Court File No. 33880

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF MANITOBA)

BETWEEN:

Manitoba Metis 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

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Introduction

1. This case is about the promises Canada made to the Red River Métis, in order to facilitate the entry of Manitoba into Confederation. The Red River Métis were Canada's "negotiating partners in the entry of Manitoba into Confederation."[1]

2. The promises are expressed in ss. 31 and 32 of the *Manitoba Act*, which is part of the Constitution of Canada. Those promises are constitutional obligations in two ways. First, because they are embedded in a constitutional statute. Second, because they were an essential component of nation building. The promises in ss. 31 and 32 were the mechanism used to give legal force and effect to the negotiated agreement between Canada, as represented by the Prime Minister and Sir George-Etienne Cartier, and the delegates of the Red River settlement.

> … the *Manitoba Act* is not only a statute constituting the Province of Manitoba; it is also a statute constituting the union of Manitoba and Canada, and its constitutional provisions affect not only Manitoba but also the union … [It is the means by which the citizens of Manitoba] were induced to put an end to the Red River insurrection and to support the creation of a Province and its union with Canada only on the basis that their rights would be ensured for the future.[2]

Part 1 – Facts

3. This intervener ("MNO") accepts the facts in the Appellants' Factum and adds the following.

4. Canada denies that the Red River Métis were a collective prior to passage of the *Manitoba Act*.[3] This is contradicted by the whole of the evidence, as well as by the Manitoba Provincial Court in *R. v. Goodon*, wherein the judge held that:

> The Metis community of Western Canada has its own distinctive identity ... The Metis created a large inter-related community that included numerous settlements located in present-day southwestern Manitoba, into Saskatchewan and including the northern Midwest United States. This area was one community as the same people and their families used this entire territory as their homes ... Within the Province of Manitoba this historic rights-bearing community includes all of the area within the present boundaries of southern Manitoba from the present day City of Winnipeg and extending south to the United States and northwest to the Province of Saskatchewan including the area of present day Russell, Manitoba.[4]

5. The historical and contemporary fact is that the Métis are a collective and an aboriginal people distinct from Indians. The Crown's position in the case at bar does not reflect the historic

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[1] MNO Authorities, Tab 11: *R. v. Blais*, [2003] 2 S.C.R. 236, at para. 33.
[2] MNO Authorities, Tab 6: *Forest v. AG Manitoba,* [1979] M.J. No. 78, para. 31-32.
[3] Canada's Factum, at para. 256.
[4] MNO Authorities, Tab 12: *R. v. Goodon*, 2008 MBPC 59, paras. 46-48.

facts with respect to the Métis collective culture. It reflects one thing only – Canada's historic administrative policy with respect to the Métis.

6. Aboriginal title is a collective interest. That does not mean that there are no individual, family or clan land holdings by the members of the aboriginal collective. It is true that the Métis did not hold or manage their customary lands in the same manner as their Indians neighbors and cousins. However, the evidence in the case at bar shows that the Métis were a people with a common culture and economy, who lived collectively "in large, clan-like groups of relatives, consisting of parents and children, brother and sisters, and in-laws."[5] They wanted to have their lands grouped together to continue that customary land use and occupation.

7. Manitoba is wrong when it states that, "even the buffalo hunt was carried out on an individual basis".[6] There is no evidence in the case at bar or any facts in any literature, academic writings, history or law to support Manitoba's statement.

8. The Court of Appeal erred when it held that there was "no evidence regarding ancestral links between the membership of the MMF and the Métis of the area prior to and at July 15, 1870."[7] In fact, the individual named plaintiffs are all members of the MMF and were or are members of its Board of Directors.[8] Manitoba conceded that, "eleven of the seventeen named Plaintiffs had ancestors who entered into transactions involving section 31 lands."[9] This is evidence that there are ancestral links between some of the membership of the MMF and the Métis in the area prior to and at July 15, 1870.

