File No. 33340

**SUPREME COURT OF CANADA**
**(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF ALBERTA)**

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA
(MINISTER OF ABORIGINAL AFFAIRS
AND NORTHERN DEVELOPMENT)

and

REGISTRAR, MÉTIS SETTLEMENTS LAND REGISTRY

APPELLANTS
(Respondents)

-and-

BARBARA CUNNINGHAM

and

JOHN KENNETH CUNNINGHAM, LAWRENT (LAWRENCE)
CUNNINGHAM, RALPH CUNNINGHAM, LYNN NOSKEY,
GORDON CUNNINGHAM, ROGER CUNNINGHAM AND RAY STUART

RESPONDENTS
(Appellants)

- and –

ATTORNEY GENERAL OF QUEBEC
ATTORNEY GENERAL OF SASKATCHEWAN
ATTORNEY GENERAL OF ONTARIO

INTERVENERS

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# FACTUM OF THE INTERVENER
# GIFT LAKE MÉTIS SETTLEMENT

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## PART I - OVERVIEW AND STATEMENT OF FACTS

1. The intervener Gift Lake Métis Settlement ("Gift Lake") adopts the statement of facts set out in the Respondents' Factum, and adds that it is one of eight Métis Settlements in Alberta.[1]

2. The stated object of the *Métis Settlements Act*, R.S.A. 2000, M-14 (the "MSA") was for the Métis to continue to have a land base for the preservation and enhancement of Métis culture and identity and to enable the Métis to attain self-governance.[2]

3. Sections 75 and 90 of the MSA (the "Struck Provisions") have no rational connection or relationship to the MSA's "twin pillars" of preserving and enhancing Métis culture and identity and enabling self-governance, and undermine those objectives.

4. A fundamental principle of self-governance is the right to control membership and, as part of that right, controlling who may reside in that community's territory.[3]

5. The Struck Provisions impair the ability of Métis Settlements to self govern by forcing Métis Settlements to deny "citizenship" (membership status) to people who are accepted members of that community.

6. Further, excluding any self-identifying Métis people who are accepted by their community from membership in a Métis Settlement is counter to the objective of preserving and enhancing Métis culture and identity.

7. The Struck Provisions impose a particular construction of Métis identity on the Métis Settlements that has not been generally accepted by the community and that is contrary to this Court's analysis in *R. v. Powley*.[4]

8. The Struck Provisions do not support or have any rational connection to the ameliorative purpose of the MSA, are arbitrary and have disproportionately deleterious effects with respect to

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[1] *Métis Settlements Act*, R.S.A. 2000, c. M-14, s. 2(1)(e) (the "MSA") [Respondent's Authorities ("R.A."), TAB 22]
[2] MSA, *supra*, s. 0.1(a) [R.A., TAB 22]
[3] See e.g. *United Nations Declaration on the Rights of Indigenous Peoples*, G.A. Res. 61/295, UNGA, 2007, UN Doc. A/RES/61/295 at article 33; Wendy Cornet, "Aboriginality: Legal Foundations, Past Trends, Future Prospects" in Joseph Eliot Magnet & Dwight A. Dorey, eds. *Aboriginal Rights Litigation* (Markham, Ont.: LexisNexis, 2003) at 144
[4] *R. v. Powley*, [2003] 2 S.C.R. 207 ("*Powley*") [R.A., TAB 18]

the objective of the MSA. As a result, they are in violation of ss. 15 and 7 of the *Charter*[5] and cannot be saved by the operation of s. 1 of the *Charter*.

## PART II - POSITION ON THE APPELLANTS' QUESTIONS

9. Questions 1, 3, and 5 should be answered in the affirmative; Questions 2, 4, and 6 should be answered in the negative.

## PART III - STATEMENT OF ARGUMENT

### A. The Struck Provisions undermine the objective of Métis self-governance

10. One of the two stated objects of the MSA is to "enable the Métis to attain self-governance,"[6] which the Appellants have admitted includes control of their own membership.[7]

11. A fundamental principle of self-governance is the right to determine one's own membership.[8]

12. The Struck Provisions do not support this aim. They impose external restrictions upon Métis Settlements, forcing them to deny or revoke the settlement membership of people who are accepted members of that Métis Settlement community.

