File No. 33880

IN SUPREME COURT OF CANADA
(ON APPEAL FROM THE MANITOBA COURT OF APPEAL)

BETWEEN:

Manitoba Métis Federation Inc., Yvon Dumont, Billy Jo De La Ronde, Roy Chartrand, Ron Erickson, Claire Riddle, Jack Fleming, Jack McPherson, Don Roulette, Edgar Bruce Jr., Freda Lundmark, Miles Allarie, Celia Klassen, Alma Belhumeur, Stan Guiboche, Jeanne Perrault, Marie Banks Ducharme and Earl Henderson

Appellants

and

Attorney General of Canada and Attorney General of Manitoba

Respondents

FACTUM OF THE INTERVENER MÉTIS NATION OF ALBERTA

JTM LAW
Barristers & Solicitors
28 Hawthorn Avenue
Toronto, ON. M4W 2Z2

JASON MADDEN
Tel: 416-945-7958
Fax: 416-981-3162
Counsel for the Intervener Métis Nation of Alberta

BURKE-ROBERTSON
Barristers & Solicitors
70 Gloucester Street
Ottawa, ON. K2P 0A2

ROBERT E. HOUSTON, Q.C.
Tel: 613-236-9665
Fax: 613-235-4430
Ottawa Agent

ROSENBLOOM, ALDRIDGE, BARTLEY & ROSLING
Barristers & Solicitors
440 – 355 Burrard Street
Vancouver B.C. V6C 2G8

THOMAS R. BERGER, Q.C.
JAMES ALDRIDGE, Q.C.
HARLEY SCHACHTER
Tel: 604-684-1311
Fax: 604-684-6402
Counsel for the Appellants

BURKE-ROBERTSON
Barristers & Solicitors
70 Gloucester Street
Ottawa ON K2P 0A2

ROBERT E. HOUSTON, Q.C.
Tel: 613-236-9665
Fax: 613-235-4430

Ottawa Agent

DEPUTY ATTORNEY GENERAL OF CANADA
Department of Justice
Prairie Region
301-310 Broadway Avenue
Winnipeg MB R3C 0S6

MARK KINDRACHUK
Tel: 306-975-4765
Fax: 306-975-5013
Counsel for the Respondent,
The Attorney General of Canada

DEPUTY ATTORNEY GENERAL OF CANADA
Department of Justice
234 Wellington Street
Room 216
Ottawa ON K1A 0H8

CHRISTOPHER RUPAR
Tel: 613-941-2351
Fax: 613-954-1920
Counsel for the Respondent,
The Attorney General of Canada

ATTORNEY GENERAL OF MANITOBA
Department of Justice
Constitutional Law Branch
1205 – 405 Broadway
Winnipeg MB R3C 3L6

HEATHER LEONOFF, Q.C.
MICHAEL CONNER
Tel: 204-945-0679
Fax: 204-945-0053
Counsel for the Respondent, Attorney General of Manitoba

GOWLING LAFLEUR HENDERSON
Barristers & Solicitors
Suite 2600, 160 Elgin Street
Ottawa, ON K1P 1C3

HENRY S. BROWN, Q.C.
Tel: 613-233-1781
Fax: 613-563-9869

Ottawa Agents

ALBERTA JUSTICE
ABORIGINAL LAW
1000 10025 102A Ave
Edmonton, AB. T5J 2Z2

DOUGLAS B. TITOSKY
Tel: 780-643-0858
Fax: 780-643-0852
Counsel for the Intervener, Attorney Attorney General of Alberta

GOWLING LAFLEUR HENDERSON
Barristers & Solicitors
Suite 2600, 160 Elgin Street
Ottawa, ON K1P 1C3

HENRY S. BROWN, Q.C.
Tel: 613-233-1781
Fax: 613-563-9869
Ottawa Agent

ATTORNEY GENERAL OF SASKATCHEWAN
820 1874 Scarth Street
Regina, SK S4P 4B3

MITCH MCADAM
Tel: 306-787-7846
Fax: 306-787-9111
Counsel for the Intervener, Attorney Attorney General of Saskatchewan

GOWLING LAFLEUR HENDERSON
Barristers & Solicitors
Suite 2600, 160 Elgin Street
Ottawa, ON K1P 1C3

