians” either in law or fact or any person who self-identifies as an Indian and is accepted as such by the Indian community, or a locally organized community, branch or council of an Indian association or organization which which that person wishes to be associated.

[123] It may well be that there must be a determination on a case by case basis for each individual but this general description sufficiently identifies a group of people for whom the issues in this case have meaning.

B. Métis

[124] The term Métis (sometimes the term half-breed is used, pejoratively) has been the subject of debate within the Métis community and elsewhere. There are those, such as the Manitoba Métis Council, who would limit the definition to those in and around the Red River Settlement and their descendants who are of European and Indian heritage and who followed distinct customs and ways of living.

[125] In the *Manitoba Métis Federation Inc v Canada (Attorney General)* case (2007 MBQB 293, 223 Man R (2d) 42, aff’d in 2010 MBCA 71, [2010] 3 CNLR 233, leave to appeal to Supreme Court of Canada granted, 417 NR 400 (note), 2011 Carswell Man 27 (available on WLCan) [*Manitoba Métis Federation*], dealing with s 32 of the *Manitoba Act, 1870* and the grant of 1.4 million acres of land to the children of Métis, it was principally the Red River Settlement Métis who were the subject of the litigation.

[126] However, in *Powley*, above, the Supreme Court was dealing with a Métis from Sault St. Marie. In the present case the geographic range of the question of whether Métis are Indians under s 91(24) is country-wide. The evidence shows that the term Métis was and is used well outside of Western Canada. Cases involving agreements or provincial laws are not necessarily determinative of the issue.

[127] In *Powley*, above, the Supreme Court did not attempt to define the outer limits of "Métis" but it did provide a method for finding who a Métis is for purposes of s 35. Aside from the *sine qua non* of mixed aboriginal and non-aboriginal ancestry, a Métis is a person who

> (a) has some ancestral family connection (not necessarily genetic);
>
> (b) identifies himself or herself as Métis; and
>
> (c) is accepted by the Métis community or a locally organized community branch, chapter or council of a Métis association or organization with which that person wishes to be associated.

[128] As *Powley*, above, was a question of collective right to hunt, the last point was critical. However, there may be individual circumstances where there is no such association, council or organization but the individual participates in Métis cultural events or activities which show objectively how that person identifies himself or herself subjectively as a Métis.

[129] As the further historical evidence will show, there was no "one size/description fits all" when it comes to examining Métis on a national scale.

[130] However, it is those persons described in paragraph 117 who are the Métis for purposes of the declaration which the Plaintiffs seek.

VII. WITNESSES

[131] In addition to the Plaintiffs as witnesses, much of this trial evidence was delivered by experts. I will have more comment on that expert evidence later but it is useful to give some general idea of the type of evidence presented.

A. Ian Cowie (Plaintiffs' Witness)

[132] Cowie, currently a consultant and a lawyer by training, had held senior federal government positions at DIAND during the modern evidence phase of this case. From 1977-1981 he had been Senior Policy Advisor and later Director – Intergovernmental Affairs. He later became Director General, Corporate Policy and then Assistant Deputy Minister Corporate Policy. He ended his public service career as Deputy Minister of Indian and Native Affairs for the Province of Saskatchewan.

[133] The Corporate Policy group was the policy development and clearing house for DIAND policy. Most of the native constitutional law work was done at DIAND.

[134] Cowie's evidence was important because it gave an insider's view of modern native rights policy development. He was able to speak with knowledge about a number of government documents admitted in evidence including how far up the "decision tree" each was and the degree to which some key documents reflected actual federal policy and legal positions.

[135] While Cowie was cross-examined, the Defendants put in no witness to challenge his evidence. The evidence will be referred to later in these Reasons. Suffice it to say that the Court found him to be very knowledgeable, very fair and completely credible.

[136] Of the many documents covered, one of the most important was an August 1980 DIAND paper "Natives and The Constitution" – Background and Discussion Paper. The Plaintiffs rely on this document as evidence of an admission of jurisdiction by the federal government. In part, that argument relies on such quotes from the paper as these:

- "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)."

- "Métis people who come under 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 meaning of the BNA Act. That person is, therefore, 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."

and lastly

- "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*) definition of "Indian"."

Note: "Scrip": the term used in this context was a form of paper certificate redeemable for land or money at the individual's choice of 160 or 240 acres or dollars depending on age and status.

The basic premise of scrip was to extinguish the Aboriginal title of Métis in much the way treaties did for First Nations but on an individual basis for Métis rather than the collective basis used for First Nations.

B. John Leslie (Plaintiffs' Witness)

[137] Leslie had to be called by the Plaintiffs because the Defendants would not admit that a significant number of government documents were in fact government documents. The Defendants' position was wholly untenable and just a further example of the extent to which the Defendants would proceed in attempts to frustrate this litigation.

[138] Leslie has a BA, MA and PhD in History. He had spent 33 years in the federal government primarily at DIAND. At his retirement he was the Manager of the Claims and Historical Research Centre, Special Claims Branch. It was his familiarity with DIAND's document control system which allowed him to identify that the documents were government documents although he was not personally knowledgeable about the contents of the more than 150 documents which were admitted through him. His role was tantamount to a business records identifier – a process which should have been unnecessary. However, Leslie was able to add context to a number of the exhibits.

[139] The documents introduced by Leslie gave insight into government thinking and policy development. Among the many interesting documents (some of which will be referred to later in these Reasons) is Exhibit P139, a staff paper "A Review of the Data and Information Situation with Recommendations for Improvements" dated August 15, 1980.

[140] That paper, as a precursor to the issue of defining the groups involved in this litigation, contained the following comments:

> MNSI are thus defined as a core group of native peoples who maintain a strong affinity for their Indian heritage without possessing Indian Status.
>
> In summary, it is useful to note that notwithstanding the difficulties pertaining to defining MNSI membership, there is, however, general agreement on the estimate of "identifiable core" MNSI population as ranging between 300,000 and 450,000. There are thus more "core" MNSI than the approximately 300,000 Status Indians recognized in the Indian Register as of 1980.
>
> The 1981 Census thus provides a practical means for MNSI people to demonstrate clearly their continuing existence; the 1981 Census will provide a central core to the statistics section of the MNSI database and serve as a basis for shaping future MNSI programming.

[141] A continuing theme running through many of Leslie's documents is the size of the MNSI core community and the potential program cost increases arising from their inclusion as "Indians".

[142] The documents introduced by Leslie allow one to trace the shifting policies of the federal government and the different directions taken by one governing political party and another. Despite the change in government, some positions stayed the same. In a December 1985 letter to the Institute for Research on Public Policy, the Minister of Indian Affairs and Northern Development, David Crombie, concluded:

> I would also like to clarify an apparent misunderstanding regarding the constitutional recognition of non-status Indians. 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. 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, are covered by the section 91(24) meaning of "Indian".**
>
> [Emphasis added by the Court]

[143] The policy dynamic of Bill C-31 is easily traced including the concern that if the Bill were broadened to remove further sexual discrimination in the *Indian Act*, the increase in the number of new "status Indians" would be unacceptable to the present Indian communities.

[144] The documents introduced through Leslie also threw light on the definitional issues as to who is Métis and who is non-status Indian. For example, in 1989 in an internal DIAND document (Exhibit P135) , government officials were able to identify the Métis population in 1986 as 117,400 projected to grow to 129,000 in 1990 and the non-status Indian population in 1986 was 161,772 but decreasing to 110,390 in 1990 due to the impact of Bill C-31.

[145] Leslie's evidence was not seriously challenged in cross-examination nor did the Defendants put in any witness to challenge Leslie's evidence. The Court accepts his evidence, particularly as to context and importance of certain documents and takes those documents to say what they mean and mean what they say.

[146] Before turning from the former government employee witnesses to the historical expert witnesses, the Court acknowledges that Keith Johnson, who had worked at Public Archives since 1961 and was familiar with the Sir John A Macdonald Papers, gave evidence as to that Prime Minister's handwriting - an interesting sidelight of the overall evidence.

VIII. HISTORICAL EXPERT WITNESSES

A. William Wicken (Plaintiffs' Witness)

[147] Wicken holds an MA and a PhD in History from McGill University. He is an Associate Professor of History at York University. He had been qualified as an expert in 14 trials.

[148] In this matter Wicken was qualified as an expert witness within an area of expertise in government policies towards Canada's Aboriginal peoples based on historical records with a focus on Eastern and Central Canada (Ontario/Quebec).

[149] While Wicken had in-depth knowledge of aboriginal matters in Atlantic Canada, he had sufficient grounding in Central Canada aboriginal matters to give helpful evidence on a broader geographical area than the Defendants' comparable witness Stephen Patterson.

[150] I found Wicken to be clear, well-prepared, consistent in his evidence and credible. His historical sources tended to be primary and relevant. He was a credible witness whose evidence (where it tended to be opposite to Patterson's) I generally accepted because it was more relevant to the issue of interpretation before this Court.

[151] The key points of his evidence:

(a) Wicken addressed the issue of the Framers of Confederation's goals in making Indians and Lands Reserved for Indians a federal responsibility (Framers is used in this context as the gender neutral for the previously common term "Fathers of Confederation".):

(i) to control Aboriginal people and communities where necessary to facilitate economic expansion and development of the Dominion;

(ii) to honour the obligations to Aboriginal people that the Dominion had inherited from Britain (and through it from the Hudson's Bay Company) while extinguishing those interests that may impede development;

(iii) to civilize and assimilate Aboriginal peoples and communities.

(b) Wicken was of the view that at the time of Confederation there was significant diversity within Aboriginal populations and communities with more to come with the absorption of Western Canada. There was diversity in colonial Indian administration as well. Therefore, a broad power of control and consistency was needed to address the needs of a developing Dominion.

(c) In the post-Confederation period, the federal government exercised its power over "Indians" broadly in order to meet the above objectives.

B. Stephen Patterson (Defendants' Witness)

[152] Patterson is a professor emeritus at the University of New Brunswick, an historian and historical consultant. He holds a BA from UNB, and an MA and PhD in History from the University of Wisconsin.

[153] With one exception he was an historical consultant to both federal and provincial governments. He has been accepted as an expert in 23 cases always appearing on behalf of the Crown. This fact does not justify calling into question either Patterson's integrity or objectivity.

[154] It was evident that Patterson had in-depth knowledge of Maritime aboriginal history. He was accepted as an expert historian able to give historical evidence on aboriginal peoples of eastern North America after their contact with the Europeans; the general history of North America; the history of French and British colonization and its impact on Amerindians and especially the Mi'kmaq, Maliseet and Passamaquoddy; and the history of government policy (colonial, provincial, imperial and federal) respecting natives as it relates to natives of eastern Canada with a particular focus on the natives of Atlantic Canada.

[155] Patterson was clearly well qualified to give his opinion evidence on aboriginal history in Atlantic Canada. He was a credible, co-operative and well-prepared witness. However, his Report was narrowly focused both in time (no post-Confederation history) and geography (restricted to Atlantic Canada). It is in this area of its limitations that Patterson's evidence is less helpful than that of Wicken.

[156] The central point of Patterson's evidence is that, pre-Confederation, in Atlantic Canada Europeans defined "Indians" as members of indigenous communities or collectives distinguished by common languages and customs, internal governments sufficient for their needs and specific territories that defined their subsistence patterns and their relationship to the land and its resources.

[157] It was his opinion that this identification of "Indians" with communities informed the Maritime delegates to the *BNA Act* process and influenced their acceptance of federal authority over the field of "Indians and Lands Reserved for Indians".

[158] Patterson noted that no historically identified mixed blood communities emerged in the period before the effective assertion of European control. Further, neither the French nor the British governments recognized any such community as distinct from either Indian or settler societies.

[159] Patterson saw the adoption of the first *Indian Act* as reflecting the statutes and policies of Atlantic Canada in managing Indian affairs particularly in relying on the native people to define themselves, where they lived, how many they were and in making treaties and allocating reserves in a manner that reflected their communities.

[160] To the extent that this Atlantic Canada experience influenced Atlantic Canada delegates, its relevance to the issues before the Court is limited. As other witnesses showed, the majority of Atlantic Canada delegates were more interested in the free trade with central Canada aspect of Confederation than they were in the nation-building envisioned by Sir John A Macdonald.

C. Gwynneth Jones (Plaintiffs' Witness)

[161] Jones is an independent consultant on native issues. She holds a BA and MPA from Queen's University and an MA in History from York University. For 11 years Jones worked for the Native Affairs Branch of the Government of Ontario with particular expertise in Métis and off-reserve Indian issues.

[162] Since 1995 Jones has been a freelance consultant. The breakdown of her consultancy is one-third for the federal government, one-third for provincial government and one-third for aboriginals (First Nations, Métis and off-reserve Indians). The balance in her portfolio of consultancy

reinforced the Court's impression of her as a knowledgeable witness, balanced, fair and objective, independent of even the subtle pressures of being identified with one client or type of client.

[163] Jones has given expert evidence in a number of cases including the highly relevant *Powley*, above, and in this Court in *Montana Band v Canada*, 2006 FC 261, 287 FTR 159. She was qualified in this present case as an historian having expertise towards Canada's Aboriginal people based on the historical record with a focus on Ontario and Western Canada.

[164] Jones' evidence was particularly helpful because it examined the conduct of the federal government towards natives and especially Métis along with the shifting policies and their impact. She examined how the federal government used its "Indian" power – Canada's administration of Aboriginal people from just before Confederation with emphasis on the post-Confederation era until approximately the 1930s. Her period of analysis and geographic scope dovetailed well with the evidence of Wicken.

[165] The Court was impressed with the quality of Jones' evidence and puts considerable reliance on it. She was obviously a highly credible witness and her evidence was particularly helpful in determining what was actually done by the federal government particularly in its treatment of Métis or "half-breeds" (as these persons of mixed Indian-European were often called; generally not respectfully).

[166] Her opinion on the rationale for the grant of s 91(24) powers to the national government echoed Wicken's. It was a means of furthering the objectives of Confederation; of acquiring,

developing and settling the territories of Ontario and Quebec as well as creating a stable and viable British North America entity capable of resisting absorption into the United States. Control over "Indians and Lands Reserved for Indians" enabled the central government to peacefully extinguish Aboriginal (often called "Indian") title, protect Aboriginal interests and therefore ensure the peaceful environment required for newcomer settlement and westward expansion.

[167] Jones notes that from pre-Confederation until the late 1930s, federal policy evolution established a legal distinction between "Indians" and "half-breeds". The distinction was the product of (i) the status that these Aboriginal people had themselves elected to assume at the time of the treaty/agreement (either fiscal benefit or property scrips); and (ii) the ongoing process of adjustment and reassignment of Aboriginal people to legal categories managed by Canada.

[168] Jones cautioned that Band Lists (often used as historical evidence of "Indian" status) should not be construed as comprehensive or exclusive lists of related or associated individuals or as a census of residency. Band Lists (and later Indian Registers) grew out of Treaty Paylists; not the other way around. Treaty Paylists were the product of *ad hoc* record keeping, fluctuating interpretations of the *Indian Act* and ongoing policy changes dating back to pre-Confederation.

[169] Jones' Report covered three related areas:

(1) the historical context in which Parliament was assigned jurisdiction over "Indians and Lands Reserved for Indians";

(2) Canada's historical policies and practices regarding its designation of Aboriginal people as Indians from 1850 to 1930; and

(3) the development of Treaty Paylists and the identification of "Indians".

Her conclusion was that non-status Indians and Métis were dealt with using the Indian power of s 91(24), both as a matter of fact and policy.

D. Sébastian Grammond (Plaintiffs' Witness)

[170] Dean Grammond is a law professor and dean of the Civil Law Section of the University of Ottawa. He has studied in the field of law and identity for indigenous people. He claimed an expertise in the interdisciplinary aspect of law in relation to sociology and anthropology.

[171] There was no question as to Grammond's qualifications in law, particularly international law. The interdisciplinary aspects are more difficult to quantify and qualify. His Report, or at least major parts of it, was challenged partly because they were statements of law and/or submissions.

[172] The Court ruled that certain portions of Grammond's Report had to be redacted but that he was qualified to give opinion evidence as an interdisciplinary legal scholar having expertise on the legal history of government policy towards Canada's Aboriginal people drawing on sociological and anthropological sources with a focus on the post-war period and the influence of legal norms.

[173] Grammond's evidence was directed at the development and influence of international and constitutional norms on the exercise of the federal power under s 91(24) and in the recognition of increasing numbers of people falling within s 91(24) as Indians. He predicts that in response to international and domestic pressures, Parliament will expand the exercise of s 91(24) jurisdiction over a large number of people.

[174] As interesting as his thesis and prediction may be, Grammond's evidence is directed at what Canadian policy can and should be. The Court is not deciding policy (the purview of the legislature or the executive) but attempting to interpret the Constitution. Policy evidence is useful in determining the historical understanding of words or concepts and to put context around the issue. Future policy issues, as interesting and important as they are, are to be left elsewhere.

E. Alexander von Gernet (Defendants' Witness)

[175] Von Gernet is an adjunct professor of anthropology at the University of Toronto. He has a BA, MA and PhD in Anthropology. His PhD specialization was in Ethnohistory and Archaeology of Aboriginal peoples in North America.

[176] He has been accepted in court as an expert in 25 cases in provincial, state and superior courts as well as in this Court always on behalf of the Crown. He was accepted as an expert qualified to give opinion evidence as an anthropologist and ethnohistorian specializing in the use of archaeological evidence, written documentation and oral traditions to reconstruct past cultures of Aboriginal people, as well as the history of contact between Aboriginal peoples and newcomers throughout Canada, and parts of the United States, which history includes the relationship between government policies and Aboriginal peoples.

[177] Von Gernet's Report was far ranging and delved into areas, such as post-Confederation federal policies, which were well beyond his area of expertise. There were three themes to his Report:

(1) Half-breeds or Métis would not have been contemplated as falling within the term "Indian" as it appears in s 91(24).

(2) The *Manitoba Act, 1870* does not support the view that the seven framers of the Constitution understood "Indians" to include Métis.

(3) Problems in administering treaties particularly where half-breeds are involved illustrated why the exclusive authority vested in Parliament under s 91(24) could not be effectively exercised without passing the *Indian Act* defining who was or was not an Indian.

[178] Von Gernet came at his task of making his report in an unusual way. He would brook no instructions nor work with counsel; he was there to express his opinions. Regrettably, this was evident in that he exhibited little understanding of the case or the issues for the Court; thus he could not be as helpful as one would have hoped.

[179] Von Gernet's evidence suffered from a number of other problems. He relied on a database of documents provided by the Defendants which was not current or updated. He relied extensively on secondary sources which became clear when he did not understand the context in which much of that material arose. His conclusions were often based on faulty understanding; for example, the frailties of the 1871 Census as a reliable indicator of "Indian/half-breed" population.

[180] In general, von Gernet's research and conclusions were unoriginal often reflecting virtually regurgitating other people's work such as that of Thomas Flanagan's article "The Case Against Métis Aboriginal Rights" (1983) 9(3) Canadian Public Policy 314.

[181] Unfortunately, von Gernet exhibited a shallow understanding of many of the documents he relied upon or was unexplainably selective in his use of evidence. Thus, his evidence stood in sharp contrast to many of the other witnesses on both sides in terms of knowledge, reliability and credibility.

[182] While the Court does not discount all of von Gernet's evidence, it places considerably less weight on it where it contradicts other experts. His Report did not stand up well to the glaring light of cross-examination and provided the Court with much less illumination into the issues in this case.