13. Even if a person:

a. self-identifies as Métis;
b. has aboriginal roots;
c. lives on the Settlement; and,
d. has committed to living at the settlement and preserving a peaceful community,[9]

but happens to have obtained Indian status as an adult after November 1, 1990 (an "Indian-status Métis"), a Métis Settlement cannot admit him or her as a member and the MSA operates to terminate the membership of existing Indian-status Métis members.[10]

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[5] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Appellant's Authorities ("A.A."), TAB 24]
[6] MSA, *supra,* s. 0.1(a) [R.A., TAB 22]
[7] Affidavit of Ronald Raitz, Appellant's Record ("A.R"). Vol. IV, p. 2 at para. 6
[8] *Supra, note 3*
[9] MSA, *supra*, at s. 78 sets out these membership requirements [R.A., TAB 22]
[10] Cross-Examination on Affidavit of Ronald Raitz, A.R. Vol. 5, p. 23, line 5 to line 12

14. The Appellants have conceded that s. 75 is an example of provisions within the MSA that deny Métis settlements control over their own membership.[11]

15. The *Alberta-Métis Settlements Accord* (the "*Accord*") was designed to achieve the aspirations of the Métis to "gain local autonomy in their own affairs." The MacEwan Report recommended that the legislative framework for what would become the MSA enable "the maximum practicable local self-government of the land base."[12] (emphasis added)

16. The MSA created eight Settlements in order to foster local self-governance. The Struck Provisions impose a global membership restriction on each Settlement community, which is inconsistent with the self-governance purpose of the MSA.

17. It has been suggested that the *Accord* and the history leading to the *Accord* represent a community consensus of the membership restrictions created by the Struck Provisions.[13] There is no direct evidence to substantiate this assertion. The limited secondary commentary proffered in support of this proposition is not conclusive, to a certain extent contradictory, and does not form part of the evidentiary record.[14] In fact, what direct evidence there is before the Court is contrary to the assertion of a community consensus.

18. There were at least 88 members at Peavine who were Indian-status Métis, but whose memberships were not terminated.[15]

19. Archie Collins, Chairperson of the Elizabeth Métis Settlement ("Elizabeth"), also acknowledged under cross-examination that there could be members of Elizabeth who could be

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[11] Cross-Examination on Affidavit of Ronald Raitz, A.R. Vol. 5, p. 11, line 10 to p. 12, line 13
[12] Affidavit of Dennis Cunningham, Exhibit "B", *Report of the MacEwan Joint Métis-Government Committee to review the Métis Betterment Act and Regulations*, A.R. Vol. II at 198.
[13] See e.g. Appellants' Factum at paras. 46-55, 58; Métis Settlements General Council Factum at paras. 2-6.
[14] See e.g. Fred V. Martin, "Alberta's Métis Settlements: A Brief History" in Richard Connors & John M. Law, eds., *Forging Alberta's Constitutional Framework* (Edmonton: The University of Alberta Press, 2005) 345 at 374: "Compared to the sparse and inadequate 22 sections of the existing *Métis Betterment Act*, [the draft Accord's] 212 sections overwhelmed most Settlement members;" [Intervener's Authorities ("I.A"), TAB 1] and Catherine E. Bell, *Alberta's Métis Settlements Legislation: An Overview of Ownership and Management of Settlement Lands* (Regina: Canadian Plains Research Center, University of Regina, 1994) at pp. 17 to 20 and particularly p. 20, where the author note divisions in the Métis settlements leadership over membership issues in the Accord [I.A. TAB 2]
[15] Affidavit of Sherry Cunningham, A.R.Vol. III, p. 128 at paras. 9-10 and Exhibits "C" and "D"; Cross-Examination of Ronald Raitz, A.R. Vol. V at p.46, line 1 to 48, line 16

Indian-status Métis.[16] He further conceded that Elizabeth had not taken any steps to identify how many Indian-status Métis formed part of Elizabeth's membership.[17]

20. Further exceptions are found in the MSA's *Transitional Membership Regulation,*[18] which permitted Métis who obtained their Indian status prior to November 1, 1990 to become settlement members ("Grandfathered Indian-status Members"), and s. 75(2), which permitted Métis individuals who were registered as Indians in their childhood to obtain membership (the "Child Indian-status Members").