HENRY S. BROWN, Q.C.
Tel: 613-233-1781
Fax: 613-563-9869
Ottawa Agent

METIS NATIONAL COUNCIL
201 – 350 Sparks Street
Ottawa, ON. K1R 7S8

CLEMENT CHARTIER, Q.C.
Tel: 613-232-3216
Fax: 613-232-4262
Counsel for the Interver, Metis National

MACLAREN, CORLETT
1625 – 50 O'Connor Street
Ottawa, ON. K1P 1C3

GORDON B. GREENWOOD
Tel: 613-233-1146
Fax: 613-233-7190
Ottawa Agents for the Intervener

PAPE, SALTER, TEILLET
Barristers & Solicitors
460 – 220 Cambie Street
Vancouver, BC V6B 2M9

JEAN TEILLET
Tel: 604-681-3002
Fax: 604-681-3050
Counsel for the Intervener
Metis Nation of Ontario

NELLIGAN, O'BRIEN, PAYNE
Barristers & Solicitors
1500 – 50 O'Connor Street
Ottawa, ON. K1P 6L2

DOUGALD E. BROWN
Tel: 613- 231-8210
Fax: 613-788-3661
Ottawa Agent

RATH & COMPANY
Barristers & Solicitors
Box 44, Site 8 RR1
Priddis, AB T0L 1W0

JEFFREY R. W. RATH
Tel: 403-931-4047
Fax: 403-931-4048
Counsel for the Intervener,
Treaty One First Nation

MCMILLAN
Barristers & Solicitors
300 – 50 O'Connor Street
Ottawa, ON. K1P 6L2

MARIE-FRANCE MAJOR
Tel: 613-232-7171
Fax: 613-231-3191
Ottawa Agent

ARVAY, FINLAY
Barristers & Solicitors
1350 – 355 Burrard Street
Vancouver, B.C. V6C 2G8

JOSEPH J. ARVAY, Q.C.
Tel: 604-689-4421
Fax: 604-687-1941
Counsel for the Intervener,
Assembly of First Nations

MCMILLAN
Barristers & Solicitors
300 – 50 O'Connor Street
Ottawa, ON. K1P 6L2

JEFFREY BEEDELL
Tel: 613-232-7171
Fax: 613-231-3191
Ottawa Agent

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INTRODUCTION

1) This is a case about the promise of land *for the benefit* of one of Canada's aboriginal negotiating partners in Confederation – the Manitoba Métis. It is the story of a growing nation encountering a new aboriginal people, in possession, on the land, in the historic Northwest, and making solemn commitments to them in order to secure its desired westward expansion. It is also the story of a young aboriginal people, uniquely born in the historic Northwest, asserting their rights and interests in a territory they called home, and ultimately securing promises for the protection of their distinct identity[1] and lands in a new province and growing nation. Those promises – solemn linguistic (s. 23), religious (s. 22) and land related (ss. 31 and 32) commitments – are embedded within the *Manitoba Act, 1870*, and are a part of Canada's constitution. This appeal is this Court's first opportunity to consider ss. 31 and 32 --- the land related commitments to the Manitoba Métis.

2) In 1870, the Métis, who represented 85% of the total population in the Red River Settlement, agreed to put down their arms, participate as citizens of the new province of Manitoba, and extinguish their "Indian title" throughout the 8.2 million acres that made up the new 'postage stamp' province of Manitoba *in exchange* for the protection of their existing land base (s. 32) as well as the protection of their future by way of an additional 1.4 million acres for their children (s. 31), which represented approximately 17% of the new province's land.[2] Read purposively, ss. 31 and 32 represented an attempt to protect the 1870 existence of the Manitoba Métis as well as their collective future *through* a land base. That was the underlying purpose of the constitutional commitment.

3) The Appellants argue, with the support of the Métis Nation of Alberta ("MNA"), that the Crown, in its interpretation and implementation of ss. 31 and 32, breached its fiduciary and constitutional duties owing to the Manitoba Métis. The Manitoba Métis never received *the benefit* that was fundamental to the constitutional compact. Instead, because of government action and inaction (i.e., the great delay, random selection, etc.), they became a marginalized and landless aboriginal people in the province they helped to establish.