IX. HISTORICAL EVIDENCE

A. Pre-Confederation Era

[183] Given the nature of this litigation, the Court was presented with over four centuries of history since first contact between European settlers and the indigenous population in what became Canada. It is not the purpose of this judgment to provide a survey course in Canadian history but to focus on the key events and circumstances relevant to the issue of whether non-status Indians and Métis are Indians under s 91(24). The pre-Confederation evidence was directed at what the term "Indian" meant at the time and thus likely was the meaning that the Framers of Confederation had in mind when it was inserted into the s 91 powers assigned to the federal government.

(1) Atlantic Canada

[184] Both parties' experts (particularly the Plaintiffs) used the following historical evidence to draw conclusions as to what the delegates from Atlantic Canada understood about the "Indian

situation". The Plaintiffs particularly relied on these facts (and others) to conclude on what the Framers from Atlantic Canada meant by "Indian" and by extension what other Framers likely meant.

[185] What any individual Framer may have understood and intended is, in the absence of specific historical writing, a substantial bit of speculation and not particularly reliable.

[186] However, the evidence of the situation in each colony or area lends context to determining the meaning and scope of s 91(24). The Indian power was an amalgam of colonial power and British government power and responsibility for natives. It helps in understanding who or what kinds of people fall under the rubric of "Indian" before and up to Confederation and thereafter.

[187] There had been 300 years of European-Indian contact in Atlantic Canada prior to Confederation. At that time of contact the Mi'kmaq were located along the coasts of what is now Nova Scotia and New Brunswick. In addition, the Maliseet and Passamaquoddy were part of a larger aggregation known as the Etchemin whose homeland stretched from the Kennebec River, now in Maine, to the Saint John River in New Brunswick.

[188] Natives of Atlantic Canada were generally organized into small self-governing communities tied by cultural affinity rather than by a centralized leadership. As an example, the Mi'kmaq were organized into at least 12 communities, ranging from 40 to 200 people. Each community had its own territory as a resource base.

[189] Both the French and British tended to accept the natives' definitions of their communities as they defined themselves. The two European powers also recognized the existence of small government structures adequate for the needs of the particular native group.

[190] Both Patterson and Wicken focused on Atlantic Canada in their reports, looking at how federal Indian policy shaped the lives of "Indians" in that area.

[191] While Wicken focused on evidence relating to the pre-Confederation experience of Indians themselves, Patterson focused on the post-Confederation observations and reports of government officials. Not surprisingly they arrive at two different conclusions with regards to what the situation in Atlantic Canada reveals about the Framers' broader understanding of the term "Indian".

[192] Patterson opined that the identity of Mi'kmaq, Maliseet and other aboriginal groups in the area was connected to the communities where they lived. In this respect, the British signed treaties with distinct communities of people in the 18th century. In the 19th century, local colonial Maritime governments continued the tradition of dealing with natives as distinct communities and sought to respect those communities' collective character. Patterson's focus is on the community or tribal aspect in defining "Indian".

[193] For the reasons already given, the Court generally preferred the evidence of Wicken over Patterson where there was a conflict. Both experts' approaches are reasonable – one seeing matters from the viewpoint of the native community; the other from the viewpoint of the bureaucrats. However, in understanding what the situation was prior to 1867 and the problems to be addressed

by the Framers, Wicken's approach was more useful because it identified behaviour which was of concern.

[194] Wicken's opinion was that the situation of the Mi'kmaq and other native groups was more complicated and reflected a long history of contact. In his view, the colonial governments dealt with native people wherever they lived – on or off-reserve; in communities of people or in smaller household units. Regardless of where they lived, how they lived or their racial complexion, the local governments dealt with them as "Indians" under the government's jurisdiction. When the federal government assumed responsibility for "Indians" in 1867, they continued doing as the local governments had done before.

[195] Patterson looked at the observations made by local and federal officials as recorded in reports made in the late 19th and 20th centuries to conclude that the reports showed a remarkable continuity and confirmation of pre-Confederation community life. These reports discuss how, under federal jurisdiction, the Mi'kmaq and other native communities engaged in a wide range of economic pursuits both on and off-reserve (which was a departure from simply practising agriculture on reserves, which had been an old measure of the success of native groups).

[196] Patterson's point in making this comment is that whatever the impact of government policy on the lives of Atlantic Canada natives, those natives maintained valued aspects of culture and identity in their own way. This "continuity of community" indicates that the federal policy was to protect deeply rooted societies and cultures.

[197] Wicken, on the other hand, looked at the activities and movements of the Mi'kmaq and Maliseet peoples themselves to illuminate the manner in which Indian policy was applied at the local level. He points to evidence that demonstrates that these native people were pushed inland, often on to reserves that were too small or of such poor quality that families were unable to make their living through farming.

[198] The English and the French established relationships with the natives and developed Indian policies but in much different ways.

[199] The French's relationship with the natives was primarily of military alliance, of friendship and respectful co-existence of the respective communities. The relationship with the natives was not formalized or reduced to writing. It consisted of more informal visits by chiefs, the grant of military honours to the chiefs and gifts of guns, ammunition, clothing and food stuffs.

[200] Although the natives became dependant on French goods (i.e. metal pots, guns), the Mi'kmaq, Maliseet and Passamaquoddy retained much of their autonomy and freedom of action.

[201] Because of this dependence on trade for European goods, the natives of the area needed to maintain a relationship with a European power.

[202] Unlike the French, the British established formal ties with the Mi'kmaq, Maliseet and Passamaquoddy through treaties with the chiefs of tribes and through the policies of colonial governors acting on directives from Britain. Although acting on general directives, the method and

implementation was left to the colony. The basic requirement was that any colonial legislation regarding Indians had to be in conformity with the laws of Britain.

[203] From 1725 to 1779 the colonial governors made treaties with the Mi'kmaq, Maliseet and Passamaquoddy. These treaties were made between the chiefs of the various Indian tribes and the governors including chiefs who were of mixed ancestry.

[204] Reciprocal promises made in 1725 and 1726 were part of a scheme to regulate relations between natives, soldiers and settlers and more importantly to bring natives under British law.

[205] The British peace and friendship treaties were entered into in recognition of future settlement and expansion as well as to break the strong ties that the tribes had with the French.

[206] After the Seven Years War, the British issued the Royal Proclamation of 1763 [1763 Proclamation]. It was a seminal document for all of British North America including the natives of the continent.

[207] In addition to establishing new colonies and dealing with colonial general assemblies, the Proclamation set out Britain's plan in respect of unorganized and unoccupied land putting a restriction on movement west of the Appalachian Mountains into the North American interior where there were numerous natives and war or conflict with the settlers would be inevitable.

[208] The 1763 Proclamation affirmed British control and authority over the manner by which Indian lands would be purchased and surrendered. There was a need to address the frauds and other mischief perpetrated on natives. Britain recognized an obligation to protect Indians and Indian lands.

> 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. We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.
>
> 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.
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> …
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> 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 by the Governor or Commander in Chief of our Colony respectively within which they shall lie; …

[209] For Nova Scotia, Britain instructed the governor to permit Euro-Canadian settlement so long as natives were accommodated. Large tracts of land were given to settlers so long as there was no claim or possession by natives.

[210] The first reserves were created in Nova Scotia during the 1760s. This was done usually by a licence of occupation which continued a form of trusteeship between natives and government; a feature that has under various guises continued to the present day.

(a) *Nova Scotia*

[211] The situation of Nova Scotia and the Mi'kmaq in particular was used in evidence as representative of the situation in Atlantic Canada and of the different natives in each colony.

[212] The Mi'kmaq were originally a fishing people. In the 1780s they moved away from the coast. There is debate as to whether they were pushed inland by white settlers or moved inland for their economic benefit to be able to better trade with the European settlers.

[213] In cases where the land was fertile, non-native settlers encroached on the land and governments sided with the Euro-Canadian (or predominantly Euro-Canadian) settlers over the

natives on the issue of encroachment. The end result was to marginalize Mi'kmaq participation in the Nova Scotia economy causing families to live off-reserve or on and off-reserve and scattering them across the province.

[214] By 1864 there were about 28 reserves set aside for Mi'kmaq but many were unoccupied. A number of Mi'kmaq left the reserve, camping in various areas within what they considered to be their own territory to fish, trap (in winter) and to gather wood for woodworking goods which they would sell to merchants and farmers.

[215] Many of the Mi'kmaq wandered into Halifax or Sydney or Yarmouth which caused problems with the Euro-Canadian urban population.

[216] Importantly, for this case, most of the Mi'kmaq population by at least 1864 was of mixed blood of varying degrees.

[217] During this timeframe Indian agents compiled census data about natives living on and off-reserve but they did not always distinguish those people who inter-married. Sometimes they were identified as "half-breeds", sometimes not; sometimes half-breeds were treated as "Indians", other times not. Even where a half-breed self-identified as an "Indian", he/she might be included in the census as Indian but not necessarily so.

[218] The evidence establishes the diversity of people and degree of aboriginal connection which fell under the word "Indian".

[219] The Court accepts the thrust of Wicken's evidence that Mi'kmaq were treated as "Indians" at that time despite the mixed blood component, and the Mi'kmaq's preference to "wander" (as it was then described) had an impact on the creation of the federal Indian power.

[220] In the 1840s, after authority over Indians transferred from the governor to the legislative assembly, the policy was to assist the Mi'kmaq in becoming self-sufficient and not to rely on government for food and supplies.

[221] The Mi'kmaq who migrated into the cities could not provide for themselves and they had to receive government aid. By the 1850s many of the Nova Scotia Mi'kmaq were suffering from poverty which required the legislature to further allocate funds to purchase supplies for these Mi'kmaq people.

[222] The cost of supplying funds for Mi'kmaq needs was a serious political problem with constant wrangling in the legislature. The potential cost of attempting to "civilize" the Mi'kmaq (to make them more European in outlook, values and education) was significant. Wicken's view was that Nova Scotia could not afford this process. The colony did not have a taxing power and could only raise the money through customs tariffs and the sale of surplus reserve land.

[223] The elimination of this burden was one of the benefits flowing from the creation of the federal power over Indians.

[224] Prior to the Confederation process, Nova Scotia had control over Indians (the Mi'kmaq) and their reserves. The Mi'kmaq included people of mixed ancestry who were treated as Indians. The cost and administrative burden of the Indian population was increasing while the revenue base of the colony (because of new British trade policy) was about to decline.

(b) *New Brunswick*

[225] The situation in the New Brunswick colony was much like that of Nova Scotia although the native groups were the Maliseet and Passamaquoddy. New Brunswick had been part of Nova Scotia until 1784.

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[226] Upon the creation of New Brunswick, the same Nova Scotia policies and approach to native issues was assumed by the New Brunswick government and that government was economically in much the same situation as Nova Scotia.

(c) *Prince Edward Island*

[227] Not much is known about the Mi'kmaq on Prince Edward Island (at least according to the experts who testified) but they were there at the time of Confederation.

[228] Three reserves were established on Prince Edward Island by private action – none had been established by government. These private reserves were ultimately taken over by the federal government. The colony's power over Indians was transferred to the federal government under the Terms of Union 1873.

(d) *Newfoundland and Labrador*

[229] Although Newfoundland and Labrador did not become part of Canada until 1949, the experiences in that colony became relevant to later discussions of the breadth of the term "Métis" and the use of s 91(24) power.

[230] The indigenous people on the Island of Newfoundland, the Beothuk, became extinct before the British colonial regime could establish any relations with them. Although other native groups such as the Mi'kmaq, Montagnais and Montagnais-Naskapi peoples were on the Island after the late 1700s, they were nothing but trading relations with the British.

[231] In Labrador, as found by Justice Fowler in *Labrador Métis Nation v Newfoundland (Minister of Transportation and Works)*, 2006 NLTD 119, [2006] 4 CNLR 94 [*Labrador Métis Nation*], there was a mixing of Europeans and Inuit along the coast resulting in the present day Labrador Métis.

[232] The Labrador Métis did not occupy a single fixed community because they followed a migratory life-style dictated by the seasonal presence of animals, fish and plant life. Because their life was also driven by the pursuit of fishing, these Métis had a regional identification of settlement much like that of the Métis in the Upper Great Lakes area (see *Powley*, above, at para 25).

(2) Quebec/Ontario (Upper/Lower Canada)

[233] Both parties in their Memoranda of Fact and Law relied on Wicken's evidence with respect to general facts covering the period and this area from approximately the Royal Proclamation of 1763 to Confederation, most of which is well-known in Canadian history.

[234] The Royal Proclamation of 1763 provided for, among other things, government in Quebec. The *Quebec Act of 1774*, 14 Geo 3, c 83 (UK) (legislation of the British Parliament) created the Quebec colony which encompassed much of what is now southern Ontario as well as southern Quebec.

[235] In 1774 and continuing towards the end of the century, the Quebec colony had colonial rule but no elected assembly. The *Constitution Act of 1791*, 31 Geo 3, c 31 (UK), divided Quebec generally along the Ottawa River into two provinces to become Upper and Lower Canada. That legislation provided for an elected assembly for each of Upper and Lower Canada with a governor general and an executive council but not responsible government.

[236] During this period the elected assemblies of the two colonies were in constant conflict with their executive councils. This led to the armed rebellion of 1837 which resulted in Lord Durham's report recommending the union of Upper and Lower Canada into one colony, the United Province of Canada with one assembly but two separate legislative councils. The *Union Act of 1840* (*An Act to Re-unite the Provinces of Upper and Lower Canada, and for the Government of Canada,* 3 & 4 Vict, c 35) put this scheme into effect as of 1841 with an elected assembly of an equal number of representations from Upper and Lower Canada.

[237] In what is now British Columbia, there were two colonies; Vancouver Island created by imperial statute in 1849 and New Caledonia created by imperial statute in 1858. Both these colonies were then amalgamated in 1866.

[238] By 1867 there were, in British North America, independent colonies in British Columbia, Upper and Lower Canada (the United Province), New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland, each with their own experience in dealing with natives.

[239] Each colony had at least one piece of legislation dealing with natives.

[240] In what is now known as the Quebec-Windsor corridor, by the mid 1860s, there had been a long period of settlement and interaction between natives and European settlers. As a result, several reserves had been established in the area and there was extensive intermarriage between native and non-native people. The extent of the intermarriage was such that there were few “pure blood” natives left.

[241] Many of the natives engaged in farming on reserve land. They owned or had a right to own a plot of land often 25-30 acres in size.

[242] These natives were integrated into the wage labour economy around them and often beyond just the local area. They might move off the reserve at certain times of the year to fish and hunt but always returned to the reserves.

[243] It was the expert opinion that the Framers of Confederation from the United Province (in particular Sir John A Macdonald [Macdonald]) would have had extensive knowledge of the native people in the Quebec-Windsor corridor grounded in a long period of contact which preceded 1763 and as a result of extensive governmental interaction with the natives after 1763. These Framers had access to fairly detailed documents including six commission reports on native matters by various governmental bodies between 1828 and 1859 to which reference will be made later.

[244] In the area outside the Quebec-Windsor corridor, in the area from Lake Simcoe to Sault Ste Marie, the principal native people were Anishinabe. As one moved northward into the Canadian shield, the land is less sustainable for agriculture and the Anishinabe people spent part of the year on the reserves and part off the reserve hunting and fishing.

[245] The reserves in this particular area were established between 1830 and 1850 as a result of the Royal Proclamation and treaty surrenders.

[246] North of this area through to the north shore of Lake Superior is the area covered by the Robinson-Huron and Robinson-Superior treaties signed in 1850.

[247] Again, the principal people are the Anishinabe who, with the exception of Manitoulin Island, did not live on reserves.

[248] Further north into what is known today as Northern Ontario and Northern Quebec, the land was unsurrendered land which would be transferred after Confederation.

[249] In this more northerly area, the people tended to live in small nucleated settlements during the summer along river systems or lakes and to migrate inland during the winter months in small hunting bands. These native groups may comprise from one family up to five families moving over a specific area.

[250] Particularly pertinent to this litigation, the people of this area included those of mixed ancestry usually between native women and French or English fur traders. These “half-breeds” sometimes lived within the native communities, sometimes not. Most of these half-breeds “wandered” as did other natives.

[251] The Framers (including those who attended the 1864 Charlottetown Conference) would have had limited knowledge of these people and their habits. There was some awareness as a result of the Palliser and Hind expeditions and other reports dealing with the unsettled lands west and north of Upper and Lower Canada.

[252] There is little dispute in the evidence that the Framers expected that these areas would be surrendered by the British Crown after Confederation and would be an area open to settlement, development and expansion where social reform would take place and, consistent with the mores of the time, natives would be “civilized”.

[253] It was Wicken's view that:

> To do all these things, as I said before, they (the Framers) would need … as in Nova Scotia, and other areas of the new Dominion, they would need a broad power to deal with these people.

[254] Therefore, the native situation in Upper and Lower Canada prior to Confederation was multi-layered and complex. The range of activities, lifestyles and composition of the native people was diverse ranging from near urban communities such as Kahnawake (across from Montreal) to the open spaces of northern Quebec and Ontario; from settled agricultural establishments on reserves with housing and religious institutions which mirrored in some ways non-native life to semi-nomadic remote circumstances. These more settled areas had their own unique problems which underlined the need to protect the integrity of reserves and the need for a power to define who could and who could not live on reserves. In these areas encroachment and abuse of natives by Euro-Canadians (many of whom were rogues and scoundrels) was a significant problem.

[255] Two communities, Kahnawake and Six Nations/Grand River were described as representative of the issues in Upper and Lower Canada.

(a) *Kahnawake*

[256] This reserve across the St. Lawrence River from west-end Montreal was granted from the Jesuit Fathers in 1667. Well prior to the Quebec Conference in 1864 a situation evolved with having Euro-Canadian men living on the reserve and marrying Mohawk women.

[257] By the late 1840s/early 1850s, there was a set amount of land in the reserve, the native control over which was jeopardized by "white men" marrying the native women. As the white men

married into the native community, they demanded access to the land and to the political councils within the reserve.

[258] The government response was to amend the legislation to exclude white men from the reserve by defining them in such a way that ensured that they did not have access to this land and therefore could not enter into the councils of the Kahnawake reserve.

(b) *Six Nations/Grand River*

[259] The problem in Six Nations was not marrying into the community but that of white squatters living on the Six Nations reserve, particularly in Tuscarora Township.

[260] The Six Nations council continuously complained to the government who eventually ordered the squatters off the land. In the late 1840s there was violence on the reserve as the government tried to evict the squatters.

(c) *Impact of these Issues*

[261] It was the Plaintiffs' position that these and other similar issues and complaints would have impressed on the Framers from Upper and Lower Canada that it was necessary to protect the reserves by means of a statute and that they needed a power so that they could define who could and who could not live on a reserve.

[262] It was Wicken's opinion that those seeking a power in relation to "Indians" would have had in mind that within that power there would be authority over relocation, settlement, assistance, education, economic reform, social reform and "civilization".

[263] Wicken also referred to other documents such as the writings of Father Marcoux, a missionary among the Kahnawake Mohawks, who wrote in respect of half-breeds and "Indians":

> … 'there is no difference, their education, which is exactly the same, gives them the same ideas, the same prejudices, and the same character, because they all speak the same tongue.'

Marcoux added that both half-breeds and "Indians" were treated exactly the same before the law and had the same rights.

[264] The half-breeds and "Indians" had the common Mohawk language, the kinship due to extensive intermarriage, cultural ties through such things as hunting, religion (Roman Catholicism) and longhouse tradition.

[265] It was Wicken's opinion that prior to Confederation the term "Indian" was understood, at least by the Framers, to include half-breeds. In coming to that conclusion, in addition to the matters referred to in the preceding paragraphs, Wicken relied on the pre-Confederation Indian statutes or statutes in relation to Indians because " … the law in this sense is a reflection of the social reality or deals with problems which legislatures see as existing within society".