21. Even two national political representative organizations, the Congress of Aboriginal Peoples (CAP) and the Métis National Council, do not agree on the issue of defining the Métis people. As Paul Chartrand notes, "securing agreement amongst the Métis regarding their own self-definition is a difficult political challenge."[19]

22. In light of these numerous exceptions, the lack of direct evidence to suggest such a consensus and the limited (and contradictory) commentary on the issue, this Court cannot be satisfied that there is a community consensus on whether Indian status should affect membership.

23. In the absence of such consensus, the Struck Provision are paternalistically imposed restrictions on the Métis Settlements' right to self-govern and are not rationally connected or related to the enhancement of local Métis self-governance.

24. Further, the Struck Provisions compromise the Settlements' self-governance by restricting their ability to control who may live on their lands.

25. One of the "twin pillars" of the MSA was for Métis to "continue to have a land base…to enable the Métis to attain self-governance."[20]

26. Members who lose their membership also lose any interest they had in lands in the settlement area[21] and their right to reside or occupy patented land except in certain specific

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[16] Cross-Examination on Affidavit of Archie Collins, A.R. Vol. II at p. 101, lines 10-21.
[17] *Ibid.*, at p. 100, lines 21-25.
[18] Alta. Reg. 337/1990 [A.A. TAB 32]
[19] Paul L.A.H. Chartrand, "Defining the 'Métis' of Canada" in F. Wilson and M. Mallet, eds. *Métis-Crown Relations: Rights, Identity, Jurisdiction and Governance* (Toronto: Irwin Law, 2008) at 31 [I.A., TAB 3]
[20] MSA, *supra*, s. 0.1(a) [R.A., TAB 22]

instances (such as living with members of their immediate family who are Settlement members).[22] Even in those exceptional circumstances, non-members can be removed from the lands for "just cause."[23]

27. The Struck Provisions neuter the Métis Settlements' ability to determine who shall reside on their land base, in violation of the purpose of enhancing self-governance.

28. In light of the above, the Struck Provisions do not comply with this "twin pillar" of the MSA, nor are they rationally related to them.

## B. The Struck Provisions undermine the objective of preserving and enhancing Métis identity and culture

29. Excluding self-identifying Métis people from Métis Settlement membership is also not rationally related or connected to the MSA's objective of preserving and enhancing Métis culture and identity.

30. The assumption underlying the Struck Provisions is that a Métis individual's registration as an Indian or Inuk will compromise Métis culture and their Métis identity. This assumption grounds the assertion that any MSA benefits should be reserved for Métis people and must not be "diluted" by sharing them with Indian-status Métis.[24]

### 1. Métis Culture and Identity

31. Disqualification of otherwise eligible members due to Indian status cannot be rationally related to the MSA objective of preserving and enhancing Métis culture and identity.

32. This case is an illustration in point: the Respondents are Métis individuals who were and are an integral part of the Peavine Métis Settlement community. The Respondents are individuals who lived most of their lives at Peavine,[25] taught Métis children[26], trained Métis workers,[27] acted

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[21] MSA, *supra*, s. 95 [R.A., TAB 22]
[22] MSA, *supra*, ss. 91(1)(a) and 92 [R.A., TAB 22]
[23] MSA, *supra*, s. 93 [R.A., TAB 22]
[24] See e.g. Appellants' Factum at para. 54, East Prairie Factum at para. 19
[25] See Affidavits of the Respondents, A.R. Vol. II, pp. 1, 11, 20, 30, 43, 52, 58, 67, all at para. 1
[26] Affidavit of Barbara Joyce Cunningham, A.R. Vol. II, p. 12 at para. 7
[27] Affidavit of Lawrent (Lawrence) Bernard Cunningham, A.R. Vol. II, p. 31 at para. 8

as Settlement Administrator[28] and Chairperson,[29] built roads,[30] and whose families lived at Peavine.[31] Yet, by registering for Indian status to obtain medical benefits, the Struck Provisions operate to exclude these people from "citizenship" in their community.

33. Depriving Indian-status Métis of the ability to continue to live in community on a Métis Settlement detracts from the MSA's objective of preserving and enhancing Métis culture. A culture cannot thrive without members. The Struck Provisions arbitrarily deprive Métis Settlements of "citizens," such as the Respondents, who enhance Métis culture and identity in that community.