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[1] The MNA notes this unique Métis identity included many aspects that were at odds with Canada's political establishment at the time. The Métis were predominantly French-speaking and had their own language – Michif – that combined French and Indian languages; they were largely Catholic; they had their own land use customs; they were a mobile aboriginal hunting society. This uniqueness necessitated the *Manitoba Act, 1870* to attempt to reconcile diversity within unity. Today, the Métis Nation continues to work to reconcile their uniqueness – as a distinct aboriginal people – within Canada. It is hoped that this case will assist in the furtherance of this goal.

[2] For a contemporary comparison see: *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103 at paras. 9 and 33 [hereinafter "Beckman"], where this Court noted that Yukon First Nations, who made up approximately 25% of the Yukon population, exchanged their Indian title in almost 484,000 kms² (over 119 million acres) for approximately 41,595 kms² (over 10.2 million acres) in settlement lands, representing approximately 8.59% of the total land mass of the Yukon.

4) Today, the promise of ss. 31 and 32 remain one of this country's old and difficult grievances. It engages whether partners in confederation, such as the Manitoba Métis, can rely on Canada's constitution – no matter how old the promise or how much the relationship and power dynamics have changed – to achieve the purpose of the original compact. It also engages whether and how reconciliation will finally begin with the Métis – as one of Canada's now constitutionally-recognized aboriginal peoples. For these very reasons, the resolution of this appeal goes to the very heart of Canada's constitutional morality.

5) The stakes are huge for the Manitoba Métis. They remain a landless aboriginal group in the province they helped create, and could be fated to remain that way. This would be an unthinkable future for any aboriginal people. It is equally so for the Manitoba Métis. With no land, economic or self-government base from which to build, their unique identity, language and culture are at risk, as they continue struggle to find a space for themselves between the two larger identities from which they descend. With this appeal, the Manitoba Métis do not seek to change or undo the past, only the opportunity to secure their collective future as ss. 31 and 32 were intended to.

PART I – STATEMENT OF THE FACTS

6) The MNA accepts the facts as set out by the Appellants.

PART II – ISSUES ON APPEAL

7) The MNA proposes to address the following issues in this appeal: (1) mootness; (2) the interpretation of s. 31, (3) the importance of land to the Métis, and (4) standing.

PART III – ARGUMENT

A. Mootness

8) At paragraphs 368 of its Reasons, the Court of Appeal concluded that "the appellants are essentially seeking a private reference regarding the constitutionality of certain spent, repealed provisions" and dismissed the appeal as moot. It is submitted this was an error for two reasons.

9) First, the Court of Appeal conflated the main issue in this litigation; namely, the interpretation and implementation of ss. 31 and 32, as constitutional provisions, with the existence of legislation that purportedly fulfilled these constitutional provisions.[3] Courts have the task of interpreting

[3] Only one of the seven declarations sought by the Appellants is with respect to now repealed legislation that purported to implement ss. 31 and 32. The rest are for declarations with respect to ss. 31 and 32.

constitutional provisions, and ensuring that legislative choices adhere to those provisions.[4] A constitutional provision cannot be 'legislated away' by unconstitutional legislation or legislation that may not fulfill the constitutional commitment. It is the ultimate role of courts to assess whether constitutional guarantees have been met. As such, the Court of Appeal erred in concluding that repealed legislation made the issues moot, without first interpreting ss. 31 and 32 (which have not been repealed) to determine whether they had been fulfilled by the impugned legislation.

10) Second, the Court of Appeal erred by failing to consider a unique aspect of this case in relation to mootness; namely, that it involves the claims of the Manitoba Métis. Unlike other constitutional litigation, this appeal will have a direct impact on reconciliation between the Crown and the Manitoba Métis. Reconciliation is "[t]he fundamental objective of the modern law of aboriginal and treaty rights."[5] It "is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982.*"[6] For the most part, reconciliation with Canada's Métis is not occurring.[7] The principles articulated by this Court with respect to the Crown's relationship with "aboriginal peoples" have not yet penetrated the Métis reality.[8] This appeal will represent an important step in answering how reconciliation will move forward with the Métis, regardless of the outcome. A decision will either spur negotiations or require the Manitoba Métis to pursue alternate strategies (legal, political, international, etc.). As such, it is submitted that one thing the constitutional issues in this case are not is moot. Further, it is submitted that reconciliation requires that this case be decided on its merits.