[266] In von Gernet's opinion, because of the diverse population of people with mixed blood ancestry, the Framers had little interest in half-breeds who lived as "whites". It was, in summary, his

view that while “Indians” included people of mixed blood, not all people of mixed blood were understood to be “Indians”.

[267] Wicken’s counter to this proposition was that those of mixed blood were often distinguishable by visual markers such as darker hair or darker complexion. A further problem was that while many half-breeds did not want to be identified as “Indians”, they could not overcome the racial stereotyping which existed among “whites”, particularly those in positions of authority. Such people were marked as “Indian” because of their ties to natives and ancestry whatever their mode of living may have been.

(3) Pre-Confederation Statutes

[268] Between 1842 and 1867, the British North America colonies passed various statutes relating to Indians. British Columbia had six pieces of legislation; Lower Canada had three; Upper Canada had six; Nova Scotia had nine; New Brunswick had two; Prince Edward Island had one and the Province of Canada had seventeen.

[269] There was no definition of Indian in many of the statutes; many were highly situational. However, examples of the statutes show that legislators were attempting to deal with pure blood and mixed blood people, “marrying-in/marrying-out” issues, and off and on reserve situations. To that extent these issues continue to the present day.

[270] Regarding the 1850 statute, *An Act for the better Protection of the Lands and Property of the Indians in Lower Canada*, 13 & 14 Vict, c 42, Wicken was asked (as an historian) whether under

this statute one had to be pure blood to be defined as an Indian. It was his understanding that one did not and that that conclusion "reflects what we have seen in the other historical documents before this time period".

[271] Section V of that statute provided that "Indians" includes all persons intermarried with any such Indians and residing amongst them and their descendants. More specifically, it stated:

> All persons residing among such Indians, whose parents on either side were or are Indians of such Body or Tribe or entitled to be considered as such;

would be "Indians".

[272] For Wicken, this statute and others, as well as writings and documents of the era, establish that "Indians" included half-breeds and that one did not have to live on a reserve or in an Indian community to be an "Indian".

[273] Wicken, on the basis of this understanding, concluded that the Framers would have intended the word "Indian" in the constitution and the power which went with it, to be a broad power to be able to deal with the diversity and complexity of the native population whatever their percentage mix of blood relationship, their economies, residency or culture.

[274] Both von Gernet and Patterson dispute this understanding and conclusion holding that the Framers would have had no interest in dealing with half-breeds who were not acknowledged as members of a band or who lived as "whites". These half-breeds, von Gernet said, would not be viewed as deserving of the advantages afforded to disadvantaged Indians.

[275] It was Jones' view that the Indian legislation of the 1850s appeared to offer maximum scope for administrative flexibility where Indians were to include intermarried or mixed blood persons who lived as members of a tribe or band and on the reserves of those tribes or bands. However, because so much of "Indian" relations were policy driven, the Framers wanted and needed a broad power to ensure maximum flexibility.

[276] In the Lower Canada statute – *An Act to repeal in part and to amend an Act, intituled , An Act for the better protection of the Lands and property of the Indians in Lower Canada*, 14 & 15 Vict, c 59 (August 30, 1851), - the colonial government addressed a problem (one which continued into the current era) of "marrying-in". The problem at issue was white men intermarrying Mohawk women and gaining access to land and political councils (discussed in paragraph 257 in relation to Kahnawake).

[277] The amendment to the legislation was that women marrying-in are Indians, but men marrying-in are not. And further, the children from the non-native women marrying-in, and their descendants, are Indian. Therefore, these half-breeds were referred to as Indians. There was no requirement for the half-breeds nor for their descendants that they live on a reserve to still be defined as Indians.

[278] It is generally accepted by the experts that in this period of the 1850s, government policy was also moving in the direction of assimilation, civilization and enfranchisement. It was a phenomenon of Indian policy then and well into the 20th century that governments moved from this

policy of inclusion (on European society terms) to exclusion (sometimes to foster the unique lifestyle of native population) and sometimes oscillating between the two ends of the spectrum.

[279] A particular example of this inclusion policy is Macdonald's own statute of June 10, 1857, drafted by him – *An Act to encourage the gradual Civilization of Indian Tribes in this Province, and to amend the Laws respecting Indians, 20 Vict, c 26*. This statute applied to what was then known as Canada East and Canada West.

[280] The purpose of the statute was to enact the policy of the Indian department of the United Province of Canada to reform natives so that they would adopt ideas about private property, correct moral behaviour and would learn to farm properly and otherwise engage in the commercial markets.

[281] The importance of this statute and the policy behind it was that it gave authority over such elements as relocation, settlement, assistance, education, economic and social reform. Arguably the scope of these powers would be what was envisaged by Macdonald and others in creating the federal power over Indians.

[282] Within the statute, a half-breed could be defined as an Indian and could live off reserve or in an Indian community and retain that status.

[283] In the 1859 *An Act respecting Civilization and Enfranchisement of certain Indians*, 22 Vict, c 9, the government enacted a consolidated statute. It provided that a) mixed blood persons could be "Indians", and b) such a person did not have to live on reserve or in an Indian community.

[284] The six Indian statutes in the Province of Canada passed between 1850 to 1861 were highly situational and at times reflected the differences between Upper and Lower Canada. These statutes covered a multitude of issues from receipt of annuities, shares in reserve land, protection from debt collection to liquor sales and prohibitions.

[285] Any definition of "Indian" was established to suit the purpose of the statute. For example, the requirement to live on reserve was important for the *An Act respecting Indians and Indian Lands*, CSLC 1860, c 14, ss 10-11, which protected "Indian" property on reserve from seizure for debt collection by white merchants. Other statutes had no such residency requirement.

[286] Under the Nova Scotia statute, *1859 Act Respecting Indians*, such items as clothing or blankets could be distributed to "Indians" regardless of whether they were of mixed ancestry, lived on or off reserve or integrated into Indian communities.

[287] By the time of the Confederation Debates starting in 1864, the statutory landscape of "Indian" legislation was that those of mixed ancestry were recognized as "Indians"; those of more direct mixed ancestry (half-breeds) were also considered "Indians" for most purposes; that residency on reserve was not necessarily a prerequisite to recognition as an "Indian". The elements of subjective and objective identification which have been more fully developed in recent case law, was a sub-text of the legislative and societal view of who was an "Indian".

(4) Pre-Confederation Reports re "Indians"

[288] At the time of the Confederation discussions, the Framers had available to them a number of reports regarding the situation with respect to Indians in what became Canada. At least some of these people had knowledge of the Indian situation, i.e. Macdonald was responsible for Indian matters in Upper Canada.

[289] The early reports, such as that of Major General Darling of 1827-28 identified the tribes of Upper and Lower Canada. In 1829 colonial Indian Affairs moved from military aspects to civil administration under which a chief superintendent was to watch over the interests of all Indian tribes.

[290] By 1845 the focus started to centre on the composition of such tribes. The Bagot Commission was established in 1845 in the Province of Canada to inquire into the application of the annual grants. Resident Superintendents (Indian Affairs Officers) provided answers to a variety of questions. One aspect of that report is the extent of intermarriage and therefore the extent of mixed ancestry within tribes. There are significant amounts of mixed ancestry in most of the tribes.

[291] The reports of Father Marcoux, the missionary at Kahnawake (then spelt Caughnawaga) to the question "Amongst the Indians under your superintendence what is the proportion of half-breeds" is representative:

> If by the word *Métis* you mean those who are half or less than half Indian, they are very numerous. At Sault St. Louis you would not perhaps find ten pure Indians. The annual Presents have a few years ago been unjustly taken from some of those half-breeds, while they have been given to others who have less Indian blood and in other villages no distinction is made …

[292] In 1858 the Pennefather Commission was established to address the best means of securing the future progress and civilization of the tribes, and managing Indian property for the benefit of Indians without impeding settlement of the country. The results in the Pennefather Report 1858 was similar to that of Darling with respect to those of mixed blood living with Indian tribes. Pennefather noted that in Lower Canada the Indians were of mixed descent (Euro-Canadian and native) who continued their work as Canoemen and Voyageurs of the HBC or as raftmen and pilots on the St. Lawrence. Mixed descent was so prevalent that Pennefather observed "… as scarcely to reckon a single full blooded individual among their number …".

[293] Palliser was sent to gather information about the environment, the value of land and resources and the feasibility of constructing a railway between Canada and the northwest. He concluded that there were no obstacles to the construction of a railway from the Red River to the eastern base of the Rockies.

[294] The Palliser Report divided the inhabitants of the northwest into Indians, Esquimeau, whites and half-breeds. Whites were described as mostly Orkney and Scots settlers and their descendants at the Red River Settlement and half-breeds as offspring of whites and natives as well as their descendants.

[295] The Palliser Report and another, the Hind Report of the same era, also on the matter of building a railway, showed the variety of the inhabitants of the northwest and the diverse mix of people with Indian ancestry.

[296] In the 1850s it was well-known that the lease to the Hudson Bay Company [HBC] of that vast territory in the northwest and north (the bulk of present day Canada) was about to expire and that it would not be renewed. The British Parliament established a Select Committee to report on the HBC to the House.

[297] The Select Committee Report has already played a significant role in Canadian constitution law. That Report was one of the principal documents referred to in the Supreme Court of Canada decision in *In Re Eskimo Reference*, above (the Eskimo Reference case discussed more fully later). Both Wicken and von Gernet had their own views on what the Supreme Court of Canada did or did not do. This area of debate is more properly one for the courts to deal with. The Court opined that Eskimos (more properly the Inuit) are "Indians" under s 91(24) of the Constitution.

[298] The census information in the Select Committee Report referred to by the Supreme Court of Canada judgment included the following comment:

> "The estimates referred to are headed "Establishments of the Hudson's Bay Company in 1856 and number of Indians frequenting them." After a long list of the names of the posts and localities and of the number of Indians frequenting each post is appended the following:
>
> | | |
> |---|---|
> | Add Whites and half breeds in Hudson's Bay Territory, not included ..... | 6,000 |
> | Add Esquimaux not enumerated ..... | 4,000 |
> | Total ..... | 158,960 |
>
> ---
>
> The Indian Races shown in detail in the foregoing Census may be classified as follows:--

Thickwood Indians on the east side of the Rocky mountains	35,000
The Plain Tribes (Blackfeet, &c)	25,000
The Esquimaux	4,000
Indians settled in Canada	3,000
Indian in British Oregon and on the Northwest Coast	80,000
Total Indians	147,000
Whites and half-breeds in Hudson's Bay Territory	11,000
Souls	158,000"

[299] This census data has led to the argument that half-breeds were not considered Indians because they are not listed under "Indian Races".

[300] In addition to the census date, the Report also contained a narrative of the problems with half-breeds at the Red River Settlement – problems which the new government of Canada would face as it expanded west:

> *Half-breeds.* Difficulty in governing half-breeds, as at Red River, *Ross* 129-131 --- Reluctance of the English half-breeds to settle, *Rae* 655-659 --- Doubt as to there being any difficulty in governing the English half-breeds, *ib.* 660, 661--The half-breed population is in some places largely increasing, *ib.* 662.
>
> There are about 4,000 half-breeds at Red River, *Sir G. Simpson* 1681, 1682 --- The increased instruction of the half-breeds has not created any increased desire on their part for a free trade in furs, *ib.* 1686-1694.
>
> Dissatisfaction among some of the half-castes at Red River on account of the monopoly of the fur trade, *Sir J. Richardson* 2942, 3128 --- Discontented state of the half-breeds at Red River, because they were not allowed to distil spirits from their own corn, or to traffic in furs, *Crofton* 3232-3246.
>
> Progressive social and intellectual development of the half-castes at Red River, *Right Rev. Dr. Anderson* 4383. 4421-4429 ---

> Dependence to be placed in the half-castes as settlers, *ib.* 4384, 4416, 4425.
>
> Explanation as to a claim made by the half-breeds upon the Hudson's Bay Company in consequence of their having been prohibited by the Americans from hunting buffalo south of the 49th parallel, *McLaughlin* 4903-4907 --- Neither physically nor intellectually are the half-breeds at Red River inferior to the Whites, *ib.* 4992-4996 --- High position of the American half-breeds at St. Peter's, *ib.* 4997-4999.
>
> Large proportion of half-breeds in the Red River Settlement, *Caldwell* 5363 --- Troublesome conduct of the half-breeds when witness arrived at Red River some years ago; they require a stringent mode of government, *ib.* 5364, 5372 --- Means of livelihood of the half-breeds, *Caldwell* 5365-5368 --- Good social position of some of the half-breeds *ib.* 5573, 5574.

[301] The census report confirmed the diversity of the Métis "half-breeds", both at the Red River Settlement and elsewhere on the Prairies, and the restrictions on their conduct similar to that imposed on natives (i.e. liquor) by the HBC.

(5) Pre-Confederation Treaties

[302] One of the powers and obligations which the new federal government would take over from the British Crown was treaty-making and treaty responsibilities. Prior to Confederation, there was a significant history of treaty relationships with the natives. The treaties were not "one size fits all" but served different purposes at different times and therefore each had their own scope, provisions and characteristics.

[303] The treaties in Nova Scotia established between 1725 and 1779 were entered into between the British government and the Mi'kmaq and Maliseet. These "Peace and Friendship" treaties were very different from the later numbered treaties of Western Canada. In particular, the Peace and

Friendship treaties were not treaties of cession, did not provide for annuities nor for the provision of gifts. Further, they did not contain the element of wardship found in later treaties. These treaties were a set of reciprocal obligations, based on acceptance of British law and sovereignty and designed to regulate interactions with settlers.

[304] For purposes of this case, one important feature of treaty negotiations was that those natives of mixed ancestry were not excluded; indeed some played a leadership role in the operation of the treaties. As some of the experts on each side agreed, leaders such as Paul Laurent and several Chiefs who signed the Robinson Treaties were of mixed ancestry. Chief Simon Kerr of the Six Nations was a "quarter blood".

[305] In the early 19th century Britain and the natives of Upper Canada signed various treaties of surrender whereby the native group surrendered land and Britain provided a one-time cash payment. These treaties did not contain the features of annuities or wardship.

[306] In 1850 William Robinson negotiated two treaties in the Upper Great Lakes region; the Robinson-Huron Treaty and the Robinson-Superior Treaty. The importance of these treaties, beside their particular importance to the regions and its people, is that these treaties were the model for the post-Confederation numbered treaties in Western Canada. As Jones outlined in her evidence, these treaties featured annuity payments in perpetuity, recognition of a perpetual ongoing relationship between the Crown and treaty signatories and the inclusion of hunting and fishing rights.

[307] The spark for the Robinson treaties was the Mica Bay conflict of 1849 in which half-breeds and pure blood natives acted against a mining venture that they considered was threatening their lands. There was a perceived need to control the pure bloods and half-breeds as a group because they could act collectively.

[308] I accept Wicken's conclusion that this Mica Bay event would have caused those Framers who knew of it to want a constitutional power to control circumstances that could lead to this type of conflict. Specifically, as Wicken found, there were close cultural, linguistic and social ties between those known as half-breeds and pure bloods in the Lake Huron and Lake Superior region.

[309] As a result of these ties, there was an issue as to the extent to which the half-breeds had any claim to a share in remuneration under treaty. In the report of the surveyors Vidal and Anderson who were sent to enumerate the native population, they described the matter as "determining how far half-breeds are to be regarded as having a claim to share in the remuneration awarded to Indians as they can scarcely be altogether excluded without injustice to some". In a similar vein, John Sivansten, head of the HBC post at Michipicoten (and himself a half-breed) claimed that some half-breeds had a better claim to Treaty than some of the Indians.

[310] As outlined in Jones' evidence, Robinson knew of these claims. He spoke Ojibway and knew the area. In 1850 when pressed by some Chiefs to include the half-breeds in treaties, he left the matter for the Chiefs to determine.

> 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 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.

[311] Robinson counted half-breeds in the population subject to the treaties for purposes of calculating overall annuities owed. When, at a later date, the overall annuities were converted to individual annuities, the half-breeds continued to be paid and were enumerated separately for that purpose.

[312] The half-breeds of the Great Lakes included the Métis at Sault Ste. Marie considered by the Supreme Court of Canada in *Powley*, above.

[313] The evidence in that case was that while these Métis had a separate identity, they had close ties with the "Indians" of the North Shore. Some Métis "took treaty" and lived on the Batchewana and Garden River Reserves. At Garden River, the Métis occupied a separate part of the reserve known as "Frenchtown" indicating that they maintained their separate identity after taking treaty.

[314] Other Métis did not take treaty and were members of the historic Métis community that was found to have s 35 rights in *Powley*, above.

[315] There was no evidence that those who took treaty were required to demonstrate that they lived with "Indians", were members of "Indian" tribes, or followed an "Indian" way of life.

[316] The feature of Métis opting in to treaty or not became a very important post-Confederation feature in the new province of Manitoba and the use of the "scrip" system. The scrip system, as

described earlier, was used to purchase or extinguish any "Indian title or claim" held by individual Métis. It began to be used in Manitoba in 1870, in the NorthWest in the 1880s and in the areas of Treaties 8 and 10. It was used up until the 1920s. The issue of whether Métis, particularly in and around the Red River Settlement, had "Indian title" is and has been a hotly debated matter; as discussed later in these Reasons.

[317] I accept the Plaintiffs' evidence and argument that this pre-Confederation treaty experience would suggest that Canada, when taking over the British power over Indian Affairs, would need to be able to (and intended to) address at least:

- the establishment and maintenance of peaceful relations with natives of all different varieties;
- the payment of one-time cash amounts for the surrender of native interests in land;
- the payment of ongoing annuities;
- the creation and acceptance of surrenders of reserve;
- the recognition, pacification, control and dealing with interest in land of Métis who were seen as distinct in some respects from "Indians", who did not live with Indians, who were not necessarily members of Indian tribes or who not necessarily followed an "Indian" way of life.

[318] This experience and recognized need speaks to the requirement for and understanding that the s 91(24) power had to be sufficiently broad that the federal government could address a wide range of situations, in a wide range of ways covering a diverse composition of native people.

(6) Synopsis: Indian Power Pre-Confederation

[319] Wicken and von Gernet have a fundamental disagreement as to the understanding of the term "Indian" generally and particularly by those engaged in the Confederation process.

Wicken concludes that the great variety of people with mixed blood and the variety of lifestyles of all people with Indian blood lead to an understanding that "Indian" was and should for constitutional purposes be a broad term.

Von Gernet finds in this variety the very reason why there was no such understanding and that half-breeds, particularly those that lived like "Euro-Canadians", were of no interest to governments as "Indians". Von Gernet tied "Indianness" to living with and being part of a tribe.

[320] Jones is of the same general opinion as Wicken in part based on the fact that people of some native Indian blood were included in treaties and the distributions related thereto. Her opinion was that there was a general understanding that "Indian" included those with native blood and those intermarried with natives.

[321] These Plaintiffs' experts appear to agree that the term "Indian" also had to be understood in policy terms. The particular statutory definition could change from time to time depending on the policy objectives of the legislation.

[322] These same experts also accept that the Framers were creating a constitutional power which would be different from a statutory power: the power to make laws regarding "Indians" being broader than the statutory definition of "Indian".

[323] Given the history outlined and for reasons given earlier for generally preferring the Plaintiffs' experts, Wicken's opinion as to the understanding of what type of power the Indian power need be is accepted. The latter point concerning whether a constitutional power is necessarily broader than a statutory definition is a matter of law for the courts to decide but in this case, it is an accurate reflection of the law.