34. Further, if registration as an Indian is a threat to Métis culture and identity, then it would not be rational to have permitted the Grandfathered Indian-status Members and Child Indian-status Members to maintain membership. It is no more rational to conclude that inclusion of Indian-status Métis will somehow threaten Métis culture and identity.[32]

### 2. The "Diluted Benefits" Assertion Assumes Métis Identity and Indian Status Are Mutually Exclusive

35. It has been suggested that it is legitimate for Indian-status Métis to be excluded from membership in order to avoid the dilution of limited resources available to each Métis Settlement.[33]

36. However, while the MSA provides a land base for the Métis Settlements, and individual Métis Settlements may decide to provide benefits for its members out of its communal resources,[34] the MSA is not structured as a benefits-providing statute.[35]

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[28] Affidavit of Lynn Noskey, A.R. Vol. II, p. 53 at para. 8
[29] Affidavit of Lawrent (Lawrence) Bernard Cunningham, A.R. Vol. II, p. 32 at para. 9
[30] Affidavit of John Kenneth Cunningham, A.R. Vol. II, p. 21 at para. 8
[31] See Affidavit of Ralph David Cunningham, A.R. Vol. II, p. 2-3 at paras. 5-7; Affidavit of Barabara Joyce Cunningham, A.R. Vol. II, p. 12 at paras. 4-6; Affidavit of John Kenneth Cunningham, A.R. Vol. II, p. 21 at paras. 5-7; Affidavit of Lawrent (Lawrence) Bernard Cunningham, A.R. Vol. II, p. 31 at paras. 5-7; Affidavit of Gordon Cunningham, A.R. Vol. II, p. 44, 45 at paras. 4-6; Affidavit of Lynn Tracey Noskey, A.R. Vol. II, p. 53 at paras. 5, 7; Affidavit of Roger Peter Cunningham, A.R. Vol. II, p. 59 at paras. 5-7; Affidavit of Ray Charles Stuart, A.R. Vol. II, p. 67-68 at para. 3
[32] Cross-Examination on Affidavit of Archie Collins, A.R. Vol. II, p. 98 at lines 3-8.
[33] See Appellant's Factum at para. 54, East Prairie Factum at para. 19
[34] Such as medical transportation support at Peavine: see e.g. Affidavit of Ralph Cunningham, A.R. Vol. II, p. 3 at para. 14; or job training programs and subsidized housing at Elizabeth: see e.g. Affidavit of Archie Collins, A.R. Vol. II, p. 74 at para. 8, see also Affidavit of Cameron Henry, A.R. Vol. V, p. 116-120.

37. In any event, the "diluted benefits" assertion presumes that, absent the Struck Provisions, there will be an influx of Indians claiming membership at Métis Settlements.

38. However, the existing MSA criteria for membership in a Métis Settlement prevents individuals from obtaining membership who do not already qualify as "Métis":

39. The MSA criteria limit membership eligibility to those who:

a. Are persons of Canadian aboriginal ancestry;

b. Identify with Métis history and culture;[36]

c. Are committed to living in the settlement area and preserving a peaceful community.[37]

40. These are virtually identical to the indicia of Métis membership set out by this Honourable Court in *R. v. Powley*, namely:

a. Ancestral connection to a historic Métis community;

b. Self-identification as a member of a Métis community; and,

c. Acceptance by the modern Métis community

41. If the community of a particular Settlement is not satisfied that the MSA/*Powley* criteria are met, then membership cannot be granted.[38]

42. There is no evidence before this Court that absent the Struck Provisions there would be a flood of people with Indian status claiming to be Métis in order to unjustly deprive "pure" Métis of their resources.[39] To the contrary, the evidence indicates that, just like the Respondents, Indian-status Métis are already part of their Métis Settlement community, if not already members.[40]

43. In all instances, the "diluted benefits" assertion cannot be sustained as the MSA/*Powley* criteria for membership at a Settlement would have to be satisfied.

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The assertions regarding benefits made in paras. 4-6 of the Elizabeth Métis Settlement Factum are not supported by the cited Reasons for Judgment or are not in evidence.

[35] See Cross-Examination on Affidavit of Ronald Raitz, A.R. Vol. V, p. 12, line 17 to p. 13, line 4

[36] See also MSA, *supra*, s. 1(j) [R.A. TAB 22]

[37] *Ibid.*, s. 78(1)

[38] *Ibid.*

[39] Reasons for Judgment in the Court of Appeal of Alberta, A.R. Vol. I, p. 64 at para. 62

[40] Affidavits of the Respondents, A.R. Vol II; Cross-Examination on Affidavit of Ronald Raitz, A.R. Vol. V, p. 24, line 18 to p. 32, line 3; Affidavit of Sherry Cunningham, A.R. Vol. III, p. 128 at para. 9.