11) In the event that this Court does determine that this appeal or aspects of it are moot, it is submitted that the requirements in *Borowski v. Canada*, [1989] 1 S.C.R. 342 are met and warrant the exercise of this Court's discretion to make determinations on moot issues.

12) The adversarial context is present, as held by the Court of Appeal.[9]

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[4] See *Doucet-Boudreau v. Nova Scotia*, [2003] 3 S.C.R. 3; *RJR-MacDonald Inc. v. Canada*, [1995] 3 S.C.R. 199 at para. 136.

[5] *Mikisew Cree First Nation v. Canada*, [2005] 3 S.C.R. 388 at para. 1 [hereinafter "*Mikisew*"].

[6] *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511 at para. 20 (emphasis added) [hereinafter "*Haida*"].

[7] While Métis north of 60° are included in modern day land claims processes (*e.g.*, Métis are a part of the *Sahtu Dene Métis Land Claim Settlement Act*, S.C. 1994, s. 27 and *Gwich'in Land Claim Settlement Act*, S.C. 1992, c. 53), Métis south of 60° are excluded from all negotiations. Further, since *Powley*, Métis have been forced to litigate by the "hectare" across the Prairies to even have their food harvesting rights recognized: *R. v. Kelley*, 2007 ABQB 41 at para. 66; *R. v. Laviolette*, 2005 SKPC 70; *R. v. Belhumeur*, 2007 SKPC 114; *R. v. Goodon*, 2008 MBPC 58; *R. v Hirsekorn*, 2011 ABQB 682.

[8] It was not until after this Court's decision in *Re Eskimos*, [1939] S.C.R. 104, combined with *Calder v. AG British Columbia*, [1973] S.C.R. 313 [hereinafter "*Calder*"], and Canada's subsequent renewed treaty-making efforts, that these principles began to penetrate the reality of another distinct aboriginal people – the Inuit. In less than 40 years since, four modern day land claim agreements and the creation of Nunavut have been achieved with Canada's Inuit.

[9] *Court of Appeal Reasons*, Record Vol. III-IV, para. 371.

13) The conservation of judicial resources criteria is met. The case has already taken 20 years of judicial resources. If the fundamental issues raised in this appeal are left unanswered, it would likely lead to subsequent litigation. Further, it raises issues of public importance. The Court of Appeal also recognized this.[10] Also, as discussed above, this appeal will impact reconciliation between the Crown and the Manitoba Métis. Its effects will be enduring – not limited or temporal. Finally, as this Court recently stated in *Cunningham*, "the time has finally come for recognition of the Métis as a unique and distinct people."[11] This case provides an opportunity to do so.

14) Finally, contrary to the Court of Appeal's conclusion that in this case "a declaration in aid of extra-judicial political relief weighs in favour of this court declining to exercise its jurisdiction to decide moot matters," this Court has consistently recognized that judicial determinations are periodically needed to assist the Crown and aboriginal peoples in advancing reconciliation, and ultimately reaching extra-judicial settlements.[12] Further, in *Solosky v. The Queen*,[13] this Court recognized a declaration cannot cure past ills, but could affect future rights. This forward-looking view did not negate the utility of a declaration on issues that may otherwise be considered moot. Finally, lower courts have recognized that the refusal of governments to engage in any negotiations with the Métis on significant constitutional issues justify judicial determinations on such matters.[14]

15) Based on the above criteria being met, it is submitted that, even if some or all of the legal issues raised in this case are moot, this Court should exercise its discretion to decide the merits.

B. The Interpretation of Section 31

16) The MNA submits there are three distinct parts of s. 31 that must be interpreted based on the "meaning of its words, considered in context and within a view of the purpose they were intended to serve."[15] First, **the intent of the provision**: "towards extinguishment of the Indian title to the lands of the Province." Second, **the benefit provided to realize the provision's intent**: "one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents." Thirdly,

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[10] *Court of Appeal Reasons*, Record Vol. III-IV, para. 11.

[11] *Alberta (Minister of Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37 at para. 70 [hereinafter "*Cunningham*"]. Thirteen years ago, the trial judge in *R. v. Powley*, [1998] O.J. No. 5310 (O.C.J.) at para. 137 asked the following rhetorically question: "[i]s it not time to find answers regarding the issues affecting the Metis?"