Part 2 – Issues

9. This Intervener will address three issues raised by the Appellants, and submits that the Court of Appeal erred in:

a. finding that the Crown fulfilled its constitutional obligations to the Métis pursuant to ss. 31 and 32 of the *Manitoba Act*;
b. finding that case was moot; and
c. denying standing to the Appellant, the Manitoba Metis Federation (the "MMF").

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[5] Appellants Factum, para. 133.
[6] Manitoba's Factum, at para. 7.
[7] Reasons of the Court of Appeal, at para. 253.
[8] MNO Authorities, Tab 3: *Dumont v. Canada (Attorney General),* 1987 CanLII 992 (MB QB) at p. 4.
[9] Manitoba's Factum, para. 178.

Part 3 – Argument

1. Constitutional Obligations

10. The *Manitoba Act* was the result of a negotiated agreement between the Métis and Canada as negotiating partners in the entry of Manitoba into Confederation. The Métis "were induced to put an end to the Red River insurrection and to support the creation of a Province and its union with Canada only on the basis that their rights would be ensured for the future."[10] Although speaking with respect to s. 91(1) of the *British North America Act, 1867*, the words of Lord Sankey L.C. are particularly apt:

> Inasmuch as the Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded …[11]

11. Political compromises with aboriginal peoples were an important means of obtaining their goodwill and co-operation in the peaceful settlement and development of Canada. The fact that the obligations to the Metis were set out in s. 31 and 32, rather than in a formal agreement or treaty, should not be used to defeat or "whittle down" the substance of the obligation. It was on the basis of that compromise that the Métis agreed to the entry of Manitoba into Canada.[12]

12. In *Mahe*, dealing with French language education rights, this court addressed the need to respect such political compromises.

> The provision … confers upon a group a right which places positive obligations on government to alter or develop major institutional structures. Careful interpretation of such a section is wise: however, this does not mean that courts should not "breathe life" into the expressed purpose of the section, or avoid implementing the possibly novel remedies needed to achieve that purpose.[13]

13. Sections 31 and 32 reflect a political compromise, but they also comprise terms of Confederation. The *Manitoba Act* needs to be understood and given effect in that context – the context of nation building.

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[10] MNO Authorities, Tab 6; *Forest v. AG Manitoba,* [1979] M.J. No. 78, para. 31-32.
[11] MNO Authorities, Tab 10: In *Re: Authority of Parliament in relation to the Upper House*, [1980] 1 SCR 54, at p. 14-15, this court looked at whether pursuant to s. 91(1) of the *British North America Act, 1867* the Federal Parliament could abolish the Senate. In that context this court quoted with approval the words of Lord Sankey in *Re: The Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54 at 70.
[12] Appellant's Factum, paras. 34-37.
[13] MNO Authorities, Tab 8: *Mahe v. Alberta,* [1990] 1 S.C.R. 342, para. 37.

14. The s. 31 obligation is expressly stated: to appropriate and grant 1.4 million acres of land to the children of the resident half-breed families, for two purposes - towards "the extinguishment of the Indian Title" and "for the benefit of the half-breed families." The s. 32 obligation is also expressly stated: to assure "to the settlers in the Province the peaceable possession of the lands now held by them," for the purpose of the "quieting of titles".

15. The Appellants submit that these are fiduciary and constitutional obligations that were breached by the Crown. The MNO agrees with the Appellants' submissions, and adds argument with respect to the constitutional nature of the obligations.

16. The Court of Appeal failed to conduct a purposive analysis of these constitutional provisions, which should have included the following: (1) the purpose of the negotiation process that resulted in these provisions of the *Manitoba Act* and the interests of the Métis that the provisions were intended to protect; (2) the parties' intension to create mutual obligations; and (3) the substance of the provisions, and the result of their implementation.

17. The purposes of ss. 31 and 32 were to provide certainty with respect to title and a benefit for the half-breed families. The interest intended for protection was land, to ensure a future for the Metis' culture and economy. Protecting that interest was to be accomplished by two specific mechanisms – establishing a land base for the Métis into the future, by land grants to their children (s. 31), and legally recognizing and confirming existing land holdings (s. 32).