44. The "diluted benefits" assertion thus depends on the inaccurate assumption that Indian-status Métis are not "Métis" and are therefore not entitled to "Métis" benefits.

## C. The Struck Provisions violate Sections 15, 7 and 2(d) of the *Charter*

### 1. The Struck Provision fail to support the ameliorative purpose of the MSA

45. As set out by this Honourable Court in *R. v. Kapp*, if the government can show that a law meets criteria set out in s. 15(2) of the *Charter*, then that law will be constitutional.[41]

46. To qualify for s. 15(2) protection, a law must have "as its object" the amelioration of conditions of the disadvantaged group. An ameliorative purpose is established by examining the stated purposes of the legislation and whether it was rational for the state to have concluded that the means chosen to reach its ameliorative goal would contribute to that purpose.[42]

47. Gift Lake submits that the Struck Provisions are not rationally related to either of the "twin pillars" of the MSA, for the reasons described above.

### 2. The Struck Provisions are arbitrary

48. The Struck Provisions also constitute an arbitrary deprivation of the fundamental right to life, liberty and security of the person.

49. This Court has confirmed that the s. 7 right to life, liberty and security of the person includes "fundamentally or inherently personal matters" that "implicate basic choices going to the core of what it means to enjoy individual dignity and independence," such as choosing where to establish one's home.[43] This choice may involve particularly personal considerations, including "the historical significance or cultural make-up of a given locale", or being "physically proximate to family or close friends."[44]

50. The utilization of the Struck Provision on the Respondents has left them vulnerable to deprivation of their "individual dignity and independence" by removing their right to live in their community. The potential deprivation is all the more egregious considering this is the only place

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[41] *R. v. Kapp*, [2008] 2 S.C.R. 483 at para. 40 [A.A. at TAB 16]
[42] *Ibid.* at para. 48 [A.A., TAB 16]
[43] *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 at para. 66 [R.A., TAB 5]
[44] *Ibid.*, at paras. 67-68

that they can live in community with others as Métis. Put more starkly, for most of the Respondents, it is the only home they have ever known.[45]

51. Any deprivation of this fundamental right can only be allowed in accordance with the principles of fundamental justice[46] -- which means that the law should not be arbitrary.[47]

52. A law is arbitrary where "it bears no relation to, or is inconsistent with, the objective that lies behind [it]."[48] There must be a real connection between the limit of the freedom and the legislative goal, not merely a theoretical one.[49]

53. The fact that Grandfathered Indian-Status Members and Child Indian-Status Members were permitted to obtain or maintain membership is a key indicator of the arbitrariness of the Struck Provisions.

54. Further, as discussed above, there is no real connection between the "twin pillars" of the MSA and the limit on a Métis person's freedom to live on Settlement Lands within their community arising from the Struck Provisions. As a result, the deprivation of the Respondents' s. 7 rights is arbitrary and not in accordance with principles of fundamental justice.

### 3. The Struck Provisions are not saved by the application of s. 1

55. In order for the Struck Provisions to be saved by the application of s. 1 of the *Charter*, the Appellant must show that the objective of the impugned provision is of sufficient importance to override the applicable rights or freedoms and that the means chosen to effect that objective were reasonable and demonstrably justified. Means are reasonable and demonstrably justified only if they are rationally connected to the objective, impair the right or freedom as little as possible and if there is proportionality between the effects of the measures and the objective.[50]

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[45] See also T.C. Pocklington, *The Government and Politics of the Alberta Métis Settlements* (Regina: Canadian Plains Research Center, University of Regina, 1991) at 104: "...when asked what they saw as the best things about settlement life...many of the respondents concluded simply by saying "Well, it's *home*, you know," with a look that suggested that anyone who could understand that answer would not have asked the questions in the first place ...The Métis have a distinct culture, that culture permeates settlement life, and the settlers cherish it" [I.A., TAB 4]
[46] *Charter*, *supra*, s. 7 [A.A., TAB 24]
[47] *Chaoulli v. Quebec (Attorney-General)*, [2005] 1 S.C.R. 791 at para. 129 ("*Chaoulli*") [R.A., TAB 2]
[48] *Ibid.* at para. 130
[49] *Ibid*, at para. 131
[50] *R. v. Oakes*, [1986] 1 S.C.R. 103 at 139, c-f [I.A., TAB 5]

56. While the "twin pillars" of the MSA are important and pressing objectives, the Struck Provisions do not serve these purposes, nor is there any rational connection between them. The Struck Provisions are arbitrary and based on irrational considerations.