[12] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 186 [hereinafter "*Delgamuukw*"]; *R. v. Powley*, [2003] 2 S.C.R. 207 at para. 50 [hereinafter "*Powley*"]; *Haida, supra,* at para. 20.

[13] *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at p. 818.

[14] For example see: *Daniels v. Canada (Minister of Indian Affairs)*, [2002] F.C.J. No. 391 (F.C.T.D.) at para. 24.

[15] *R. v. Blais*, [2003] 2 S.C.R. 236 at paras. 16-17.

how the benefit was to be achieved: the granting of the lands to the "children of the half-breed heads of families residing in the Province at the time of said transfer to Canada."

(i) "Towards the Extinguishment of the Indian Title"

17) On the interpretation of the term "Indian title" in s. 31, the MNA makes, as a preliminary submission, that the trial judge's determination that the Métis needed to first prove they had "Indian title" before the could rely on s. 31's explicit language was an error of law.[16] This Court has never required aboriginal groups, who have reached negotiated arrangements (i.e., treaties, agreements, promises, etc.) with the Crown (which provide the definition of aboriginal rights with greater precision in exchange for the abandonment of broader asserted rights claims) to *first* prove the underlying basis for the negotiated arrangement *before* they can rely on its terms. For example, in *Beckman*, this Court did not assess whether the Yukon First Nations actually had aboriginal title, based on the test established by this Court in *Delgamuukw*, to the 484,000 kms² the First Nations surrendered, before interpreting the benefits and obligations in the treaty.

18) The trial judge's proposed approach to s. 31 on this issue, which was not overturned by the Court of Appeal, would result in courts determining whether the asserted rights claims were sufficient to warrant a negotiated benefit or term in a Crown-aboriginal agreement or treaty. Such an approach would be unworkable, and undermine the very purpose of reaching negotiated agreements with aboriginal peoples. It is submitted that the trial judge's conclusions on this issue should be overturned, and that the starting point for analysis must be the actual text of s. 31, as it would be in the case of a treaty or agreement with any other aboriginal group.

19) In 1870, "Indian title," as a term and concept, was well-known and used. While the exact content of what was included in "Indian title" was far from comprehensively defined (similar to the term 'aboriginal title' today), it was acknowledged that it derived from pre-existing rights of "Nations or Indian tribes"[17] to their lands, as recognized in the *Royal Proclamation.* In treaties before and after 1870, Indian peoples "surrendered, ceded, granted and conveyed" their "rights, title, and interests" or "Indian title" in exchange for benefits defined in treaties.[18] Further, this Court has recognized that "Indian title" was historically regarded as a legal right based on pre-existing occupation and

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[16] *Trial Reasons*, Record Vol. I-III at para 594.

[17] *Royal Proclamation* issued on October 7, 1763 by King George III (emphasis added).

[18] For use of the term "Indian title" see: *McDiarmid Lumber Ltd. v. God's Lake First Nation*, [2006] 2 S.C.R. 846 at para. 97 in the context of Treaty No. 5 in 1875 or *Williams Treaty, 1923* (Queen's Printer, Ottawa: 1967) for the use of the term in a treaties. For surrender of Indian "rights, title, interests" treaties see: *Robinson Huron Treaty, 1850* (Queen's Printer: 1964).

possession, with ultimate title resting with the Crown.[19] Based on the language of s. 31, the Crown clearly recognized the Métis in the Red River also had rights based on their pre-existing occupation and possession of the territory. Similar in the case of Indians, knowing the precise content of the "Indian title" was not required for the Crown's purposes. It is submitted that s. 31's text supports finding that the Manitoba Métis, as an aboriginal people, in possession, had "Indian title" *qua* Métis in 1870, similar to how they have aboriginal rights *qua* Métis today.[20]

20) Further, after 1870, Canada continued to recognize the "Indian title" of the Métis in the Northwest in legislation, orders-in-council, and authorizations for Métis scrip commissions (1885-1910). In 1879, the *Dominion Lands Act*, s. 125(e) was adopted to satisfy "the extinguishment of the Indian title, preferred to the Halfbreeds." In 1899, the *Dominion Lands Act*, s. 90(f), was amended to provide for granting "lands in satisfaction of claims of half-breeds arising out of the extinguishment of the Indian title."[21] In introducing these proposed amendments, Prime Minister Laurier and Clifford Sifton, Minister of the Interior, made the following statements in the House of Commons:

> We determined at the outset, when we acquired the territory of the Hudson Bay Company, that we would treat the half-breeds as we would the Indians – that is, as first occupants of the soil. It has been the policy of the British Government from time immemorial not to take a possession of any lands without having in some way settled with the first occupants and giving them compensation...[22]
>
> ... the Government of the Dominion, in taking possession of the territory, was bound to recognize [the Métis] petition and extinguish his title ...[23]

21) An Order-in-Council for Treaty 8 that was subsequently passed pursuant to the 1899 amendment read:

> After careful consideration the Minister has come to the conclusion that this claim of the Half-Breeds is well-founded and should be admitted. As already set forth he is of the opinion (sic) that Indian and Half-Breed rights are co-existent and should be properly extinguished concurrently. When half-breed rights are not so extinguished, they must, he considered, be held to exist after the extinguishment of Indian title and up to such time as action is taken for their extinguishment.[24]

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[19] *Calder,supra*; *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at pp. 376, 382; *Delgamuukw, supra*, paras. 189-190.

[20] The MNA notes the parallels to *Powley* where governments argued that this Court should look past the text of s. 35, which explicitly recognizes the Metis as an aboriginal people, and adopt an interpretation of a constitutional provision that would render it meaningless for the Metis (i.e., Metis could not have aboriginal rights because they weren't "Indians" who were here at contact). This Court rejected such an interpretation. In this appeal, governments make similar arguments with respect to 31. They ask this Court to look past the language of s. 31, which explicitly recognizes the Manitoba Metis had "Indian title", in order to render it meaningless for the Metis (i.e., Metis could not have "Indian title" because they were not culturally Indians). Similar to *Powley*, it is submitted that such an interpretation cannot be sustained.

[21] *An Act further to amend the Dominion Lands Act*, s. 4., Canada Statutes, 62 – 63 Vic., cap. 16.

[22] *Canada House of Commons Debates*, 3 July 1899, col. 6418.

[23] *Canada House of Commons Debates*, 3 July 1899, col. 6413.

[24] Order-in-Council, P.C. 918, May 9, 1899.

22) Far from being an anomaly, the recognition of the "Indian title" of the Métis in the Northwest continued almost 40 years. Viewed in this context, it strains credibility to suggest it was a "political expedient" in 1870. Moreover, since it clearly could not be a 40-year "political expedient", the only other way it could be interpreted to mean that the Métis did not have "Indian title" would be to suggest that this recognition was a legislative ruse perpetuated on the Métis and the public for four decades. It is submitted that such an interpretation is untenable, and that the recognition that Métis had "Indian title" based on the language and historical context of s. 31 must be preferred.

23) Finally, ss. 32(3) and 32(4) also include the term "Indian title." These sections refer of the "Indian title" extinguished by the Saulteux, Cree and Chippewa through the 1817 Selkirk treaty as well as the "Indian title" that was to be extinguished in Treaty 1 and 2. It is submitted that an interpretation that the "Indian title" of the Métis in s. 31 was a "political expedient" or of some different substance and form than the "Indian title" of the Chippewa, Cree and Saulteux included in ss. 32(3) and 32(4) is not supported by the text of the legislation. Such an interpretation would result in incoherence and inconsistency between sections of the act using the same term. This Court has held that interpretations, which create these types of internal conflicts in legislation, should be avoided.[25] As such, it is submitted that the "Indian title" referred to in the act – whether it is that of the Chippewa, Cree, Saulteux or Métis – should be interpreted consistently.

(ii) "For the Benefit of the Families of the Half-breed Residents"

24) There are two key aspects of this part of s. 31 based on the language used: (1) there was to be a "benefit", (2) the "benefit" was to be for the "families of the half-breed residents."

25) Definitions of "benefit" include: "advantage; privilege; profit or gain,"[26] "something that promotes or enhances well-being; an advantage,"[27] "to derive benefit or advantage; profit; make improvement."[28] It is submitted that the ordinary meaning of benefit invokes creating an advantage or enhancing well-being. As such, it requires execution in a manner that gives effect to the benefit.