B. Confederation

(1) Genesis

[324] The general story of Confederation is so well-known in Canada that the courts can take judicial notice of most of the historical facts. In addition, the following description of events is supported by all experts' evidence in this case. The point of departure in the expert evidence is the significance to be attributed to events, statements and documents.

[325] In the late 1850s into the early 1860s, the colonies of Canada, Nova Scotia and New Brunswick had acquired considerable debt from railroad construction and the pooling of the debt was thought that it might provide some relief.

[326] Britain was pulling away from its colonial commitments, attempting to reduce its colonial expenditure, and maintain the trade advantages with the colonies while increasing its trade with Europe including the use of Baltic states for raw materials.

[327] The Province of Canada, particularly Upper Canada, had become a politically dysfunctional legislature. Broadening the political components was thought, certainly by Macdonald, to be a way out of this political mess.

[328] By 1864 the U.S. had the largest standing army in the world, had just finished a civil war and elements in the U.S. intended not only to settle their western areas more fully but considered expansion or annexation of the western parts of British North America to be a viable political and economic goal.

[329] The Maritime area was driven by concerns that the colonial preferential tariff on goods to Britain was declining, that the Reciprocal Treaty with the U.S. was to end, and the loss of populace from the region. Representatives of Nova Scotia, New Brunswick and Prince Edward Island planned to meet in Charlottetown in September 1864 to discuss Maritime Union (Charlottetown Conference).

[330] As a result of political turmoil in the Province of Canada, representatives of Canada requested an opportunity to join the Conference. Newfoundland could not attend.

[331] Of the 24 delegates to the Charlottetown Conference many became important Confederation figures – Tilley, Pope, Macdonald, Cartier, Galt, Langevin and Tupper. The principal result of the Conference was the decision to have a federal union rather than a legislative union.

[332] There is no documentary evidence of any reference at the Charlottetown Conference to Indians or Indian territory/land, despite the development of a comprehensive list of the powers to be divided as between the "Federal Legislature" and the "local legislature". An interesting side note is that naturalization was to be federal but immigration was to be local.

[333] A month later in October 1864, thirty-three delegates (from Canada, New Brunswick, Nova Scotia and Prince Edward Island) gathered in Quebec (Quebec Conference 1864) to move the process of confederation forward. The Quebec Conference developed 72 Resolutions which were turned into the *British North America Act* – the present *Constitution Act, 1867*.

[334] Again, without any recorded discussion or documentation, the power over "Indians and Lands reserved for the Indians" was included in relation to which the "General Parliament" had the power to make laws.

[335] At the London Conference in November 1866, the 16 delegates representing the Canadas, Nova Scotia and New Brunswick met with British officials to draft the *British North America Act 1867* based upon the 72 Resolutions.

[336] A startling feature of the "Indian power" is that there was no discussion of the power, of the need to control Indians or of what constituted Indians. In the period 1858 to 1867 when there is a record of discussions by delegates to the Confederation Conference about the range of topics from political deadlock, to education, religion, local autonomy, fear of U.S. annexation and expansion

into the north-west (northern Ontario to Alberta), there is not one reference to "Indians" or the issue of what level of government should be responsible or who was to be included in this power.

[337] Unlike so much of federal-provincial relations, the power over Indians was not one that was fought over or bargained over between governments. That was the case in 1864 and is the case now.

[338] This has led to the conclusion that the Indian power was not an important power, critical to the purposes of Confederation. That conclusion is countered by the proposition that given the purposes of Confederation, the power over Indians was so clearly necessary for the federal government that there was no need for discussion. Given the history of Confederation and subsequent events, this latter conclusion is the more reasonable one particularly given the legal requirement to look at the purposes of legislation in construing its provisions.

(2) Objects and Purposes of Confederation

[339] The Supreme Court of Canada has concluded that a (not "the") dominant intention of the creation of the *British North America Act, 1867* was the establishment of a new political nationality and its counterpart, the creation of a national economy.

> **34** 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 an 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.

Black v Law Society (Alberta), [1989] 1 SCR 591, 58 DLR (4th) 317

[340] Consistent with the Supreme Court of Canada's conclusion, Wicken confirmed that from an historical perspective, the objects of Confederation were expansion, settlement, building a railway and development of a national economy. These objects can be divined from the text of the *British North America Act, 1867* itself.

[341] In Wicken's opinion, which I accept, the purposes of Confederation relevant to this case are:

- The expansion of British North America into the Northwest and towards British Columbia in response to the pre-Confederation economic and political crisis.
- The eventual absorption of the Northwest and British Columbia into Confederation.
- Integration of the Atlantic colonies (Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland) with Central Canada. The intent to absorb Newfoundland, Prince Edward Island and British Columbia as well as Rupert's Land and the Northwest Territories is seen in s 146 of the *British North America Act 1867*. Section 147 shows advanced plans for including Newfoundland and Prince Edward Island in the Union.

- To settle the Northwest with farms which would become a new market for Central Canada manufacturing.
- The maintenance in the East of the current population and the prevention of out-migration.
- The settlement of British Columbia particularly Vancouver Island and the Lower Mainland.
- The building of a transcontinental railway which was essential to creating a national economy and to settle the unsettled areas particularly the Northwest.

[342] According to Wicken, the intercontinental railway was central and integral to the Framers' intentions at Confederation. In that regard:

- Joseph Howe saw the importance of the railway but more so in terms of permitting Nova Scotia to tap into the market in Central Canada.
- Palliser had opined on the feasibility of constructing a railway from the Red River to the eastern base of the Rocky Mountains.
- Section 145 of the *British North America Act 1867* created a duty on the federal government to provide a railway linking the Province of Canada with Nova Scotia.
- The British Columbia Terms of Union s 11 provided that the Government of the Dominion would build a railway from the Pacific through the Rockies connecting British Columbia to Central Canada.
- The Prince Edward Island Terms of Union required the federal government to maintain a steamship service linking Prince Edward Island to the intercontinental railway.

- The Framers intended to expand the economy which included expanding settlement throughout the country.
- The expansion of the economy was to be accomplished through uniting the East and West through a railway, expanding agricultural settlement and developing the manufacturing industry in the urban areas which would lessen the dependency on U.S. goods.

[343] This expansionist view of Confederation was attributed to Macdonald. In that respect he had the support of Cartier, Brown, Galt, McGee and others.

[344] Patterson criticizes Wicken and this perspective on Confederation citing the fact that many Atlantic Canada leaders did not share this view.

[345] I conclude that Patterson's narrow and local perspective does not accord with the better evidence supporting the expansionist view of Confederation and the critical role Macdonald played in formulating it, drafting it and implementing it. Most importantly, the better view is supported by the terms of the *British North America Act, 1867* and the historical context of a nation being built including the absorption of Rupert's Land and the obligations toward natives inherent in that transfer.

[346] The Defendants accept that at Confederation the Framers had experience in dealing with "Indians"; the colonies had a long history of legislation and policies in this area. Macdonald was at the time Attorney General for Canada West; George Étienne Cartier [Cartier] for Canada East.

William MacDougall, another Framer, had been the Commissioner of Crown Lands and Chief Superintendent of Indian Affairs for Canada West and had negotiated the Manitoulin Island Treaty of 1862. Langevin was Solicitor General of the Province of Canada and later Secretary of State and Superintendent General of Indian Affairs.

[347] The Defendants also accept that the Framers would have known that Indians were located in the Province of Canada, that they included persons intermarried with them and who were accepted as members of the band.

[348] The Framers did not specifically acknowledge that there were those of mixed blood and their descendants but given the evidence that fact can hardly be denied.

[349] The Framers also knew of "Indians" outside the Dominion and that Rupert's Land and the Northwest Territories were about to become part of the Dominion.

[350] The Defendants accept that the assignment of Indians and Lands Reserved for the Indian to the federal government would be viewed as facilitating the management of Indian Affairs in the new territories and would promote uniformity in the administration of Indian Affairs throughout Canada.

[351] However, the Defendants do not accept, but the Court does, the expert opinion evidence that:

- in the Northwest in particular, a large nomadic native population potentially stood in the way of expansion, settlement and railway construction.
- the relationship between the objects of Confederation in terms of settlement and expansion and the native people was critical to Confederation.
- the idea of railway construction and federal responsibility for "Indians" are interconnected.
- the Framers needed to be able to reconcile native people to the building of the railway and other measures which the federal government would have to take.
- maintaining peaceful relations with the "Indians" would protect the railway from attack.
- natives needed to be reconciled with the expansion westward to ensure the larger development of the nation.
- lands occupied by natives would have to be surrendered in some fashion.

[352] This leads to the purposes of s 91(24) at least from an historical perspective. The Defendants put forward no opinion evidence on the purpose of the provision as that was not within their experts' mandate.

[353] The Plaintiffs' two principal experts put forward slightly different but complementing summaries of the purpose of the provision.

(a) Wicken concluded that the purpose was:

- to control native people and communities where necessary to facilitate development of the Dominion.

- to honour the obligations to natives that the Dominion inherited from Britain while extinguishing interests that stood in the way of the objects of Confederation.
- eventually to civilize and assimilate native people.

(b) Jones, who has also recognized the government's goal of "civilize and assimilate", summarized the purpose of s 91(24) as:

> This power was integral to the central government's plan to develop and settle lands in 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 1857. These included the recognition of Aboriginal title in the "Indian territories" and protocols recognizing the relationship between Aboriginal nations and the Crown. Canada also inherited a British policy of "civilization" of the Indians, in place since 1830s.

[354] I accept these experts' opinion on the purposes of s 91(24) from the viewpoint of those creating the power. The opinion is consistent with the evidence relied on both prior to and subsequent to 1867. The post-Confederation period and the manner of dealings between natives and the federal government provide insight into the meaning and scope of the power, absent any 1867 contemporaneous documents of discussion.

C. Post-Confederation

(1) Rupert's Land

[355] It was well-known at the time of Confederation that the new Dominion would take over Rupert's Land. On December 16 and 17, 1867, in a joint address of the House of Commons and the

Senate to the Queen requesting an Order-in-Council authorizing the transfer of Rupert's Land to Canada, a reference to "Indians" was made as follows:

> And furthermore, that upon transference of the territories in question 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.

[356] The new federal government agreed with the Hudson's Bay Company, on March 22, 1869, to the terms of transfer of Rupert's Land, which agreement included the following:

> 8. It is understood that any claims of 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.

[357] The terms of the transfer were incorporated into the Rupert's Land and North Western Territory Order dated June 23, 1870 and the lands covered by the Order were transferred to Canada as of July 15, 1870.

[358] The Rupert's Land and North Western Territory Order forms part of the Constitution of Canada. Section 8 of the agreement referred to in these Reasons at paragraph 356 appears as s 14 of the Rupert's Land and North Western Territory Order. The Joint Alliance of December 1867 referred to in paragraph 355 is an appendix to that Order.

[359] I accept Ms. Jones' explanation of the historical context of these undertakings that it was critical to the new Canada to create an environment of safety and security for the settlers. A part of

creating that environment was extinguishing Indian claims. Canada needed possession of those lands for the construction of the transcontinental railway but also for the general national settlement and development of the west.

(2) Post-Confederation Statutes - 1867-1870

[360] In the absence of Confederation debate evidence as to the scope of the Indian power, the early post-Confederation statutes give some indication of the intent of the power and its scope.

[361] The first federal statute after Confederation relating to "Indians" was the *1868 Secretary of State Act* (*An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordinance Lands*, 31 Vic 2, c 42) which reorganized Indian Affairs and placed it under the control of the Secretary of State.

[362] The Act contained a definition of "Indians" at s 15:

> 15. 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 classes of persons, and none other, shall be considered as Indians belonging to the tribe, band or body of Indians interested in any 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.

[363] From an historical perspective Wicken testified that the Act included as "Indians" both half-breeds and those people living off reserve.

[364] While the actual meaning of the statute is a matter of law, I concur with Wicken as to this aspect of the definition.

[365] The *Secretary of State Act* was followed in 1869 by the unwieldy named *An Act for the gradual enfranchisement of Indians, the better management of Indian Affairs and to extend the provisions of the Act 31st Victoria Chapter 42*, 32-33 Vict, c 6.

[366] This Act had a number of critical components:

(a) it introduced, for the first time in a statute, the "marrying out" rule whereby an Indian woman who married a non-Indian man would lose her status, as would her children. This appears to be in response to the problem of non-Indian squatters.

(b) in respect to the entitlement to annuities, 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 which was sanctioned by the Superintendent.

(c) the provisions for "enfranchisement" of Indians were expanded such that an enfranchised Indian (in summary, a person more closely resembling a member of Euro-Canadian society – such as those natives who became lawyers or church ministers) ceased to be an Indian except as to annuity and other moneys of his tribe,

band or body of Indians to which he belonged. (This is a restricted form of opting out.)

(d) the Act did not contain a definition of Indians but provided that this Act be read together with the *1868 Secretary of State Act*.

[367] In summary, by 1869 there was no comprehensive Indian Act but there was a broad definition of Indian in place under the *Secretary of State Act* except that in 1869 the "marrying out" rule had been formalized but qualified to the extent that those who married out and their descendants could still be "Indians" for the purposes of receiving annuities.

[368] This legislation was not extended to Manitoba until 1874.

(3) Aboriginal Population of the Northwest

[369] While the situation in Eastern Canada regarding natives and the degree of mixed peoples makes the analysis of the issues in this case complex, the situation in the "Northwest" (present day Manitoba, Saskatchewan, Alberta, Northwest Territories, Yukon and parts of northwestern Ontario) is even more so. The mix and variation of the aboriginal people was extensive and showed few, if any, clear dividing lines.

[370] The various situations and events in the Northwest occupied a significant amount of the Plaintiffs' evidence in this case. It is also instructive of the historical understanding of who was an "Indian" at or around the time of Confederation and later, as the situation in the Northwest was dynamic.

[371] Ms Jones laid out in clear terms the nature of the aboriginal population mix and their status – the Métis at the Red River Settlement were not homogenous. Some had small farms that they maintained throughout the year laid out in strips from the riverbank in the same manner as in Quebec along the St. Lawrence River. Others were out hunting buffalo four to eight months of the year while others were engaged in woodland hunting and trapping of small furs.

[372] As Jones said, there was a wide spectrum of pursuits in the Métis population at the Red River Settlement; some had lives that differed little from those that government called Indians and there was a similar spectrum of pursuits by those the government did call Indians – for example, at St. Peters Mission in Manitoba, whether called "Indians" or "Half-Breeds", most were farmers. (This was not unlike the situation on the Six Nations Reserve in southern Ontario where many on the reserve were relatively educated, and most lived by farming.)

[373] In *The Treaties of Canada with Indians of Manitoba and the Northwest Territories* (Alexander Morris, *The Treaties of Canada with Indians of Manitoba and the Northwest Territories* (Toronto: Belfords, Clarke & Co, 1880)), relied on by Jones as accurate history, Morris described three classes of half-breeds of that area in 1876: those with farms and homes, those living with Indians and identifying with them and those who did not farm but lived like Indians by pursuing buffalo.

[374] The description of half-breeds was consistent with the Department of Interior Annual Report for 1876 which described four classes of half-breeds: those that followed the customs and habits of

Indians; those that have not altogether followed the ways of the Indians; those that followed the habits of Euro-Canadians more than Indians; and those that followed the habits of Euro-Canadians and have never been recognized as anything but half-breeds.

[375] The definitional problem for government was well summarized by Jones:

> The 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.

[376] One of the modern difficulties with the evidence of the immediate post-Confederation era was that 19th century values in Canada are racist by modern terms. People were to be neatly divided by race (or religion or language). When it came to aboriginal peoples, the evidence is compelling that there were "whites" and there were the "others" whether called Indians, natives, half-breeds or even less complimentary terms. One was on one side of this divide or the other.

[377] Ms. Jones characterized the purported efforts by some Red River Métis to distinguish themselves from the "uncivilized Indians" as the attempt, in a frontier town of 10,000, to make little distinctions and most importantly motivated by the sense that "the closer you were to being considered white, the higher you were on the social scale".

[378] This racial typology of "pure blood Indians" and "half-breeds" (even terms such as "Red Indians", savages, etc.) reflect concepts of racial identity and bloodlines which has not only been discredited but which history has taught, as with the Nuremberg Laws or apartheid, is repulsive. However, it is necessary to understand that perspective to understand not only the evidence but to assess what constitutional power was being exercised when governments enacted legislation or took

some particular action or established various policies. This was a phenomenon not restricted to the Northwest as Dr. Patterson conceded. There were similar racist attitudes and language used in respect of the Mi'kmaq and other natives in Eastern Canada.

[379] This racial stereotyping and the practices and policies of government, somewhat similar to the U.S. experience with blacks, had the effect that many individuals tried to distance themselves from the stigma of being identified as "Indian".

[380] The dichotomy between Indian/Half-breed and Whites, between civilized and uncivilized/savage was further complicated by the varying degrees of civilized behaviours or ways of life practised by the Indian/Half-breeds. Even Dr. von Gernet acknowledged this variation and accepted a number of specific examples:

(a) 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 some of the Métis of the Red River Settlement.

(b) That same 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.

(c) The Pennefather 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 United States, had stone houses and a school. They bore some of the characteristics of 19th century "civilization".

(d) Pennefather also considered the Hurons of La Jeune Lorette. They were described as all half-breeds, Roman Catholics and had two schools, cultivated gardens and stone houses. They were described as one of the most advanced in civilization in the whole country.

(e) Simcoe Kerr was a lawyer and a Six Nations Grand Chief but clearly considered an Indian.

(f) In a typically 19th century comment, Alexander Ross said that some Métis are respectable in their habits while others are as "improvident as the savages themselves".

(g) Minutes of a meeting of the Governor-in-Council of Assiniboia in 1869 recorded 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".

(h) In sum, the "Half-breed" communities varied significantly along the spectrum of so-called "civilization", as did other aboriginals. To that extent, von Gernet agreed with Wicken's reference to the diversity of the aboriginal population.

[381] The evidence established that the aboriginal population was mixed, varied and interrelated. It was not possible to draw a bright line between half-breeds/Métis and Indians.

[382] There were parallels between the mixtures and varieties of the aboriginal people of the Northwest and those in Eastern Canada. These people lived in a variety of conditions ranging from near Euro-Canadian society to that of their more traditional way of life.

[383] There was a certain and indeed a significant degree of social stigma attached to being "Indian" but Euro-Canadian society seldom accepted even the most "civilized" as part of the general population. The fact of native connection remained as a significant divide between Euro-Canadian and aboriginal people of whatever variety, mixture and combination.

[384] It is, at least in part, against this backdrop, in this social context, that the scope and meaning of the s 91(24) "Indian Power" must be defined. The issue, at least in part, is "did this federal power extend to all of these people in their varied conditions and diverse mixtures?"

(4) The *Manitoba Act 1870*/The Scrip System

[385] The issues surrounding the *Manitoba Act*, its provision for the settlement of Indian title and its relationship to Métis has been the subject of litigation in Manitoba (see *Manitoba Métis Federation*, above). It is not the intent of this decision to impact the Manitoba litigation although it touches on some of the same areas. However, this Court's evidence included evidence not before the Manitoba courts and covered areas of the West beyond that of Manitoba.

[386] Following Confederation, and as anticipated in the *British North America Act*, Canada acquired the Northwest Territories formerly administered by the Hudson's Bay Company. The new legislation – *An Act for the temporary Government of Rupert's Land and the North-Western Territory when united with Canada*, 32-33 Vict, c 3 (1869) – provided for the appointment of a Lieutenant Governor of the now-called Northwest Territories.