18. Father Ritchot negotiated with the Prime Minister of Canada for the terms of a compromise that would enable Manitoba to enter Confederation and also provide security for the residents of Red River. Their negotiated agreement was ultimately expressed and given effect as legislation. The form does not justify confusion about the substance – that the *Manitoba Act* set out Crown obligations of a constitutional character, resulting from a negotiated agreement.

19. But such confusion did occur. The governments of Canada and Manitoba both acted as if the provisions of the *Act* and its implementation could be developed according to their own interests and convenience. Because the agreement was expressed in the form of legislation, the Prime Minister was able to unilaterally and fundamentally change the agreement in the process

of getting the legislation through the house.[14] The promise of future regulations allowed Cartier to mislead Ritchot into believing that local control over the land distribution and grants would be forthcoming.[15] Manitoba passed, amended and repealed a series of enactments designed to facilitate sales of the children's lands, regardless of whether the lands had actually been granted or the children had reached their majority.

20. The form of a constitutional obligation should not be used to diminish the substance of a Crown obligation, the need to implement it effectively, or the right to seek a remedy if the beneficiaries believe it has not been fulfilled. Constitutional obligations cannot be carried out in a manner that ultimately undermines or defeats the interest intended for protection. In short, it should not matter if the Crown's constitutional obligation is expressed orally, on the back of a napkin, in a treaty or in legislation.

(a) Section 31

21. The discretion conferred on the Crown under s. 31 was limited by the express terms of the *Act* – it had to be exercised "for the benefit of the families of the half-breed residents" on proper principles and not in an arbitrary fashion. The Métis, one of the aboriginal peoples of Canada, should have been able to rely on that commitment and expect Crown discretion to be implemented in a timely and effective manner that actually provided the promised protection.

22. In the courts below there was discussion as to whether or not the Métis had "Indian Title" and the trial judge found that the reference to Indian Title in s. 31 was merely a "vehicle of convenience."[16] This denies the historical context. The history of dealing with aboriginal peoples and their land interests, including all historic treaties and modern land claims agreements, has always been based on uncertainty about the existence, nature and scope of aboriginal title. Indeed, the whole reason for extinguishing Indian Title is to achieve certainty.

23. It is also worthwhile recalling that at the time (1870-1885) uncertainty with respect to the nature of Indian Title was not limited to the Métis, as shown by the following 1886 remarks of Osborne J in *St. Catharines Milling*:

> … the first objection of the learned counsel for the appellants is a very startling one, viz.: That the Act can have no application to the lands in question, inasmuch as at the time of Confederation the title to them was in the

[14] Reasons of the Court of Appeal, para. 68.
[15] Reasons of the Court of Appeal, para. 74-77.
[16] Reasons of the Court of Appeal, paras. 238(e) and 242.

> Indians … It would require very strong authority to induce any Court to come to such a conclusion, and … I think it is the first time that such a contention has been urged in a British Court of Justice. Nor do I think the decisions in the United States warrant any such conclusion. It was stated in *Fletcher v. Peck* … that the Indian title was a mere occupancy for the purpose of hunting. It is not like our tenure, they have no idea of a title to the soil itself. It is over-run by them rather than inhabited … It is a right not to be transferred but extinguished. … Counsel referred to the practice of all civilized nations to deny the right of the Indians to be considered as independent communities having a permanent property in the soil. And it was said in argument that the North American Indians could have acquired no proprietary interest in the vast tract of territory which they wandered over … According to every theory of property the Indians had no individual right to the land; nor had they any collectively, or in their national capacity, for the lands used by each tribe were not used by them in such manner as to prevent their being appropriated by settlers.[17]

24. The plain and express language of s. 31 is sufficient evidence to show that the *quid pro quo* for providing the 1.4 million acres to the Métis was the extinguishment of their legal interest – the Indian title – in the land. Whether a process that ultimately failed to provide the land actually extinguished title, is not the question before this court. If, as we submit, the Crown has unfulfilled obligations with respect to ss. 31, there is uncertainty with respect to whether or not the Indian Title of the Métis has been extinguished. Having said that, it is worth noting that when Canada did not fulfill its Treaty 11 obligations – by failing to provide reserved lands – it engaged in modern land claims and self-government agreements with the Gwich'in, Sahtu and Tlicho as a remedy.