26) The second aspect of this part of s. 31 is that the "benefit" is for "the families of the half-breed residents". *Black's Law Dictionary* defines a family as "[a] group of persons connected by blood, by

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[25] *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867 at para. 30. See also: *Bastien Estate v. Canada*, 2011 SCC 38 at paras. 4 and 14 re: consistent interpretation of "on a reserve" within various sections of the *Indian Act*, R.S.C. 1985, c. I-5.

[26] "Benefit." Def. 1 and 2. *Black's Law Dictionary (9th Edition)*. 2009. Print.

[27] "Benefit." Def. 1. *The American Heritage Dictionary of the English Language (4th Edition)*. On-line. (accessed November 22, 2011 at http://education.yahoo.com/reference/dictionary/entry/benefit)

[28] "Benefit." Def. 7. *Webster's Unabridged Dictionary, 2nd Edition. 2009.* Print.

affinity or by law, esp. within two of three generations."[29] The ordinary meaning of "families" engages a collective interest. For example, individual children do not constitute "families". Neither does one family in isolation. Therefore, it is submitted that the text supports an interpretation that the "benefit" was to accrue to a collective. While the means to achieve the "benefit" for the collective was to be *through* the provision of land to the children, it is submitted that s. 31's text does not support a conclusion that the benefit was to be purely individualistic in nature.

27) From a statutory interpretation analysis, the MNA notes that s. 31 did not need to include the language that it was "for the benefit of the families of the half-breed residents." Section 31 could have just as easily read that the "Indian title" of the half-breeds was to be extinguished by providing lands to the children, but s. 31's text does not say that. Instead, it uses language that demonstrates a collective benefit was required to be provided through the granting of lands to the children.

(iii)"Lots and Tracks" for the "Children of the Half-breed Heads of Families"

28) The final component of s. 31 is that the 1.4 million acres were to be granted to the "children of the half-breed heads of families residing in the province at the time of said transfer." As noted above, the distribution of land needed to be undertaken in a manner that achieved the promised advantage or enhanced well-being to the Manitoba Métis. The "great delay", "random selection" and other Crown breaches ensured the collective benefit was never realized.[30] As a result, it is submitted that s. 31's intent and benefit, based on the ordinary meaning of the text, was not achieved.

C. The Importance of Land to the Métis

29) Today, international law recognizes the legal right of aboriginal peoples to their traditional lands.[31] It also recognizes that the loss of these traditional lands requires "just, fair and equitable compensation."[32] Domestically, this Court has held Canada's common law recognizes aboriginal title, and, more recently, this right is constitutionally protected within s. 35.[33]

30) These relatively new legal protections and norms recognize that *land is essential* to the well-being and survival of aboriginal peoples in Canada and around the world. Land provides a space

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[29] "Family." Def. 1. *Black's Law Dictionary (9th Edition)*. 2009. Print.
[30] Appellants Factum, paras. 124-206.
[31] *United Nations Declaration on the Rights of Indigenous Peoples*, adopted by the General Assembly, September 13, 2007, A/RES/61/295, Article 26.
[32] *United Nations Declaration on the Rights of Indigenous Peoples, supra,* Article 28.
[33] *Calder, supra; Delgamuukw, supra.*

where aboriginal peoples can call home and where their distinct languages, cultures and identities can be protected. In its final report, the *Royal Commission on Aboriginal Peoples* concluded:

> Aboriginal people have told us of their special relationship to the land and its resources. This relationship, they say, is both spiritual and material, not only one of livelihood, but of community and indeed the continuity of their cultures and societies.[34]

31) The Métis are an aboriginal people. Canada's constitution now confirms this historic fact. As such, the "rights, claims and ambitions"[35] of the Métis to a land base are no less worthy or valid than that of other aboriginal peoples. The Alberta Métis experience, considered in the *Cunningham* case, illustrates this fact. In *Cunningham*, this Court affirmed that the "desire", of both the Métis and Alberta, 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 under the laws of Alberta" was consistent with Canada's new "constitutional scheme" brought about by s. 35.[36]

32) This Court also identified that a legal gap and government policies, have contributed to the unique struggles the Métis have faced historically and continue to face today. One of these key struggles, as illustrated by the Alberta Métis experience, has been to secure Métis lands for their collective benefit. Contrary to the suggestions of the Respondents,[37] the current lack of Métis lands in Canada does not flow from an innate quality of the Métis or some desire of the Métis to be a landless aboriginal people in the second largest country in the world. This reality flows from the long history of government non-recognition and indifference towards the Métis – the "legal lacuna" identified by this Court.[38] It is submitted this current landless reality was not a chosen fate.