[387] When the first Lieutenant Governor, William MacDougall, went to the territory, the Red River Métis led by Louis Riel, blocked his entry to Fort Garry and prevented his assertion of Canadian authority. Riel established a provisional government. The clumsy behaviour of MacDougall, allegedly jumping from the U.S. to Canada at night to plant the flag and back again, inflamed the situation with the Métis, the details of some of the behaviour which was interesting and comical/tragic, is not germane to this case. It does, however, again establish that Canadian history and its characters were not boring.

[388] Macdonald was informed that the "rebellion" was almost entirely limited to the Roman Catholic French Métis centered around St. Boniface. The demands made by this Métis group were:

(a) that the Indian title to the whole territory should be paid for at once;

(b) that on account of the relationship with the Indians a certain portion of this money shall be paid to them; and

(c) that all their (the Métis) claims to lands should at once be conceded.

[389] On December 1, 1869, a List of Rights was adopted by the French and English Métis representatives. In addition to calling for their own legislature, rejecting Canadian law until adopted

by that legislature and demanding fair and full representation in the Canadian Parliament, the Métis demanded that:

> Treaties be concluded and ratified between the Dominion Government and the several tribes of Indians in the Territory to ensure peace on the frontier.

[390] This demand was consistent with the joint proposal of the Canadian House and Senate in late 1867 made to the U.K. government that:

> And furthermore, that upon the transference of the territories in question 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.

[391] As a result of the actions of Riel's Provisional Government, in 1870 the Canadian government began negotiations with the Provisional Government leading to the creation of the Province of Manitoba – a much smaller Manitoba than now exists and which became known, at least to historians, as the "postage stamp" province due to its configuration.

[392] It was the Defendants' position that the negotiations showed that the Métis considered themselves half-breeds, not Indians. One of the Métis leaders, James Ross, summarized the position in early 1870 as follows:

> The fact is, we must take one side or the other. We must either be Indians and claim the privileges of Indians – certain reserves of land and annual compensation of blankets, powder and tobacco (laughter) – or else we must take the position of civilized men and claim rights accordingly … Considering the progress we have made, and the position we occupy, we must claim the rights and privileges which civilized men in other countries claim.

[393] The statement relied on by the Defendants is consistent with the other expert evidences that there was a stigma attached to being labelled “Indian” and that Red River Métis sought to put some distance between themselves and Indians. They sought to move further along the “civilized scale” towards white society.

[394] The statement also shows that these Métis had not yet established their goal of being considered “civilized”. This is evidence which shows that at least from the government perspective and the use of government power, these Métis were not considered outside the more general and varied class of “Indian”.

[395] On April 25, 1870, the Métis delegates who had been sent to Ottawa to negotiate what became Manitoba’s entry into Confederation met with Macdonald and Cartier to discuss the compensation claim for lands. A Métis delegate, Reverend Noel Joseph Richot (Richot), recorded the responses to the positions taken by Macdonald and Cartier that the Métis of the Red River could not claim the rights of settlers of the Northwest as “civilized” men and also claim the privileges granted to Indians.

[396] In an often quoted passage from Richot’s Journal relied on for the argument that Métis were not Indians, Richot records the Métis’ position in these negotiations:

> They did not claim them (the privileges granted to Indians). They wish to be treated like the settlers of other provinces and it is reasonable. Well, while the Métis wish to be treated like the settlers of other provinces and they did not claim the privileges of Indians they nonetheless wanted certain land rights as descendant of Indians.

[397] The sentiment of that statement, indicative of Métis having one foot in each camp, is carried forward to modern day. More pertinent to this litigation, it was a continuing theme of Métis leadership during the immediate post-Confederation era.

[398] In considering the evidentiary value of this evidence, it is important to recognize that the comments reflect the situation of the Red River Métis and not the situation of the other Métis in the Northwest. The Red River Métis, as reflected by these negotiators were "Fathers of Confederation" and if not treated equally with whites, it is reasonable to conclude that they had a status akin to an enfranchised Indian. An enfranchised Indian was considered "civilized" and avoided the strictures of the *Indian Act* but was nevertheless an Indian for constitutional purposes. The same cannot be said for all Métis either in the then Manitoba or more generally in other areas of Western Canada or in other locations in Canada.

[399] The end result was the passing of *An Act to amend and continue the Act 32 and 33 Victoria, Chapter 3; and to establish and provide for the Government of the Province of Manitoba*, 33 Vict, c 3 (*Manitoba Act 1870*) which provided:

> 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 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 shall from time to time determine.
>
> [Emphasis by Court]

[400] The term "toward the extinguishment of Indian title" has been the subject of other litigation. This Court is not in a position to nor is it necessary for the resolution of the issues here, to determine whether Métis/half-breeds had Indian title to be extinguished or what Indian title may have meant at the time. The case before the Court is not one of aboriginal rights and title.

[401] The importance of the provision is that it was made in reference to Métis and Indians and the direct connection between the two. It is only one fact in a complex matrix of facts where Métis and Indians were linked in the exercise of federal jurisdiction and the use of the tools associated with the exercise of the Indian Power e.g. treaty provisions, residential schools, reserves, prohibited conduct.

[402] There is considerable conflict in the expert evidence, particularly between Jones and von Gernet, as to the context and significance of this provision and the events surrounding its creation and implementation.

[403] Von Gernet put considerable weight on Richot's diary and the Métis' original position that they ought not to claim the privileges granted to Indians but to be treated as settlers. It was Richot's intervention that Métis wished certain land rights as descendants of Indians that muddied the Métis' position. This so-called ""Richot's nuance" led Macdonald to accommodate this new position by extinguishing Indian claims. As a result of this confusion of the Métis' position, Macdonald

repeated, in the House, his explanation of the extinguishment of title and his analogy, false though it may be, with United Empire Loyalists.

[404] Jones places less emphasis on the Richot nuance and attributes Macdonald's position to the need of the federal government to control public lands while making settlement with the Indians as part of Canada's responsibilities inherited on the purchase of Rupert's Land including the "Indian title" of, as Macdonald said, "the representatives of the original tribes … the half-breeds". It was Jones' view that Macdonald had concluded that the best way of dealing with half-breeds was to give small grants of land for them and their children out of a reserve of land for half-breeds. This was an administrative way to allocating communal lands held in trust as Indian Reserves, as had been done in the Robinson Treaties. This allowed Macdonald to give the Métis their desired guarantee of protection for their lands without the policy baggage of the *Indian Act* including wardship.

[405] It was Jones' view that the Métis wanted more than the rights of settlers – they claimed that they had rights because they were related to Indians; they had rights as people who were indigenous to the territory. Therefore, the land reserved for Métis was not a misconception caused by Richot nor an erroneous assertion of Indian title but a government policy to deal with whatever title or interest was being separated from the *Indian Act* which required people called Indians to lose their right to vote, to buy liquor, and to hold their land individually. It was a recognition that Métis as half-breeds had some claim to Indian land or rights therein.

[406] The scrip system allowed half-breeds in Manitoba to accept scrip (a document giving title to an unspecified piece of land of 160 acres or $160) which was transferable. Later and in other parts

of the Northwest the land and money changed to 240 acres or $240. There were numerous incidents of land speculators buying up scrip and, after the money was spent, the half-breed was left destitute.

[407] While there was confusion among some opposition members as to the scrip system, twice in the May 2, 1870 debate, Macdonald referred to the allocation of lands to the half-breeds as being "for the purpose of extinguishing the Indian title".

[408] While the reservation of 1.4 million acres was provided for, the land could not be immediately handed over because, as Macdonald said, the Dominion needed control of the land "so that the Pacific Railway could be built".

[409] As to who may be entitled to claim, Cartier, who had been a representative in the Rupert's Land Terms of Agreement negotiation, stated that "any inhabitant of the Red River country having Indian blood in his veins was considered to be an Indian".

[410] Aside from the possible hyperbole in this statement, it is consistent with the weight of credible evidence in this case in expressing the general view of who was considered, at least from the Euro-Canadian perspective, to be an "Indian". The view that "Indian" did not necessarily mean pure blood was acknowledged in a legal opinion from the Office of the Attorney General of Upper Canada, at the time 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.

[411] Whatever the merits of the extinguishment issue, both experts recognized that treating half-breeds as Indians, as if they had Indian title, persisted for decades. As Jones noted, the scrip system operated between 1870 and 1930 and reflects that the federal government accepted the existence of a title or interest on the part of Indians that had to be addressed in some way. Scrip was described in much of the documentation and legislation, up until the mid-1920s, as being "in extinguishment of Indian title" and the concept was carried through all scrip legislation.

[412] Whether the Métis/half-breeds had Indian title in law is less important than the fact that, immediately post Confederation, half-breeds were considered as closely associated with "Indians" and part of the problem to be solved to permit expansion, settlement and the building of the railway, all as contemplated in the *British North America Act*.

[413] The Defendants put considerable reliance on a statement by Macdonald in the House of Commons debates on July 6, 1885 in which he recanted his description that the land reserved for Métis was for the "extinguishment of Indian title". Macdonald is reported to have said:

> Whether they had any rights 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 the Province, I order, to make a Province at all – in order to introduce law and order there and assert the sovereignty of the Dominion.

> … 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, because the half-breeds did not allow themselves to be Indians. If they were Indians they go with the tribe; if they are half-breeds they are whites and they stand in exactly the same relation to the Hudson Bay Company and Canada as if they were altogether white. That was the Principle under which the arrangement was made and the Province of Manitoba was established.
>
> [Emphasis by Court]

[414] Quite apart from the caution with which courts must approach comments in Hansard as being a basis for legal conclusions, Jones points out other reasons including context of the statement and continued scrip use of the concept which undermine the weight this statement should be given as reflecting what was understood by the word "Indian" for purposes of the constitutional power.

[415] The notion that scrip was given to extinguish Indian title was reiterated over 65 years. Most importantly, it was reiterated between 1870 and Macdonald's 1885 statement by both the government of Macdonald and its replacement Liberal government:

- In 1876 when the *Indian Act* was introduced by the Liberal government of Alexander MacKenzie, the Minister explained that "lands had been given to half-breeds in order to extinguish their title".
- 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 Act* in 1879 and 1883 (when the scrip system was extended to what is now other parts of Manitoba, Saskatchewan and Alberta) and all of the Orders-in-Council establishing scrip conditions.

- Similar language was used in the 1873 Half-Breed Treaty 3 Adhesion reflective of the *Manitoba Act* language of compensation in exchange for the surrender or commutation of half-breed claims by virtue of their Indian blood.
- In April 1885 correspondence between the Half-Breed Commissioner and the Minister of the Interior, the Minister agreed to an amendment to the Order-in-Council related 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.
- The resulting Order-in-Council dated April 17, 1885 (three months before his recantation) signed by Macdonald specified that the scrip was issued to extinguish Indian title.

[416] The context in which Macdonald made his July 1885 statement was, as pointed out by Jones, in response to an opposition motion accusing the Conservative government of having caused the 1885 Riel Rebellion by neglect, delay and mismanagement. At this time Riel was awaiting trial. Macdonald had been subject to a seven-hour speech by the Opposition Leader attacking him for the delay in implementing scrip outside Manitoba which was authorized under the *Dominion Lands Act 1879* (*An Act to amend and consolidate the several Acts respecting the Public Lands of the Dominion*, 42 Vict c 31).

[417] Macdonald's statement concerning the history of scrip in Manitoba was made in the early hours of the morning after hours of attack in Parliament and contained a number of inaccuracies including that there were few half-breeds in the Northwest Territories at the time and that half-breeds were treated the same as whites when in fact they received more land than white settlers.

[418] The statement, Jones opined, stands in isolation not only to what came before but also came after. For example:

- The 1898 Order-in-Council authorizing a new scrip commission regarding Treaty 8 referred to the extinguishment of aboriginal title of half-breeds.
- A subsequent Order-in-Council in 1899 regarding Athabasca noted that the half-breeds had their rights in land by virtue of their Indian blood and that while there may be differences of degree between Indian and Half-Breed rights, they were co-existent and had to be extinguished.
- From Treaty 8 in 1899 to Treaties 9, 10 and 11, the federal government dealt with Indians and half-breeds at the same time.
- Liberal Prime Minister Wilfred Laurier in the Commons debate of July 3, 1899 regarding the 1899 amendments to the *Dominion Lands Act* referred to the Indian title of half-breeds being extinguished.
- The 1899 amendments to the *Dominion Lands Act* refer to satisfaction of claims of half-breeds arising out of the extinguishment of Indian title.
- In 1921 when Treaty 11 was concluded and the final Half-Breed Commission established, Prime Minister Arthur Meighen noted that scrip is for the extinguishment of Indian title.

[419] Jones puts forward other instances where the federal government referred to half-breeds extinguishing their Indian title. These include legal opinions and litigation in the 1920s and 1930s regarding compensation to the western provinces for loss of public lands. This evidence is not as

persuasive as to what was understood by the term “Indian” in the creation of the Indian power because it significantly postdates 1867 but it shows a consistency of understanding that half-breeds (which included Métis) were considered as “Indians” for various legal purposes.

[420] What can be said about must of the post-1867 evidence is that the early post-1867 evidence shows that half-breeds were considered as at least a subset of a wider group of aboriginal-based people called “Indians”. What the latter evidence shows is that Canada was prepared to exercise jurisdiction over half-breeds, to use Indian power like methods and to justify such exercise of jurisdiction as the exercise of s 91(24) along with the power to control Dominion lands.

[421] In the scrip system the federal government offered Métis land or money in scrip form in lieu of treaty. In offering Métis scrip, the federal government treated the Métis differently than other Indians. The alternative of taking treaty is more clearly the exercise of the Indian power. The federal government would have had no basis to extend treaty protection unless those people to whom it was extended were “Indians”.

[422] The use of scrip was only one policy option used in dealing with half-breeds. As Jones pointed out, over the same period various options were used depending on the half-breed/Métis group. These included:

- Accepting treaty and living on reserves.
- A hybrid system whereby an aboriginal person could accept treaty and 160 acres of land off reserve held in trust. This system was used in Treaties 8 and 10.
- The readmission to treaty even after scrip was taken such as the Bobtail Band.

- The creation of "half-breed reserves" as occurred at St. Paul-de-Métis.

D. Other Examples – Half-breeds and Section 91(24)

[423] Both parties refer to a number of post-Confederation events (other than those already covered) but draw different conclusions from such events.

(1) Adhesion to Treaty 3

[424] Prior to the Treaty 3 negotiations, the Ojibway Chief asked Treaty Commissioner Morris whether 15 families of half-breeds living on the Rainy River could be included in the treaty.

[425] This group of half-breeds had previously been enumerated in 1871 when they were noted to be intermarried with Ojibway peoples of the area. Some of the half-breeds lived in settlements of their own but hunted together with the Ojibway.

[426] The fate of these half-breeds was raised during the Treaty negotiations. The government response was to seek instructions from Ottawa.

[427] The final conclusion from Ottawa was that the federal government had no objection to half-breeds outside of Manitoba who had married Indian women and adopted Indian habits to choose to be treated as Indians rather than as half-breeds.

[428] In September 1875 the Surveyor General of Dominion Lands entered into an "adhesion" with the half-breeds of Rainy River and Lake. That Adhesion contained a clause "subject to

approval and confirmation by the Government, without which the same shall be null as void and of no effect". No record of such approval was ever discovered.

[429] However, at about that time, the Indian Commissioner Provencher established a policy against acknowledging groups of half-breeds as a special group distinct from Indian bands around them. His concern was that to recognize such a distinction could create "a new class of inhabitants, placed between the Whites and the Indians …".

[430] The result was that in 1876 the *Indian Act, 1876* was passed and the Indian Affairs branch took the position that "the Department cannot recognize separate Half breeds bands". Consequently these Rainy River 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.

[431] The Plaintiffs' expert, Ms. Jones, was of the view that by this event the highest levels of the federal government recognized the idea of a separate reserve for a group of half-breeds (which she described as a historic Métis community). The recognition was based on knowledge of the community, and awareness of the distinctiveness of the half-breeds from the Ojibway in the area, although interrelated.

[432] It was Jones' view that the absence of a record of Order-in-Council approval of the Adhesion was unimportant. The requirement to join the Little Eagle Band was the result of new policy and legislation not that on the policy and laws more closely tied in time to Confederation.

[433] Dr. von Gernet described the Treaty 3 Adhesion as another anomaly – "among the strongest departures from Indian Treaty making in Canada" and "not only unprecedented but unacceptable".

[434] The Treaty 3 Adhesion is an instance where the federal government treated the half-breeds/Métis group as if it had a claim to Indian title, and gave the group a reserve as part of the surrender of that claim. It is a further instance of the federal government exercising jurisdiction over a Métis group based not on this connection to European ancestors but on their connection to their Indian ancestry.

[435] The difficulty with Dr. von Gernet's "anomaly" theory is that there are numerous other such "anomalies" where half-breeds/Métis were treated as Indians or dealt with under power associated with the Indian power. At some point the compounding of "anomalies" leads to the conclusion that these are not "anomalies" but in fact reflect the main line of thought and reflect the general view.

[436] This so-called anomalist treatment of half-breeds/Métis did not end with the *Indian Act, 1876* or with the 1879 amendment which allowed half-breeds who had been admitted to treaty to withdraw upon repayment of any annuity monies received.

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

[437] In 1895 Father Lacombe petitioned for poor "Half-breeds" to receive some land on which to settle, because they were destitute. The reserve was to consist of four townships to be established, together with an industrial school so that the half-breeds could learn "the different trades of civilized life". The industrial school was similar to the industrial schools established for other Indians.

[438] Title to the reserve lands would be vested in the Crown so that it could not be alienated. Interestingly, the Memorandum of the Deputy Minister of the Interior noted that the 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 sensitivities, but it would be the functional equivalent of an Indian reserve.

[439] The Lacombe 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 10 years later the school burned down, take up of the settlement did not meet expectations and the project was abandoned by the federal government in 1908. The lands not occupied by those Métis who took up settlement were disposed of.

[440] This instance of the exercise of federal power over Métis and lands for them is later juxtapositioned by the Alberta Métis lands discussed in the recent Supreme Court decision in *Cunningham*, above,, referred to later in this judgment.

[441] The St. Paul de Métis project consisted of the establishment of a "reserve" exclusively for Métis with title to the land held by the federal Crown. The federal government also established an industrial school for Métis. The project was not a policy accident. It was the use of powers similar to or arising from those exercised in regard to "Indians" under s 91(24).

[442] It is noteworthy both in the historical context and in the modern efforts at reconciliation over industrial and residential schools that Métis also had been subject (or subjected) to residential

schools along with other Indians (for example: Memorandum from Duncan Scott – December 11, 1906). Dr. Wicken also reported that in respect to the Maritimes off-reserve Mi'kmaq (including those of mixed ancestry) were also subject to being taken to residential schools in Nova Scotia well into the 1940s.

[443] The use of residential schools is an unfortunate phenomenon visited upon all aboriginal peoples – Indians, Métis and Inuit.

[444] The convergence of and exercise of Indian powers over Métis was also evident in the treatment of half-breeds/Métis in regard to liquor – a curse for native communities throughout Canada into modern time.

(3) Liquor Policy

[445] Ms. Jones relies on the administration of the liquor policy by the federal government as further evidence that it was understood and accepted that the federal power over Indians included Métis and non-status Indians. The Defendants do not refute this matter to any real extent.

[446] In 1894 Parliament amended the *Indian Act* to broaden the specific provision dealing with persons who sold intoxicating liquor to an "Indian". The source of the problem was the difficulty the North-West Mounted Police had, as outlined in an 1893 letter, in distinguishing between "Half-breeds and Indians in prosecutions for giving liquor to the latter".