(b) Section 32

25. The purpose of s. 32 was to protect the existing proprietary interests, 85% of which belonged to the Manitoba Métis. The Court of Appeal held that "the obligations associated with s. 32 simply did not arise in the context of the Crown-Aboriginal relationship."[18]

26. As noted above, the fact that the obligation is expressed in legislation, rather than in a treaty, should not be used as a means of whittling down the obligation. The choice of whether to identify or separate out the Métis from the non-Metis "settlers in the Province" was not within the power of the Red River negotiators. We note that Canada's historic treaties with First Nations also provided protection for existing land interests such as camps, fishing and village sites and often included non-Indians.[19] These facts should not be used in the Métis context to deny the Crown-aboriginal relationship embedded, but unexpressed, in s. 32.

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[17] MNO Authorities, Tab 13: *R. v. St. Catharines Milling*, [1886] O.J. No. 108 (ON CA), paras. 48-51.
[18] Reasons of the Court of Appeal, para. 722.
[19] The Robinson Huron Treaty and Treaty 4 are good examples of the practice of including non-Indians; specifically - half-breeds.

27. Most of the existing land holdings were within the settlement belt, which was a two-mile strip in Red River. In 1817, Lord Selkirk's treaty with Indians purported to extinguish the Indian Title of that two-mile strip. In 1871, Canada entered into Treaties One and Two, which are considered to have extinguished the Indian Title in the area of the postage stamp province outside of the two-mile strip.

28. However, the Selkirk Treaty could not have extinguished the Indian Title of the Métis to the two-mile strip, because the Métis were not signatories to the Selkirk Treaty. *R. v. Powley* stands for the legal principle that extinguishment of the Indian title of First Nations does not extinguish the rights of the Métis.

29. Therefore, if the s. 32 obligation is unsatisfied, as submitted by the Appellants, then uncertainty remains, not only with respect to the s. 31 lands, but also with respect to the Indian title of the Métis within the two-mile strip. Uncertainties of this kind strongly suggest the need for extra-judicial remedies guided by declarations of this court.

2. Mootness

30. Constitutional obligations must be given effect, including those resulting from old political compromises. Sections 31 and 32 were designed to protect and sustain the Métis as a people. The long years since 1870 have been marked by a battle on the part of the Métis to prevent the progressive erosion of their identity and culture. They negotiated Manitoba into Confederation on the promise that they would have a land base. The loss of their lands is at the heart of their cultural erosion and vulnerability. There are outstanding obligations with respect to the Métis and their lands, and that unfinished business needs to be attended to.

31. Such arrangements should never be considered moot if their obligations have not been fulfilled.[20] The country was formed on the basis of these compromises. The honour of Canada rests on fulfilling these obligations. Sections. 31 and 32 must be understood in this light.

[20] The French language cases provide good examples of this court breathing life into such constitutional provisions, because they reflect compromise arrangements that enabled Confederation, and are therefore foundational agreements of our country. See MNO Authorities, Tab 8: *Mahe v. Alberta*, [1990] 1 S.C.R. 342, para. 37; MNO Authorities, Tab 5: *Doucet-Boudreau v. Nova Scotia (Minister of Education),* [2003] 3 S.C.R. 3, paras. 23-29; MNO Authorities, Tab 7: *Lalonde v. Ontario (Health Services Restructuring Commission),* [2001] O.J. No. 4767, (ON CA), paras. 86 and 114.