33) Finally, the Alberta situation demonstrates that a Métis land base is not a 'theoretical' concept. It can be achieved, and it is submitted that it is fundamental to reconciliation with Métis. Similar to Manitoba Métis, Alberta Métis were also landless after the scrip system failed to secure them a land base, resulting in the "independent ones" becoming the "road allowance people."[39] Alberta Métis were unwilling to accept a landless fate. After almost 75 years of collaborative efforts with Alberta,[40] Alberta Métis now possess approximately 1.3 million acres of land (roughly the same amount of land

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[34] *Report of the Royal Commission on Aboriginal Peoples*, 1996, Vol. 2, Part 2, p. 448.
[35] *Mikisew, supra,* at para. 1.
[36] See *Métis Settlements Act*, R.S.A. 2000, c. M-14; *Cunningham, supra*, at paras. 69 (citation) and 60-68.
[37] See Factum of AG Canada, at paras. 103, 105, 106, 128, 131 and Factum of Manitoba, at paras. 6, 7.
[38] *Cunningham, supra,* at para. 8.
[39] *Report of the Royal Commission on Aboriginal Peoples*, 1996, Vol. 4, at p. 227.
[40] The MNA notes this has largely been achieved through political will, not through a rights recognition process. These same political conditions have not and do not exist in Manitoba. At various times, Canada has been willing to negotiate on self-government and land with the Métis. See *Report of the Royal Commission on Aboriginal Peoples, supra*, at pp. 377-382.

promised in s. 31), along with a level of self-government over eight collectively-held Métis Settlements. While insignificant in size to Alberta and Canada as a whole (i.e., the Alberta Métis Settlements comprise less than 0.008% of Alberta's land mass and 0.00053% of Canada's), for Alberta Métis, these lands represent a secured future.

34) The MNA submits that the importance of land to the Métis, as an aboriginal people, should inform this appeal, along with recent international law and the constitutional backdrop of s. 35. The technical defenses of the Respondents, the uniqueness of the Métis (i.e., the fact that they are a distinct aboriginal people who were and are not culturally Indians), and the "legal lacuna" the Métis have faced in Canada should not obscure the fact that land has always been and continues to be of primary importance to the Métis, as an aboriginal people.

D. Standing

35) In *Powley*, this Court held that in order for Métis communities to assert their constitutional rights it was imperative that membership requirements became standardized so legitimate rights-holders could be identified."[41] Since *Powley*, Métis groups, such as the MNA and the MMF have done just that. They have established new identification systems in order to pursue rights claims – as communities – in the courts (if negotiations with government are refused or fail). It is submitted that the denial of the MMF's standing undermines this work and this Court's direction in *Powley*.

36) Further, s. 31, and now s. 35 recognize the rights of the Métis – as collectives – not as individuals. These collectives must be able to pursue these rights – as collectives – in the courts. They should not be prejudiced because of their historic lack of legal recognition by governments in pursuing legitimate rights claims. As such, courts should apply the test for public interest standing in a purposive manner when collective rights, such as those protected in constitutional provisions, are being pursued by aboriginal peoples. Anything less could risk undermining Canada's constitutional commitments to aboriginal groups. It is requested that this Court address this very important issue to the Métis.

PART IV – COSTS

37) The MNA does not seek costs in this appeal.

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[41] *Powley, supra*, para. 29.

PART V – NATURE OF ORDER SOUGHT

38) The MNA asks that the appeal be allowed and the Appellants be granted the declarations sought.

39) The MNA asks that this Court grant it time to make oral representations at the hearing of this appeal.

All of which is respectfully submitted, this 23rd day of November, 2011.

Jason Madden

PART VI – LIST OF AUTHORITIES

A. CASES

B. LEGISLATION AND REGULATIONS

C. OTHER AUTHORITIES

D. INTERNATIONAL