[447] The provision against the sale of intoxicating liquor was amended by adding "… shall extend to and include any person … who follows the Indian mode of life".

> **6.** The section substituted for section ninety-four of *The Indian Act* by section four of chapter twenty-two of the Statutes of 1888, is hereby amended by adding thereto the following subsection :-
>
> "**2.** In this section the expression 'Indian', in addition to its ordinary signification as defined in section two of this Act, shall extend to and include any person, male or female, who is reputed to belong to a particular band, or who follows the Indian mode of life, or any child of such person."
>
> *An Act further to amend "The Indian Act"*, 57-58 Victoria, c 32

There was no reference to an "Indian blood requirement".

[448] The provision, as amended, caused continuing concern even into 1937 when the Deputy Minister of Justice opined that the provision (by then numbered s 126) could apply not only to a non-treaty Indian but also to a half-breed.

[449] It then became of concern that the wording could apply to a white person. In response to a query about whether the Department of Indian Affairs could define "Indian mode of life", the Department advised that it had no information by which to identify the expression "Indian mode of life".

[450] Jones' evidence confirms that the notion of "Indian mode of life" or similar life/work style criteria was unworkable. Experts on both sides recognized the enormous diversity of lifestyles of "Indians" in Canada, the rapidity with which those lifestyles could and were changing and the difficulty with cultural concepts as a means of identity.

[451] The liquor policy confirms again that the federal government exercised jurisdiction over Métis and non-status Indians regardless of mixed ancestry, residence, membership or purported membership in a band/tribe. The only limitation was compliance with a descriptively impossible "Indian mode of life".

[452] From a constitutional perspective, the *sine qua non* of the legislation was the native ancestry of the person (whether of pure or mixed blood). From the *Indian Act* perspective, it was the "mode of life" which was a further qualification on the exercise of that constitutional jurisdiction.

(4) "Half-Breeds" whose Ancestors took Scrip

[453] The Defendants' expert, Dr. von Gernet, pointed out that in the early to mid-20th century, there were numerous instances of "Half-breeds" who had taken scrip, or whose ancestors took scrip, but who continued to reside on reserves and continued to receive treaty annuities despite statutory exclusion of such persons from the definition of "Indian".

[454] The problem, particularly in the Lesser Slave Lake area of Treaty 8, caused in 1944 a Commission of Inquiry before Justice Macdonald of the Supreme Court of Alberta. Having traced the history of the choice of scrip under Treaty 8 and thereafter, Justice Macdonald commented as follows (and relied upon by the Plaintiffs):

> 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 an 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 inseparable bar to

> treaty. A good deal of latitude was allowed in switching from scrip to treaty and vice versa. …
>
> …
>
> 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. 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, no matter how circumscribed these rights may be, as is accorded any other citizen of the nation.

[455] Von Gernet takes comfort in the fact that the Department did not follow Justice Macdonald's recommendation because of concern for the impact of the redefinition of "Indian" under the *Indian Act* upon the administration of Indian Affairs.

[456] However, the Department did not follow the recommendation because of concerns for legislative/constitutional jurisdiction. There was no issue that the federal government had constitutional competence to implement the recommendation.

[457] Most importantly, in 1958 in an amendment to the *Indian Act*, the federal government enacted what Justice Macdonald had recommended for the same reasons as referred to in his report of August 7, 1944.

[458] Consistent with the inclusion and exclusion of half-breeds in the numbered treaties, the federal government chose when and if to exercise its constitutional jurisdiction over this group. The 1958 amendment was a clear example of federal legislation with respect to Métis as a group or class and founded on the Indian power in the Constitution.

(5) Other Examples of Jurisdiction over Non-Status Indians

[459] In the post Confederation period, the federal government dealt with the rights of Indians who were without status under the *Indian Act*.

[460] In the 1869 legislation *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act*, 81 Vict, c 43, the federal government introduced the statutory marrying out rule but it permitted women who married out to continue to draw annuities. The provision was continued in the *Indian Act, 1876* and an administrative practice arose of issuing those women identity cards known as “red tickets”.

[461] By 1951 the *Indian Act* was amended and these “red ticket Indians” were required to commute their annuities and to leave the reserves. Ultimately those women who married out, together with their first generation descendants, were reinstated to Indian status under Bill C-31 in 1985.

[462] In the Robinson treaty areas of Ontario, by 1890 there were many Euro-Canadians who had intermarried with natives and their descendants. They were residing on reserves and receiving annuities despite their lack of qualification as “Indian” under the *Indian Act*.

[463] To address the issue and deal with the legal confusion caused by differing definitions of "Indian" at the time of the Robinson treaties, the federal government established a "non-transmissible title". Similar to s 6(2) Indians under the current *Indian Act*, those with non-transmissible title could be paid annuities for life but the right was not transmitted to their children. This category of Indian right was terminated in 1917 as a matter of policy and the non-transmissibles were merged with the transmissible title holders.

[464] In Nova Scotia, efforts were made to abolish small reserves and open the land for timbering. In New Germany the Department chose to define mixed ancestry residents as non-Indians whereas in large reserves mixed ancestry was no bar to being recognized as Indian.

[465] Those Indians without status under the *Indian Act* included those "enfranchised", either voluntarily or otherwise, between the 1869 "Act for the gradual enfranchisement of Indians" and Bill C-31 in 1985 which permitted enfranchised Indians and their first generation descendants to be reinstated to status.

[466] In Newfoundland and Labrador certain natives who entered Confederation in 1949 as fully enfranchised and their non-status Indians were not brought under the *Indian Act* until 1984.

[467] The foregoing examples established that the federal government exercised jurisdiction over a broad range of persons with native ancestry who did not have status as Indians under the *Indian Act*.

[468] Most importantly, this exercise of jurisdiction over non-status Indians and half-breeds including Métis was based upon the understanding and acceptance by the Euro-Canadian population, and their federal politicians and their bureaucracies of the federal power to exercise jurisdiction over this wide range of people as "Indians". The foregoing, established by conduct, the meaning of "Indian" within s 91(24).

E. Modern Era

(1) Pre-Patriation

[469] The Court has, to some extent, earlier discussed in Section V "Nature of the Problem", some of the facts pleaded and argued by the Plaintiffs in regard to more current events. While these facts may explain the basis of this action, the impact that a determination may have and some of the history between the parties, those facts are not particularly germane to the key issue of constitutional interpretation – the meaning and scope of "Indian" as found in s 91(24) of the *Constitution Act*.

[470] For the sake of completeness, the Court will deal with the key matters raised in the arguments but the Court's determination of the meaning and scope of s 91(24) is based principally on the analysis of the pre- and post-Confederation facts and the manner in which the federal government dealt with Métis and non-status Indians.

[471] In the post World War II era, there have been several forces affecting the federal policies regarding aboriginal peoples including:

- international human rights reforms including the principles of equality, self determination and self definition for indigenous peoples, reflected to some degree in *Lavell v Canada (Attorney General)*, [1974] SCR 1349, 38 DLR (3d) 481;
- fundamental changes in Canadian law, particularly s 15 of the *Charter* and s 35 of the *Constitution Act*;
- demographic shifts in Canada's aboriginal population including the movement away from reserves and greater intermarriage between native and non-native people.

[472] The Plaintiffs' evidence traces the history of not only the patriation of the Constitution but also the attempts at constitutional reform in the Meech Lake Accord and the Charlottetown process. These failed political accords have little relevance to the legal issues in this case.

[473] However, the better starting place for this consideration of some of the issues between Canada and the aboriginal community would be in the early 1970s.

[474] In the early 1970s the federal government began funding research on treaty and land claims for status Indian groups. This was later expanded to include non-status Indians and Métis groups.

[475] By mid-1976, the Joint Cabinet-Native Council of Canada Committee was created to develop a process designed to produce agreements between government and the representatives of the "Indian People" on major policy issues.

[476] The Joint Cabinet-Native Council of Canada Committee met annually between 1977 and 1980 and again in 1982. There was a recognition that little was known about Métis and non-Status Indians as a group and that there were significant definitional issues.

[477] Despite some internal issues amongst the native groups including that with the broad Métis community as represented in the dispute between the MNC and the NCC, the funding of research on native claims for these groups continued.

[478] In 1978 an Interdepartment Committee issued a Discussion Paper concluding that there was no legal or broadly accepted definition of non-Status Indians. This Committee acknowledged the "present desperate circumstances of large numbers of native people". It further noted that it was important to recognize that the causes of these circumstances and the opportunities for improvement vary considerably across the country.

[479] This recognition of the plight of many native people and the diversity of causes and cures was a continuing theme throughout subsequent discussions of government-native issues. The Court concludes that it was recognized that these causes and remedies had to be addressed at a broad level, on a national scale, and not by piecemeal or on a province by province basis.

[480] As established in various federal government documents, the provinces had varying attitudes on the question of responsibility for MNSI programs and, except for Saskatchewan, all provincial governments did not accept the responsibility for programs specifically and exclusively for MNSI. The provinces did not want to be seen as accepting responsibility for those of Indian

ancestry or according them special status within the province (other than those already recognized as status Indians by the federal government).

[481] By 1980, while the Minister of Justice and Attorney General (the Honourable Jean Chrétien) continued to deal with the head of the NCC (Harry Daniels) on policies regarding MNSI, the government-native agenda became dominated by the Constitutional Revision Process. Issues of constitutional recognition of aboriginal and treaty rights, rights to self-government and direct consent to constitutional changes affect natives became the major themes of discussions.

[482] One of the results of the patriation process relevant to this case was the creation of s 35 and the requirement that a First Minister's conference be held within one year with an agenda item respecting the identification and definition of the rights of the aboriginal peoples of Canada.

35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the "*Constitution Act, 1867*", to section 25 of this Act or to this Part,	**35.1** Les gouvernements fédéral et provinciaux sont liés par l'engagement de principe selon lequel le premier ministre du Canada, avant toute modification de la catégorie 24 de l'article 91 de la « *Loi constitutionnelle de 1867* », de l'article 25 de la présente loi ou de la présente partie :
(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and	a) convoquera une conférence constitutionnelle réunissant les premiers ministres provinciaux et lui-même et comportant à son ordre du jour la question du projet de modification;
(b) the Prime Minister of	b) invitera les représentants des

Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.	peuples autochtones du Canada à participer aux travaux relatifs à cette question.

[483] Part IV.1 proclaimed in 1983 required two further First Minister conferences with agenda items including constitutional matters that directly affect the aboriginal peoples of Canada.

PART IV.1	PARTIE IV.1
CONSTITUTIONAL CONFERENCES	CONFÉRENCES CONSTITUTIONNELLES
37.1 (1) In addition to the conference convened in March 1983, at least two constitutional conferences composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada, the first within three years after April 17, 1982 and the second within five years after that date.	37.1(1) En sus de la conférence convoquée en mars 1983, le premier ministre du Canada convoque au moins deux conférences constitutionnelles réunissant les premiers ministres provinciaux et lui-même, la première dans les trois ans et la seconde dans les cinq ans suivant le 17 avril 1982.
(2) Each conference convened under subsection (1) shall have included in its agenda constitutional matters that directly affect the aboriginal peoples of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussion of those matters.	(2) Sont placées à l'ordre du jour de chacune des conférences visées au paragraphe (1) les questions constitutionnelles qui intéressent directement les peuples autochtones du Canada. Le premier ministre du Canada invite leurs représentants à participer aux travaux relatifs à ces questions.
(3)The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in	(3) Le premier ministre du Canada invite des représentants élus des gouvernements du territoire du Yukon et des territoires du Nord-Ouest à participer aux travaux relatifs à

discussions on any item in the agenda of a conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.	toute question placée à l'ordre du jour des conférences visées au paragraphe (1) et qui, selon lui, intéresse directement le territoire du Yukon et les territoires du Nord-Ouest.
(4)Nothing in this section shall be construed so as to derogate from subsection 35(1).	(4) Le présent article n'a pas pour effet de déroger au paragraphe 35(1).
Constitution Amendment Proclamation, 1983	*Proclamation de 1983 modifiant la Constitution*

[484] Significantly, while Canada patriated its constitution and subsequently attempted to amend it in Meech Lake and Charlottetown (which including a proposed change to s 91(24), that section remained as enacted in 1867.

(2) Post-Patriation

[485] Section 37 of the *1982 Constitution Act* provided that there be a First Minister's Conference before April 17, 1983 with an item for the agenda concerning the identification and definition of the rights of aboriginal peoples to be included in the constitution.

[486] The representations of the aboriginal peoples included the Assembly of First Nations (status Indians), the Inuit Council on National Issues (Inuit) and the Native Council of Canada (Métis and non-status Indians).

[487] A continuing issue throughout the subsequent First Ministers' and Federal-Provincial meetings was that of "definition"; in particular, who fell within the class of non-status Indians and

the class of Métis. The dispute between the NCC and the MNC has been described earlier in these Reasons.

[488] While "definitions" were one issue which ran through the various discussions, it was only one of many and not necessarily the most important. The range of issues included aboriginal title, treaty rights, social and economic rights, self-government and processes for resolution. The issue of self-government became the single dominating issue throughout 1983 to 1987.

[489] As a prelude to patriation and to deal with issues thereafter, Canada focused much of its policy development in the Corporate Policy Branch of the Department of Indian Affairs. The Director General was Ian Cowie, a witness in this trial. As indicated earlier, this evidence has been accepted.

[490] A key document produced by the Corporate Policy Branch with in depth input from central agencies (particularly Federal Provincial Office and Privy Council Office) was "*Natives and the Constitution*".

[491] *Natives and the Constitution* included a thorough review of the jurisdictional matters related to s 91(24). The evidence establishes that this document was more than just a working paper; that it reflected the collective thinking within the federal government on the interpretation and operation of s 91(24). It was a Cabinet document and was used for internal briefings and preparation for the 1983 First Ministers' Conference.

[492] The Plaintiffs rely in particular on a quote:

> 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 s. 91(24) of the BNA Act.

[493] This quote is not the definitive position of the Federal government but shows the general trend of the government position. Other references in *Natives and the Constitution*, as well as other documents in that general time frame, show both less firm and more firm statements on the constitution power over Métis and non-status Indians, examples of which follow.

In a 1979 memorandum from the Deputy Minister to the Minister:

> Although the Federal Government arguably has the power under Section 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.
>
> [Underlining by the Court]

1980 Background and Discussion Paper:

> … a person who is not considered an Indian under the Indian Act because he has opted to be enfranchised is still an Indian for purposes 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 …
>
> The 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.
>
> [Underlining in the original]

[494] The 1980 version of *Natives and the Constitution* contained the following conclusions:

> 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.
>
> S. 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.

[495] As to which non-status Indians and Métis fall within the s 91(24) term "Indian", *Natives and the Constitution* stated:

> 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 or treaty benefits still arguable retain the rights 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.

[496] The quoted positions from *Natives and the Constitution* remained the same throughout different representations and revisions of the document.

[497] This document formed the background and the basis for federal government position statements on Aboriginal people and the Constitution including in those discussions concerning proposals to amend s 91(24).

[498] It was Cowie's evidence that it was unique to have a document subjected to the scrutiny of the highest levels of government over an intense five-year period and to have those statements remain intact throughout.

[499] While not all statements are an unequivocal confirmation of federal jurisdiction of MNSI, those conclusions and the rationale (referring to understanding of "Indian" at the time of the *BNA Act*), is entirely consistent with the Plaintiffs' experts' evidence and consistent with the treatment of both Métis and non-status Indians post-Confederation as detailed by Jones.

[500] While the federal position cannot be taken as an "admission" in the usual evidentiary sense, nor can it give jurisdiction where no such jurisdiction existed, it gives great credence to the Plaintiffs' position, buttresses the expert evidence and makes the Defendants' attack and attempts to frustrate this litigation disingenuous.

[501] This recognition by the federal government of jurisdiction over MNSI took a turn in 1984 under a new government. The federal government's position appears to have been motivated by policy concerns for concrete actions and concerns for the financial consequences of recognizing this jurisdiction.

[502] In an early 1984 document, considered high level and secret (the date of which is estimated to be between January 1 and March 31, 1984), it was 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.

[503] A similar document in November 1984 stated:

> The Federal Government requires a strong position with which to respond to the pressure from the MNC, NCC and the promises to accept financial responsibility for Métis.

[504] By December 1984, the federal position on jurisdiction was shifting away from its claim to jurisdiction over non-status Indians and Métis to something more equivocal. Both parties raise as a key fact the position taken by Minister John Crosbie (Minister of Justice) (and subsequently the Federal Interlocutor for Métis and non-status Indians) disavowing jurisdiction over Métis while confirming jurisdiction over non-status Indians.

[505] At a December 17-18, 1984 conference, Mr. Crosbie responding to Harry Daniels' question regarding s 91(24) said:

> .. despite the powers that he attributes to me, I cannot change what the Constitution says simply by a statement from the Chair. We are working together to try to work out Constitutional changes in the interest of the Aboriginal Peoples, and I do not want anything I say now to distract us from that, but I have to say a few words about Section 91(24).
>
> First, it provides legislative jurisdiction to the federal government in relation to Indians and lands reserved to Indians, and you will note that provides authority only. It does not define how it is to be exercised, and as you know that has been interpreted by the courts to include the Inuit. Historically the federal government has had a special relationship with the Inuit and Indian Peoples.
>
> Secondly, the question that Mr. Daniels raises is whether Metis and non-status Indians are covered by Section 91(24); are they Indians? In other words are they Indians for the purpose of Section 91(24)? To answer that question, we have to recognize the fact that

> the word "Metis" was put in Section 35 of the Constitution Act in 1982, not in 1867. The Federal Department of Justice has concluded -- has reached a legal opinion that Parliament cannot legislate for Metis as a distinct people. That is a legal opinion. We cannot legislate for Metis as a distinct people. On the other hand Parliament can legislate for Indians irrespective of whether they are registered or not because of Section 91(24). That is how we understand the law, but I want to stress that a continuing legal debate over the impact of Section 91(24) will only work to the detriment of Aboriginal Peoples by preventing governments from dealing with the real problems that confront those people. In other words in my view, there is not much point in a continuing legal debate. It is unlikely that a legalistic approach to 91(24) will result -- certainly not in a short term -- in concrete improvements in the living conditions and the prospects of Aboriginal Peoples. What is important is that the federal government is prepared -- we are prepared to accept our share of the responsibility for Aboriginal Peoples in co-operation with the provinces and the territorial governments. They have their place. They have their responsibilities. Historically we have had the lead role in relation to Indian and Inuit People. The provinces have had the lead role for Metis People, but both levels of government have been very much involved with all Aboriginal Peoples, and that is the approach we think will serve us best in the future, and that is the way we want to approach it.
>
> We have no intention of using any legal opinions, or opinions as to what the Constitution says to disclaim any responsibility or interest in the Metis People. We consider ourselves to be responsible and interested. So I think that the question is really largely hypothetical. …

[506] From that point forward the federal position was less accepting of jurisdiction as the process of recognition of native rights proceeded under the *1982 Constitution Act*. The series of meetings and conferences culminated in the Charlottetown Accord which included an amendment to s 91(24) to include the Aboriginal peoples of Canada but which also recognized Alberta's jurisdiction to make laws affecting Métis in Alberta to the extent that it did not conflict with federal laws – in which event federal law would prevail.

[507] The federal public position, while contrary to the earlier position of recognizing its jurisdiction over MNSI, became one of disavowing that s 91(24) included Métis and non-status Indians.

[508] It is the Plaintiffs' argument that the reason for the shift in federal position was the recognition of the financial, legislation and political impacts flowing from such acknowledgement. The Defendants have not substantially rebutted that argument.