32. The Court of Appeal held that the claim for breach of fiduciary duty is barred by limitations.[21] Manitoba argues that the claim with respect to its own ancillary statutes is moot. It is submitted that the Court of Appeal erred when it held that the entire case is moot but actually only applied the mootness analysis to the ancillary Manitoba statutes.[22] The constitutional obligations in the case at bar are not moot or time limited. We note that in this way, the case at bar is similar to other provisions of the *Manitoba Act* that were litigated long after 1870, and which were not subject to limitations, laches or mootness findings.[23]

33. Finally, the *vires* of the Manitoba laws is not a moot question, because those laws contributed to the non-fulfillment of the Crown's obligations. Therefore, Manitoba has some continuing responsibility for the unresolved dispute. If the Court grants declaratory relief as requested by the Appellants, that should include this *vires* issue, because the efficacy of any non-judicial remedy that will be developed as a result of this Court's decision will depend on Manitoba accepting its fair share of responsibility.

3. MMF's Standing

34. The Court of Appeal upheld the trial judge's decision to deny the MMF standing and agreed with the trial judge that the MMF did not meet the criteria for public interest standing.[24] It is submitted that the Court of Appeal erred in determining MMF's standing on the basis of the usual criteria for public interest standing.

35. Presently the courts determine standing using two models – private standing and public interest standing. Much of that law, including the *Canadian Council of Churches*[25] that was relied on by the Court of Appeal in the case at bar, was developed in the context of *Charter* litigation. Both models are inappropriate when the party seeking standing is the representative body for an aboriginal people asserting collective rights and interests.

36. Peter Hogg sets out the restrictions on standing as intended to:

(1) avoid opening the floodgates to unnecessary litigation;

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[21] Reasons of the Court of Appeal, para. 293. The Court of Appeal, at para. 318, held that the constitutional claims are not subject to any statutory limitations.
[22] Reasons of the Court of Appeal, paras. 368-375.
[23] MNO Authorities, Tab 6: *Forest, supra* at note 2, para. 31-32.
[24] Reasons of the Court of Appeal, paras. 251-268.
[25] MNO Authorities, Tab 2: *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236 at paras. 33-36.

(2) ration the efficient use of scarce judicial resources to real rather than hypothetical cases;
(3) place limits on judicial power by precluding rulings that are not needed to resolve disputes;
(4) avoid prejudice to persons affected by a decision but not before the court;
(5) avoid inadequate representation by parties with no real interest in the outcome; and
(6) avoid the risk that a court will reach an unwise decision respecting a question that is a hypothetical or abstract and lacking the factual context of a real dispute.[26]

37. In the case at bar it is submitted that none of the points Professor Hogg raises are at issue.

38. In cases involving aboriginal litigants and claims of aboriginal interests, rights or title, standing requirements need to be re-examined. The case law on standing is characterized by uncertainty with respect to aboriginal representative bodies.[27]

39. We draw attention to two facts in this regard. First, when the issue before the court involves the interests, rights or title of the aboriginal collective, there is rarely if ever an exact match between the representative body (usually the Band) and the aboriginal members of the collective. That is because the aboriginal collective is not defined by the *Indian Act*.[28] The only situation where the aboriginal representative body actually represents all the rights holders is in modern land claims situation. There, one of the essential negotiated parts of the agreement is the determination of exactly who is a beneficiary of the modern treaty. After the modern agreement is in effect the governing body clearly represents its members.

40. The evidence in the case at bar shows that, although the MMF's membership is not an exact match with the descendants of those entitled to benefit under s. 31 and s. 31, it does represent members who were affected by the issue in the case. It is no accident that of the individual plaintiffs who are either past or present members of MMF's board, such a high percentage (11 out of 17) are descendants. It strains credulity to think that only the past and present board members of MMF would be affected by the case.

41. The MMF has been the principle force behind this case since its inception. Most of the individual plaintiffs were originally MMF Board members.[29] The MMF has funded the action.