57. Further, the Struck Provisions are disproportionate to any objective they may have. As this Court has noted, "the more severe the deleterious effects of a measure, the more important the objective must be."[51]

58. Gift Lake adopts the submissions of the Respondents regarding the deleterious effects of the Struck Provisions. Gift Lake further submits that the effect of the Struck Provisions on Métis Settlements is severe and should form part of the considerations when weighing the deleterious and salutary effects of the Struck Provisions.

59. The effect of the Struck Provisions is to deprive Métis Settlements of their right to self-determination and to deprive their community of valuable members. In such a circumstance, the Appellants must establish compelling objective in order to override the fundamental rights and freedoms of the Respondents and have failed to do so.

## PART IV - SUBMISSIONS CONCERNING COSTS

60. Gift Lake submits that no costs should be awarded against it or for it.

## PART V - ORDERS SOUGHT

61. Gift Lake requests that this appeal be dismissed.

62. Gift Lake requests an Order permitting it to make oral submissions at the hearing of this appeal.

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[51] *Ibid.* at 140

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 4th DAY OF NOVEMBER, 2010.

FIELD LLP
Per:

By their agents
NELLIGAN O'BRIEN PAYNE LLP

Per: Dougald Brown

Sandeep K. Dhir
Lindsey E. Miller
Field LLP
Counsel for the Intervener, Gift Lake Métis Settlement

## PART VI - TABLE OF AUTHORITIES

### A. JURISPRUDENCE

| Case | Paragraph Cited |
|---|---|
| *Chaoulli v. Quebec (Attorney-General)*, [2005] 1 S.C.R. 791 | 51, 52 |
| *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 | 49 |
| *R. v. Kapp*, [2008] 2 S.C.R. 483 | 45, 46 |
| *R. v. Oakes*, [1986] 1 S.C.R. 103 | 55, 57 |
| *R. v. Powley*, [2003] 2 S.C.R. 207 | 7, 40, 41 |

### B. LEGISLATION

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| *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 | 8, 45, 51, 55 |
| *Métis Settlements Act*, R.S.A. 2000, c. M-14 | 1, 2, 3, 8, 10, 13, 14, 15, 16, 25, 26, 28, 29, 30, 31, 33, 36, 38, 39, 41, 43, 47, 54, 56 |
| *Transitional Membership Regulation*, Alta. Reg. 337/1990 | 20 |

### C. SECONDARY SOURCES

| | |
|---|---|
| Catherine E. Bell, *Alberta's Métis Settlements Legislation: An Overview of Ownership and Management of Settlement Lands* (Regina: Canadian Plains Research Center, University of Regina, 1994) | 17 |
| Fred V. Martin, "Alberta's Métis Settlements: A Brief History" in Richard Connors & John M. Law, eds., *Forging Alberta's Constitutional Framework* (Edmonton: The University of Alberta Press, 2005) 345 | 17 |
| Paul L.A.H. Chartrand, "Defining the 'Métis' of Canada" in F. Wilson and M. Mallet, eds. *Métis-Crown Relations: Rights, Identity, Jurisdiction and Governance* (Toronto: Irwin Law, 2008) | 21 |

| | |
|---|---|
| T.C. Pocklington, *The Government and Politics of the Alberta Métis Settlements* (Regina: Canadian Plains Research Center, University of Regina, 1991) at 104 | 45 |
| *United Nations Declaration on the Rights of Indigenous Peoples*, G.A. Res. 61/295, UNGA, 2007, UN Doc. A/RES/61/295 | 4, 11 |
| Wendy Cornet, "Aboriginality: Legal Foundations, Past Trends, Future Prospects" in Joseph Eliot Magnet & Dwight A. Dorey, eds. *Aboriginal Rights Litigation* (Markham, Ont.: LexisNexis, 2003) | 4, 11 |

## PART VII - STATUTES AND REGULATIONS

A. *Metis Settlements Act*, R.S.A. 2000, c. M-14, ss. 75 and 90