[509] However, the reasons are not relevant to the legal considerations of constitutional interpretation. The Court will not draw any sort of "bad faith" conclusion. It is reasonable for governments to be concerned about the consequences of constitutional interpretation but the legal interpretation cannot be driven by such consequences.

[510] However, even while the federal government was disavowing jurisdiction over non-status Indians, it was amending the *Indian Act* in Bill C-31 to include as status Indians a number (but not the maximum number) of people who were non-status Indians.

[511] In 1984 the federal government recognized the Conne River people of Newfoundland as an Indian band; thereby moving these non-status Indian people to status. A similar circumstance in 2008 with respect to Qalipu Band of Newfoundland arose whereby this landless group of non-status Indians became a recognized band.

[512] Despite the recent history of federal resistance to jurisdiction over MNSI, until the 1980s the federal position was one of general acceptance of jurisdiction and subsequently even where it shied away from such acceptance, it continued to move certain native people between non-status Indians and status in obvious recognition and exercise of its jurisdiction under s 91(24).

F. Treaties and Half-Breeds

[513] Both parties acknowledge that half-breeds were from time to time either offered treaty protection in lieu of land grants or were moved in and out of treaty for various reasons. The importance of this evidence is that treaty, protection and benefits, is a power directly related to being an "Indian" for purposes of the Constitution. Treaties are not made or implemented with other groups in Canadian society – it is a *sui generis* exercise of Crown prerogative and the Indian power.

[514] As early as the 1850s, according to Alexander Morris' book (1880) *The Treaties of Canada with the Indians of Manitoba and the Northwest Territories on Which They Were Based*, William B. Robinson, Commissioner to negotiate the surrender of lands on the north shore of Lakes Huron and Superior, denied half-breed requests for land because there was no power to give half-breeds free grants of land. The annuities were paid to the Chiefs to be distributed and, as half-breeds were included in the re-distribution of annuity payments, it was up to the Chiefs to give to half-breeds as much or as little as they wanted.

[515] As detailed earlier, in the Manitoba area, those half-breeds residing among the Indians were given the choice of taking scrip or treaty.

[516] As the result of concerns that some half-breeds were (by today's terms) "double dipping" in claiming the benefits of both Indian status and rights being given to half-breeds in terms of scrip, the federal government tried to force these people to choose one or the other.

[517] This equivocal state of affairs continued from 1871 to 1877 when Treaties 1 to 7 were concluded. Ms. Jones detailed the lack of impediments and the incentives to take treaty particularly as the annuities were being distributed well before any scrip was available.

[518] With respect to Treaties 8, 10 and 11, between 1899 and 1921 Ms. Jones outlined the experience under those treaties that land and scrip were offered to the half-breeds at the same time and that the policy was that it was a matter of choice which one would take.

[519] Ms. Jones further outlined the problem created once scrip was available in the Northwest. Many of those who had taken treaty wanted to withdraw and take scrip. Scrip could be sold to land speculators for immediate cash. It was not difficult to withdraw and take scrip because a large number of the natives in the Northwest were of such mixed heritage.

[520] While there were incentives to take scrip, albeit perhaps short-term, from the perspective of the government officials, there was no real system for differentiating between "Indians" and half-breeds and the term half-breed, as Ms. Jones confirmed, was often indiscriminately used at the time.

[521] The problem of "double dipping" was one of the policy concerns in the *Indian Act 1876*. The legislation attempted to draw a distinction between "half-breeds" and "Indians". The legislation

applied to all the provinces and to the Northwest Territories, including the territory of Keewatin (*Indian Act 1876*, above, s 1).

[522] While it is not necessary to the purposes of this case to interpret this statute, it is sufficient to accept Dr. Wicken's evidence that the legislation was understood to:

- define Indians as including half-breeds.
- include as Indians those people living off reserve.
- provide that no half-breed who received land under s 31 of the *Manitoba Act* be considered an Indian under this *Indian Act*.
- yet include half-breed men who received s 31 *Manitoba Act* land, were not children, did not have families and may have engaged in the buffalo hunt, as Indians under that Act, as were half-breed women.

[523] The evidence of Ms. Jones laid out a number of examples of individuals who had taken treaty or scrip but allowed to change their choice. In some cases the re-admission of half-breeds to treaty was due to them being destitute and starving. In summary, there were at least 800 withdrawals from treaty between 1885 and 1926 while there were "hundreds" of those who took scrip admitted or re-admitted to treaty.

[524] I accept the evidence that there was, for administrative purposes, a very unclear or indistinct line between Indians and half-breeds. The reasons for this opaque distinction ranged from adhering to equitable principles in dealing with aboriginals and compensating for Indian title to ensuring economic development in the Western to humanitarian considerations.

[525] The weight of the evidence is that Métis were both included and excluded from recognized Indian status in accordance with changing government policies. It is also evident that the federal government adopted these flexible policies because they could and that it was assumed, implied and accepted that the federal government could do so because Métis were "Indians" under s 91(24).

X. LEGAL ANALYSIS AND CONCLUSIONS

A. Section 91(24) – Métis and Non-Status Indians

(1) Introduction

[526] This is the first case in which this Court has been asked to determine whether Métis and non-status Indians are a "matter" that "comes within" the class of "Indians" as provided in s 91(24). That provision vests in Parliament the exclusive power to make laws in relation to all matters coming within the class of subject "Indians and Lands reserved for Indians".

[527] Professor Peter Hogg captured the essence of the modern debate in his text *Constitution Law of Canada* (Carswell 2007) at 28-4:

> It is probable that all status Indians are "Indians" within the meaning of s. 91(24) of the Constitution Act, 1867. Bu there are also many persons of Indian blood and culture who are outside the statutory definition. These "non-status Indians", which number about 200,000, are also undoubtedly "Indians" within the meaning of s. 91(24), although they are not governed by the *Indian Act*.
>
> The Métis people, who originated in the west from intermarriage between French Canadian men and Indian women during the fur trade period, received "half-breed" land grants in lieu of any right to live on reserves, and were accordingly excluded from the charter group from whom Indian status devolved. However, they are probably "Indians" within the meaning of s. 91(24). …

> The Inuit or Eskimo people are also outside the reserve system, and are therefore not covered by the Indian Act definition, but they have been held to be "Indians" within the meaning of s. 91(24). …

[528] While the s 91(24) power must be confined to its constitutional limits, the scope of the term "Indian" has been determined to be broad.

> … 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. 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.
>
> […]
>
> 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.
>
> *In Re Eskimo Reference*, above, at paras 35 and 38 (Duff CJ)

[529] However, the scope of the term "Indian" must be consistent with the purposes, the objects, of s 91(24). Justice Pigeon, in *Canard*, above, at p 15 – a case which focused extensively on the *Canadian Bill of Rights*, SC 1960, c 44, in the context of the *Indian Act* – described the object of s 91(24), as it relates to Indians, is to enable Parliament to make and pass laws applicable only to Indians as such.

[530] In the same decision Justice Beetz at page 24 held that s 91(24) created a racial classification and refers to a racial group for whom the Constitution contemplates possible special treatment. The federal government, within the constitutional limits, could further define the persons who fall within the group based upon marriage, filiation, intermarriage in the light of Indian customs and values or in light of legislation history.

> The *British North America Act, 1867*, under the authority of which the *Canadian Bill of Rights* was enacted, by using the word "Indians" in s. 91(24), creates a racial classification and refers to a racial group for whom it contemplates the possibility of a special treatment. It does not 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 of which the Court could and did take cognizance.

[531] On the evidence in this case, both non-status Indians and Métis are connected to the racial classification Indian by way of marriage, filiation and most clearly intermarriage.

[532] Non-status Indians and Métis were differentiated from others in Canadian society, particularly Euro-Canadians, because of their connection to this racial classification. To the extent that they were discriminated against or subjected to different treatment, such as in schooling, liquor laws, land and payments (as detailed earlier), it was based on their identification with or connection to Indian ancestry. The single most distinguishing feature of either non-status Indians or Métis is that of "Indianess", not language, religion or connection to European heritage.

[533] Against the factual background outlined in this decision, the matter of the constitutional interpretation of this head of power must proceed on accepted principles.

(2) Interpretation Principles

[534] There is dispute between the parties as to which constitutional interpretation principles apply. The Plaintiffs say that only the purposive approach is valid – one that requires a broad, purposive analysis which interprets specific provisions of a constitutional document in the light of its larger objects (see *Canada (Director of Investigation & Research, Combines Investigation Branch) v Southam Inc*, (sub nom *Hunter v Southam Inc)* [1984] 2 SCR 145 at 156, 11 DLR (4^{th}) 641). The Defendants, on the other hand, argue that the Courts use three (not necessarily conflicting) approaches – the historic, the purposive and the progressive.

[535] With respect to the interpretative approach in *Reference re Employment Insurance Act (Can), ss 22 and 23*, 2005 SCC 56, [2005] 2 SCR 669, the Quebec Court of Appeal was found to have erred in adopting an original intent approach to interpreting the Constitution rather than the progressive approach which the Supreme Court had adopted for many years. The Supreme Court cautioned against undue reliance on debates and correspondence in reaching conclusions on the precise scope of legislative competence. This judicial caveat is more applicable to analyzing the constitutional competence of specific legislation than in interpreting the scope of the head of power itself but it does speak to the reliability of this type of evidence as a basis for concluding on the breadth of the power.

[536] This Court has placed greater reliance on what was done by the federal government vis-à-vis "Indians" in the early years of Confederation as indicative of intent and scope of s 91(24) than on statements made in the political milieu. As noted earlier, Macdonald's assertion as to the purpose of scrip in Manitoba to extinguish Métis Indian land rights and his subsequent resiling therefrom must be taken with a degree of caution.

[537] As to direct discussion pre and post-Confederation as to the Indian power, as indicated earlier, there is little evidence of such. These are not the debates and documents often referred to. What can be examined is legislation and actions by various levels of government.

[538] I accept the Plaintiffs' submission that the purposive approach – the "living tree" doctrine – is the appropriate approach (see *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698). History helps to understand perspectives on the purpose but does not necessarily determine the purpose for all time. This is particularly the case with a constitution power which has, at some level, racial tones and which involved people who were seen in a light which today we would find offensive. Racial stereotyping is not a proper basis for constitutional interpretation.

[539] The Defendants' argument that the purpose of s 91(24) was to allow the federal government the power to protect Indians and their lands because Indians were viewed as childlike uncivilized people (the Defendants were clear that it did not endorse that view of the natives) ignores the far broader and more acceptable purposes for the s 91(24) power. These include the acceptance of the Crown's responsibilities to natives, obligations under the Royal Proclamation of 1763, the need for coordinated approach to natives rather than the balkanized colonial regimes and the need to deal

with the rapid and forceable expansion into the West including Euro-Canadian settlement and the building of the national railway.

[540] The Supreme Court's approach in the *Reference re Same-Sex Marriage* decision, above, is particularly helpful. In addition to setting forth the purposive approach, the Court also stated at paragraph 23 that the interpretation of constitutional powers is to be large and liberal or progressive.

[541] The Supreme Court also distinguished and refused to apply the "intention of the framers" approach used in *Blais*, above (discussed more fully later), a decision relied upon heavily by the Defendants to narrow the scope of s 91(24). The *Blais* case considered the interpretative question in relation to a particular constitutional agreement as opposed to a head of power and was therefore distinguishable from the present case.

[542] The Court also reaffirmed the principle of exhaustiveness, an essential characteristic of the federal distribution of powers which ensures that the whole legislative power, <u>whether exercised or merely potential</u> (this Court's emphasis), is distributed between Parliament and the legislature.

[543] The Supreme Court of Canada has also cautioned courts on the extent to which the living tree doctrine can be applied. It cannot be used to change the nature of the power to suit evolving societal views.

> **29** This is the context in which s. 91(2A) became part of the Canadian Constitution. This provision must nonetheless be interpreted in the same way as other provisions relating to the division of powers between Parliament and the provincial legislatures. It is necessary to identify the essential elements of the

> power and determine whether the adopted measures are "consistent with the natural evolution of that power" (*Reference*, at para. 44).
>
> **30** In this analysis of the content of legislative powers, changes in the way such powers are exercised and in the interplay of the powers assigned to the two levels of government often raise difficult problems. The solutions that must be applied when exercising powers change where new problems must be addressed. However, the evolution of society cannot serve as a pretext for changing the nature of the division of powers, which is a fundamental component of the Canadian federal system. The power in question must be interpreted generously, but in a manner consistent with its legal context, having regard to relevant historical elements (*Reference*, at paras. 45-46; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (5th ed. 2008), at pp. 201-2).
>
> [Emphasis by Court]
>
> *Confédération des syndicates nationaux v Canada (Attorney General)*, 2008 SCC 68, [2008] 3 SCR 511

[544] Both in principle and in practice, one of the essential elements of the Indian power was to vest in the federal government the power to legislate in relation to people who are defined, at least in a significant way, by their native heredity. As said earlier, the factor which distinguishes both non-status Indians and Métis from the rest of Canadians (and has done so when this country was less culturally and ethnicly diverse) is that native heritage – their "Indianess".

(3) Judicial Guidance

[545] Precedent has made clear that the term "Indian" in s 91(24) is broader than the definition of "Indian" in the *Indian Act* which was passed under the authority of s 91(24) (see *Canard*, above, p 207, earlier quoted).

> 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.

[546] Parliament cannot only set qualifications for admission to Indian status under the Act but it can also amend the statute which effectively can add or reduce the number of persons entitled to status (see *Canard*, above). This, Parliament has done from time to time. The impact of such amendments is to take persons who are non-status Indians and make them status Indians or turn certain status Indians into non-status Indians.

[547] The proposition that "Indian" for purposes of s 91(24) is broader than that term in the Act was clearly established in *In Re Eskimo Reference*, above (to be discussed more fully later). On a reference the Supreme Court of Canada concluded that Eskimos (now referred to more properly as "Inuit") were Indians for s 91(24). Inuit, however, are not "Indians" under the *Indian Act* and have never been so. The class of people who are "Indians" for constitutional purposes include Indians who are not status Indians but who are Indian nonetheless.

[548] The constitution limits on who may be Indian have already been referred to in paragraph 545 but include, as per Beetz in *Canard*, above, marriages recognized by Indian customs and values.

[549] The Defendants have acknowledged this wider group of Indians, the MNSI, in its Bill C-47 and Bill C-31 (subsequently passed) under which initially granted status to MNSI and their first and second generation descendants; subsequently limited in Bill C-31 to MNSI women and their first generation descendants. There is no constitution imperative that the cut-off for Indian status is the

first generation. As pointed out earlier, the use of the first generation cut-off left behind approximately 55,000 people and their descendants who otherwise would be status Indians. These people are "Indians", even in the Defendants' view, for constitutional purposes.

[550] In *In Re Eskimo Reference*, above, the Supreme Court of Canada had to consider whether Eskimos (Inuit) were Indians for purposes of s 91(24). Both parties rely extensively on this decision but suggesting that it teaches in opposite directions. The decision must be viewed with care, as it was a reference, not a trial where evidence is test and also because it did not apply a purposive approach. Most importantly, it did not specifically address the issue of Métis or half-breeds.

[551] Despite these limitations the decision is helpful in several aspects. One of the most important is that it established that the term "Indian" in s 91(24) is much broader than the *Indian Act* and that it encompassed people of aboriginal heritage not usually identified with the tribes of the more southern regions of Canada (see *Canadian Pioneer Management Ltd v Saskatchewan (Labour Relations Board)*, [1980] 1 SCR 433, 107 DLR (3d) 1).

[552] In that regard the Supreme Court rejected the argument that the term "Indian" was restricted to those tribes recognized at the time of the Royal Proclamation. The Supreme Court's approach was to examine the historical documents to determine how Inuit were viewed and treated. The Justices came to their common conclusion but focusing on different documents and taking different meaning therefrom.

[553] The Supreme Court, however, specifically rejected the notion that to be a s 91(24) Indian, one had to live in a tribe, on a reserve or to have rights in or to land. However, the claim to rights in land and the attempt to extinguish such rights shows, particularly in respect of Métis, a recognition that Métis had a sufficient connection to this native heritage to fall within the broad class of "Indian".

[554] It is instructive that in the modern context Métis, while not in a tribe, are seen to be in a "community" not unlike that referred to in *In Re Eskimo Reference*, above.

> **50** 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 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. …
>
> *Labrador Métis Nation*, above at para 50

[555] A common thread in the decision was to speak of Inuit as part of the people identified as "aborigines" and that the term "Indian" was broad enough to cover all "aborigines" (see *In Re Eskimo Reference*, above, at p 10). I do not take from those references that the Court had clearly in mind the peoples covered by the "Aboriginal People" of s 35 of the Constitution. Given the time and context of the decision, it is more probable that the Court was referring more generally to people of aboriginal or native ancestry. The concepts are similar but not identical.

[556] In coming to their conclusion, while not addressing MNSI specifically, the Supreme Court frequently referred to ½ breeds as ½ "Eskimos" or as being part of the Eskimo people.

[557] Chief Justice Duff, on behalf of Justices Davis, Hudson and Crocket, relied extensively on Hudson Bay documents, documents from Newfoundland governors, naval officers, ecclesiastics and traders. Of particular importance to this present case is the reliance on the reference in the Report of Judge Pinsent to "300 Indians and half-breeds of the Esquimaux and Mountaineer races" and a Report from the Bishops of Newfoundland that referred to:

- "Indians (Esquimaux or mountaineer), or half Indians"
- "Indians (Esquimaux) and half Indians, who live together"
- "the race of mixed blood, or Anglo-Esquimaux" where "the Indian characteristics very much disappear, and the children are both lively and comely".

[558] Aside from these racially stereotyped comments, the Supreme Court accepted that those of mixed heritage were identified and treated differently from "whites" and were seen as "Indian".

[559] Chief Justice Duff also referred to the Hudson Bay Company census which listed the Esquimaux as a tribe. It also listed Half-breeds and Whites separately from Indian tribes but also separately from each other. While the Defendants argue that this is evidence that half-breeds are not Indians, it also shows that in a society largely divided between whites and natives, half-breeds were not whites and therefore by default were natives (Indians).

[560] Chief Justice Duff concluded that the term "Indian" included all the "aborigines" of British North America. Moreover, recognizing the importance of the relationship between the Crown and natives (an obligation which the federal government took over at the time of Confederation), the Chief Justice saw significance in the fact that Esquimaux and other Indians were under the protection of the British Crown primarily through the HBC.

> Then it is said they were never "connected" with the British Crown or "under the protection" of the Crown. I find some difficulty in affirming that the Eskimo and other Indians ruled by the Hudson Bay Company, under either charter or licence from the Crown, were never under the protection of the Crown, and in understanding how, especially in view of the Proclamations cited, that can be affirmed of the Esquimaux of northeastern Labrador. 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. 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.
>
> *In Re Eskimo Reference*, above at p 10

[561] Similarly, Justice Cannon (Justice Crocket concurring) concluded that the term "Indian" equated with "sauvages" in French and that "sauvages" included all aborigines being within the territories in North America under British authority "whether Imperial, Colonial, or subject to the administrative powers of the Hudson Bay Company" (see p 11). Métis and non-status Indians would fall under that Crown authority at the time of Confederation.

[562] While the Supreme Court of Canada may not have applied the modern purposive approach to constitutional interpretation, it was aware of the significance of the Indian power and the intent to include a broad range of people of aboriginal heritage within that power.