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[26] MNO Authorities, Tab 17: Peter Hogg, *Constitutional Law of Canada*, 5th Ed., p. 59.2.
[27] No capacity to sue – MNO Authorities, Tab 9: *Montana Band v. Canada* (1997), 140 FTR, para. 26. Capacity to sue – MNO Authorities, Tab 16: *West Moberly First Nations v. British Columbia*, 2007 BCSC 1324, paras 54-55. MNO Authorities, Tab 1: *Beattie v. R.* [2000] FCJ No. 1920 (TD) at paras 20-21. And see MNO Authorities, Tab 15: *Wahsatnow v. Canada (Minister of Indian Affairs and Northern Development),* 2002 FCT 2012, paras. 22-23, where the court confirmed than an individual acting on his own behalf cannot enforce a collective right.
[28] MNO Authorities, Tab 14: *Tsilhqot-in Nation v. British Columbia,* [2007] B.C.J. No. 2465, paras. 469-470.
[29] MNO Authorities, Tab 3: *Dumont v. Canada (Attorney General),* 1987 CanLII 992 (MB QB), p. 4.

Support for 30 years would not be sustained from disinterested members. It is wrong to deny standing to MMF by saying it has no direct interest in the case or because all of its members are not affected. Completely synchronicity between those affected and the representative body is not necessary for standing in this case, as it has not been considered necessary in cases respecting the collective rights of Indian or Inuit peoples.

42. Second, standing principles should reflect the courts' need for the holders of collective rights to be involved. That includes the case at bar, which is framed by the plaintiffs as one of constitutional and fiduciary obligations owed collectively to the Métis of Red River. The defendants seek to limit the issues to the claims of individuals procedurally by objecting to the standing of the collective representative body and substantively by denying that ss. 31 and 32 are obligations owed to the Métis collective. O'Sullivan J in the Manitoba Court of Appeal, said the following:

> It has been accepted by everyone that the aboriginal rights could not be lost save by the consent of those who enjoyed them. If the Metis people did not give up their aboriginal rights by agreeing to accept the provisions of the *Manitoba Act* in lieu thereof, then the aboriginal rights of this people must still subsist. But when they state the rights given to them under the *Manitoba Act* were given to them as a people and not simply as individuals, they are met with incomprehension … In my opinion, the plaintiffs are suitable persons to assert the claims of the half-breed people...[30]

43. The Métis are a people, and as an aboriginal collective they have the right to choose an entity to represent their collective interests. The individual named plaintiffs in an action such as this are not a substitute for the collective's chosen representative body. It is submitted that this court needs to develop a distinct standing test for representatives of aboriginal collectives.

Part 4 – Submissions on Costs

44. This Intervener makes no submissions on costs.

Part 5 – Order Sought

45. This Intervener supports the Order sought by the Appellants.

[30] MNO Authorities, Tab 4: *Dumont v. Canada (Attorney General),* 1988 CanLII 1372 (MB CA), p. 10-14.

All of which is respectfully submitted

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Dated at Vancouver, this 23rd day of November 2011.

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Part 6 – Table of Authorities

Tab	Case	Para. in Memorandum of Law
1	*Beattie v. R.* [2000] FCJ No. 1920 (TD)	39
2	*Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236	36
3	*Dumont v. Canada (Attorney General),* 1987 CanLII 992 (MB QB)	8, 42
4	*Dumont v. Canada (Attorney General)*, 1988 CanLII 1372 (MB CA),	43
5	*Doucet-Boudreau v. Nova Scotia (Minister of Education),* [2003] 3 S.C.R. 3,	32
6	*Forest v. AG Manitoba,* [1979] M.J. No. 78	2, 10, 32
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10	*Re: Authority of Parliament in relation to the Upper House*, [1980] 1 SCR 54	10
11	*R. v. Blais*, [2003] 2 S.C.R. 236	1
12	*R. v. Goodon*, 2008 MBPC 59	4
13	*R. v. St. Catharines Milling and Lumber Co.,* [1886] O.J. No. 108 (Ont. CA)	23
14	*Tsilhqot-in Nation v. British Columbia,* [2007] B.C.J. 2465	40
15	*Wahsatnow v. Canada (Minister of Indian Affairs and Northern Development),* 2002 FCT 2012	39
16	*West Moberly First Nations v. British Columbia*, 2007 BCSC 1324,	39
17	Peter Hogg, *Constitutional Law of Canada*, 5th Ed.,	37

Part 7 – Legislation

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