> 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.
>
> *In Re Eskimo Reference*, above at p 12

[563] As noted in para 554 and accepted by Professor Wicken, there is an historical parallel between the Labrador Inuit half Indian/Esquimaux and the Métis buffalo hunters of the Northwest. They were each of mixed ancestry, wanderers over a vast area for food, subject to Crown authority under the Hudson Bay Company and contemplated to come under Canadian constitutional jurisdiction.

[564] In *In Re Eskimo Reference*, above, also teaches that self-identification is not constitutionally determinative. There was no requirement for Inuit to identify themselves with constitutional Indians. The federal government did not then or even now include Inuit as “Indians” under the Act.

[565] The historical resistance of many Métis to identify with “Indians” is understandable in the historical context where being Indian was not complimentary, and where certain freedoms were denied, but it is not determinative of the constitutional issue. There is no such stigma today (or

should not be) nor is there any legal requirement that important freedoms are denied by virtue of falling within the constitutional subject matter of Indian in s 91(24).

[566] Applying the purposive approach in light of the finding in *In Re Eskimo Reference*, above, I accept the Plaintiffs' argument supported by the opinions of Professor Wicken and Ms. Jones that the purpose of the Indian Power included the intent to control all people of aboriginal heritage in the new territories of Canada. The purpose of the Indian Power included assisting with the expansion and settlement of the West of which the building of the railway was a part. Absent a broad power over a broad range of people sharing a native hereditary base, the federal government would have difficulty achieving this goal.

[567] There was a perceived need to eliminate wandering groups of natives, to settle them and to assimilate them. This policy of assimilation changed later to policies of segregation and resulting discrimination. The history of the treatment of those classified as "Indians" is painful and the reconciliation process is a continuing one today.

[568] As referred to earlier, s 91(24) is a race-based power. There is no principled reason to make that race based constitutional jurisdiction more balkanized by emphasis on degrees of kinship nor degrees of cultural purity. As described by Harry Daniels Jr. – one can honour both the feather and the fiddle. Indeed as will be seen later, there are Métis who are also registered Indians. The recognition of Métis and non-status Indian as Indians under s 91(24) should accord a further level of respect and reconciliation by removing the constitutional uncertainty surrounding these groups.

[569] The Defendants make a strong argument that the Supreme Court in *Blais*, above, had indicated that Métis are not Indians for purposes of s 91(24). While there is support for that argument in various comments of the Court, it cannot stand for the proposition so stated by the Defendants.

[570] Mr. Blais was accused of hunting in a prohibited area in contravention of provincial wildlife legislation in the Province of Manitoba. For purposes of appeals, including to the Supreme Court, Blais abandoned his argument that he had an aboriginal right to hunt under s 35 of the *Constitution*. He relied exclusively on paragraph 13 of the Manitoba Natural Resources Transfer Agreement legislation to support his claim that as a Métis he was an Indian entitled to the protection of that Act [Agreement].

[571] Paragraph 13 of the Manitoba Natural Resources Transfer Agreement reads:

In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.	Pour assurer aux Indiens de la province la continuation de l'approvisionnement de gibier et de poisson destinés à leurs support et subsistance, le Canada consent à ce que les lois relatives au gibier et qui sont en vigueur de temps à autre dans la province, s'appliquent aux Indiens dans les limites de la province; toutefois, lesdits Indiens auront le droit que la province leur assure par les présentes de chasser et de prendre le gibier au piège et de pêcher le poisson, pour se nourrir en toute saison de l'année sur toutes les terres inoccupées de la

> Couronne et sur toutes les autres terres auxquelles lesdits Indiens peuvent avoir un droit d'accès.

[572] The Supreme Court supported the constitutional approach taken in *In Re Eskimo Reference*, above, to place constitutional provisions in "proper linguistic, philosophic and historical context". The Court drew distinctions between Métis and Indians based on the Métis' (and some government officials) view of themselves as different from Indians. The distinction was based in part on the basis that Métis were not wards of the Crown in need of protection and particularly the position of Métis in Manitoba where they acted as "Fathers of Confederation".

[573] With regard to the applicability of that decision to the present case, the thrust of the Defendants' argument is somewhat blunted by the Court's refusal to conclude or even suggest a conclusion that Métis were not "Indians" under s 91(24). The Court specifically refused to impose a continuity of language requirement on the *Constitution* – such a requirement would have led to a conclusion that Métis were not constitutionally "Indians".

> **36** The appellant asks us to impose a "continuity of language" requirement on the Constitution as a whole in order to support his argument that the term "Indians" in the *NRTA* includes the Métis. We do not find this approach persuasive. To the contrary, imposing a continuity requirement would lead us to conclude that "Indians" and "Métis" are different, since they are separately enumerated in s. 35(2) of the *Constitution Act, 1982*. 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.

[574] It would be an odd result to find that *Blais*, above, effectively answered the question which is before this Court when the judgment specifically and directly refused to do so. The Supreme

Court left that issue open for another day, presumably to decide the issue on a record directed toward that end. The present case is just such opportunity with a record designed to address the issue head on and not be ensnared in agreements limited to one province or caught up in s 15 *Charter* considerations.

[575] The record before this Court encompasses evidence regarding the Métis which is broader geographically and historically than other cases cited. Even the words of MacDonald in 1885 relied on in the *Blais* decision are not juxtaposed against his words in 1870 referred to in paragraph 397 of these reasons. The issue of Métis' interest in native land title referred to as early as 1870 and continued until at least July 1899 by Sir Wilfred Laurier and Clifford Sefton are some of the matters not addressed in *Blais*, above.

[576] The Defendants in this argument seek to have a continuity of language principle applied in the opposite manner (see Defendants' Memorandum of Argument, paragraph 351). With respect, s 35 is of little assistance to the interpretation of s 91(24), each serving different purposes and reflecting different times. The consistency of having all aboriginals covered in both provisions is neither a goal to strive for nor a result to resist.

[577] This Court has addressed the matter of how Métis were considered by government just before and not long after Confederation. As mentioned earlier, the Métis were not treated homogeneously; however, the evidence in this Court is that Métis were considered even as early as 1818 as being "Indian" in the widest sense.

> It is absurd to consider them legally in any other light than as
> Indians; the British law admits of no filiation of illegitimate children

> but that of the mother; and as these persons cannot in law claim any advantage by paternal right, it follows, that they ought not to be subjected to any disadvantages which might be supposed to arise from the fortuitous circumstances of their parentage.
>
> Being therefore Indians, they, as is frequently the case among the tribes in this vast continent, as *young men* (the technical term for warrior) have a right to form a new tribe on any unoccupied, or (according to the Indian law) any conquered territory. That the half-breeds under the denominations of *bois brules* and *metifs* have formed a separate a distinct tribe of Indians for a considerable time back, has been proved to you by various depositions.
>
> Letter of William McGillivray to General JC Sherbrooke, March 14, 1818 – Ex P432

[578] The decision in *Blais*, above, was limited in the *Reference re Same-Sex Marriag*e decision, above, to being one based on a constitutional agreement and not one involving a head of powers which involves different considerations, and interpretation principles – most particularly a purposive, progressive approach.

[579] Following the conclusion of argument, counsel brought to the Court's attention two decisions which were suggested were helpful in one way or another.

[580] In *Keewatin v Ontario (Minister of Natural Resources)*, 2011 ONSC 4801, [2012] 1 CNLR 13 [*Keewatin*], Justice Sanderson of the Ontario Superior Court of Justice dealt with the interpretation of a Harvesting Clause in Treaty 3 between Canada and the ancestors of the plaintiffs in that case.

[581] The Plaintiffs here take comfort in the support that that Court gave for the purpose of s 91(24) which had a focus on the opening of the West; the need to have Indians under federal

jurisdiction to protect this minority; to take over the Imperial responsibility. The Ontario Superior Court's conclusion is consistent with this Court's finding on the purposes of s 91(24) which also included a goal of assimilation and "civilization".

[582] Justice Sanderson did not, however, address to any extent the situation regarding half-breeds/Métis. Therefore, this decision does not provide material assistance on the difficult issue regarding Métis.

[583] The Plaintiffs contend that the *Keewatin* decision, above, supports their argument that the principles of "identity of jurisdiction and interjurisdictional immunity" support the need to assign jurisdiction over MNSI to the federal government to protect aboriginal and treaty rights protected under s 35. However, s 35 rights are different from s 91(24) and do not help the analysis of the scope of s 91(24).

[584] The Defendants dismiss the *Keewatin* decision, above, of being of little assistance. The Defendants take a narrow view of treaties as merely being for the protection of Indians. There has been little evidence in this current litigation on the role of treaties other than references to instances where Métis were put into treaty, taken out of treaty or exchange treaty protection for land scrip.

[585] The Defendants' contention that treaties are entered into pursuant to Royal Prerogative and therefore do not relate to s 91(24) is misplaced. Constitutionally there is Royal Prerogative applicable to the Crown in right of Canada and the Crown in right of a province. It is s 91(24) which gives authority to the federal Crown rather than the provincial Crown to exercise that treaty power.

It was a source of the power in the federal Crown to offer scrip in lieu of treaty to these Métis in Manitoba. Any prerogative power in respect of treaties is subsumed in the legislated provision s 91(24).

[586] Lastly, the Plaintiffs find support in Justice Sanderson's reluctance to accept von Gernet's evidence. The weighing of an expert's evidence and its acceptance is uniquely within the purview of a trial judge. This Court has made its own conclusion but the fact that Justice Sanderson did not accept his evidence is of little assistance.

[587] The other post-argument decision brought to the Court's attention is the Supreme Court's decision in *Cunningham*, above,. The Supreme Court dealt with a *Charter* challenge to provisions of Alberta's *Metis Settlements Act*.

[588] The Alberta legislation created a land base for Alberta Métis. The provisions of the *Metis Settlements Act* giving rise to the litigation were those that provide that registration as an Indian under the *Indian Act* precluded membership in a Métis settlement established under the *Metis Settlements Act*. The claimants, who were status Indians, sued for a declaration that the disentitlement provisions were contrary to s 7 and 15 of the *Charter*.

[589] The disentitlement for membership generally covered a person who is a status Indian and registered Inuk. However, this status was not a complete bar and there are circumstances under which a status Indian or registered Inuk could become a Métis settlement member.

[590] The Supreme Court of Canada upheld the disentitlement provisions. It found that the *Metis Settlements Act*, as an ameliorative program, was protected by s 15(2) of the *Charter*.

[591] It is important to note that the Court did not deal with the constitutionality of the legislation or otherwise deal with s 91(24). It cannot be said that in *Cunningham*, above, the Supreme Court of Canada decided the very issue which *Blais*, above, left open; particularly when the Court made no reference to *Blais*, above. Therefore, *Cunningham*, above, is neither dispositive nor strong authority against the requested declaration.

[592] It is noteworthy that the Court referenced that s 35 requires, of necessity, that the identification with one of the three aboriginal groups leads to the exclusion from the other two, at least with respect to identity, culture and self-governance.

[593] Section 91(24) does not require such selection and exclusion. As *In Re Eskimo Reference*, above, made clear and as considered in the post 1982/s 35 context, assertion of identity with one s 35 group does not preclude inclusion in s 91(24). The Inuit assertion of a distinct identity from Indians does not take them outside being "Indian" for purposes of s 91(24).

[594] The evidence in this case, and as acknowledged in *Cunningham*, above, at paragraph 88, shows that mixed identity is a recurrent theme in Canada's aboriginal community. With regard to s 91(24), unlike s 35, the latin legal maxim *expressio unius est exclusion alterius* is not totally applicable.

[595] In *Cunningham*, above, the Supreme Court of Canada did not have before it the evidences, as presented to this Court, of the treatment of Métis as Indians detailed in these reasons.

[596] The conclusion in *Cunningham*, above, does not undermine the Plaintiffs' right to relief nor does such a right undermine the constitutionality of the *Métis Settlements Act*. Provincially run ameliorative programs which benefit aboriginal people are permitted as held in *Lovelace*, above. In *Lovelace* the Supreme Court of Canada confirmed that a provincial program that provided benefits to status Indians did not affect the core of s 91(24) federal jurisdiction.

[597] The constitutional status of the *Metis Settlements Act* was not before the Supreme Court and it would not be appropriate to decide this case on the basis of what might arise in respect of some other legislation. However, the Supreme Court recognized that the Alberta legislation was an ameliorative program. This Court concludes that based on the rationale in *Lovelace*, above, the *Cunningham* decision, above, is consistent with that rationale and not a bar to a declaration that Métis are "Indians" under s 91(24).

[598] The *Cunningham* decision, above, gives support for the Plaintiffs' interpretation of s 91(24) and the distinction between s 91(24) and s 35.

[599] The Plaintiffs also rely on numerous commentaries, articles and papers which support the proposition that MNSI are included in s 91(24). As reassuring as this may be, there are some who write in support of the opposite proposition. This case has to be decided on the evidence before the

Court. As can be seen from other decisions cited in these reasons, evidence plays a critical role in resolving the issue.

[600] The case for inclusion of non-status Indians in s 91(24) is more direct and clear than in respect of Métis. The situation of the Métis is more complex and more diverse and must be viewed from a broad perspective. On balance, the Court also concludes that Métis are included in s 91(24).

[601] Therefore, the Plaintiffs will be entitled to a declaration in their favour and to that effect.

B. Fiduciary Duty

[602] The Plaintiffs request a declaration that the federal Crown owes a fiduciary duty to MNSI as aboriginal people. There is no claim that any legal duty has in fact been breached.

[603] The only articulation of what the fiduciary duty claim could be was that there is a duty on the federal Crown to recognize that MNSI are Indians under s 91(24).

[604] There is no dispute that the Crown has a fiduciary relationship with Aboriginal people both historically and pursuant to s 35 (see *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385).

[605] In *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245 at para 79, Justice Binnie spoke of the nature of the fiduciary duty owed by the Crown.

> **79** 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)

[606] However, in subsequent paragraphs 83-86, Justice Binnie set limits on the fiduciary relationship and the duty flowing therefrom. That duty is not an open-ended undefined obligation but must be focused on a specific interest.

> **83** I offer no comment about the correctness of the disposition of these particular cases on the facts, none of which are before us for decision, but I think it desirable for the Court to affirm the principle, already mentioned, that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature (*Lac Minerals*, *supra*, at p. 597), and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.
>
> **84** I note, for example, what was said by Rothstein J.A. in *Chippewas of the Nawash First Nation v. Canada (Minister of Indian and Northern Affairs)*, *supra*, at para. 6:
>
> > The second argument is that the Government of Canada has a fiduciary duty to the appellants not to disclose the information in question because some of it relates to Indian land. We are not dealing here with the surrender of reserve land, as was the case in *Guerin v. Canada*. Nor are we

> dealing with Aboriginal rights under s. 35 of the *Constitution Act, 1982*. This case is about whether certain information submitted to the government by the appellants should be disclosed under the *Access to Information Act*. [Emphasis added.]

See also *Lac La Ronge Indian Band v. Canada* (2001), 206 D.L.R. (4th) 638 (Sask. C.A.); *Cree Regional Authority v. Robinson*, [1991] 4 C.N.L.R. 84 (F.C.T.D.); *Tsawwassen Indian Band v. Canada (Minister of Finance)* (1998), 145 F.T.R. 1; *Westbank First Nation v. British Columbia* (2000), 191 D.L.R. (4th) 180 (B.C.S.C).

85 I do not suggest that the existence of a public law duty necessarily excludes the creation of a fiduciary relationship. The latter, however, depends on identification of a cognizable Indian interest, and the Crown's undertaking of discretionary control in relation thereto in a way that invokes responsibility "in the nature of a private law duty", as discussed below.

N. *Application of Fiduciary Principles to Indian Lands*

86 For the reasons which follow, it is my view that the appellant bands' submissions in these appeals with respect to the existence and breach of a fiduciary duty cannot succeed:

1. The content of the Crown's fiduciary duty towards aboriginal peoples varies with the nature and importance of the interest sought to be protected. It does not provide a general indemnity.

…

[607] In view of the above comments, the fiduciary relationship exists as a matter of law flowing from the declaration that MNSI are Indians pursuant to s 91(24). The relationship engages the honour of the Crown and applies to Métis s well as non-status Indians.

> **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. The facts of this case make that clear. The Métis of the Red River Settlement were a powerful political and military force in the 1870s. Led by Louis Riel, they were the driving force behind the provisional government.

…

> **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. That relationship being established, it is next necessary to consider whether Canada owed any fiduciary obligations to the Métis in the administration of the *Act*.
>
> *Manitoba Métis Foundation Inc v Canada (Attorney General)*, above, at paras 439, 442 and 443

[608] However, the declaration which the Plaintiffs seek is made without specific facts about what duty has been breached for which such a declaration would have any utility. The Court is not asked to determine that there is a duty to do or not do anything.

[609] The Court is not prepared to make some general statement concerning fiduciary duty. Given the declaration of right in respect of s 91(24), one would expect that the federal government would act in accordance with whatever duty arises in respect of any specific matter touching on the non-clarified fiduciary relationship.

C. Duty to Negotiate

[610] The third declaration sought seeks to require Canada to "negotiate and consult with MNSI, on a collective basis through representation of their choice, with respect to their rights, interests and needs as Aboriginal peoples". It is curious that this declaration, like that sought in respect of a

fiduciary duty, refers to MNSI as Aboriginal peoples – s 35 wording – and not as "Indians" within the meaning of s 91(24).

[611] The law on the duty to consult and to negotiate is well-developed in Canada. The purpose of the duty is to further reconciliation. It engages the honour of the Crown. It is also directed to consultation and negotiation in respect of one or more specific matters (see *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511).

[612] The principle of a duty to consult and negotiate exists in other areas of Canadian law including labour relations and even political secession. The breadth of the principle is so wide that without reference to a specific matter to be consulted on or negotiated, a general declaration would be abstract and not particularly useful.

[613] It would appear that what the Plaintiffs seek is some form of declaration that the Crown has a duty to consult on the identity and definition of the rights of MNSI and that this process should be done with CAP as the appropriate representative.

[614] Absent better particulars of what is at issue to consult on or negotiate, the Court can offer no guidance. The duty to consult and negotiate depends on the subject matter, the strength of the claim and other factors not before the Court.

[615] The process of consultation to date suggests that there has not been a failure while it is arguable that it has not been adequate. To the extent that the issue of the constitutional status of

MNSI was something of a barrier to consultation, the declaration granted should remove such impediments.

[616] The dispute as to who are the representatives of choice on behalf of Métis in particular is also another barrier. It is not a matter on which this Court can comment; certainly not on the basis of this record.

[617] In all of the circumstances, the Court will not grant the declaration for negotiation and consultation. Hopefully, the resolution of the constitutional issue will facilitate resolution on other matters. The refusal to grant the two declarations are without prejudice to any rights to seek similar relief on a further or better record.

XI. COSTS

[618] In awarding costs to the Plaintiffs, the Court recognizes that some of the costs have already been paid by the federal government. However, those costs, particularly counsel's fees (particularly those of the law firm engaged by the Plaintiffs), were at a suppressed level in relation to the real legal costs and the public importance of this litigation. The Court is prepared to make a further cost award in favour of the Plaintiffs. The parties may make written submissions with respect to the scale of costs and the beneficiaries of such awards within thirty (30) days of the public release of these Reasons.

XII. CONCLUSION

[619] For all these reasons, the Plaintiffs' request for a declaration that Métis and non-status Indians are "Indians" within the meaning of the *Constitution Act, 1867*, s 91(24) will be granted.

The remaining declarations sought will be dismissed.

The Plaintiffs shall have their costs as described in these Reasons.

"Michael L. Phelan"
Judge

Ottawa, Ontario
January 8, 2013

FEDERAL COURT

SOLICITORS OF RECORD

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