File Number: 33880

IN THE 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

-and-

ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF SASKATCHEWAN, MÉTIS NATIONAL COUNCIL, MÉTIS NATION OF ALBERTA, MÉTIS NATION OF ONTARIO, TREATY ONE FIRST NATIONS, ASSEMBLY OF FIRST NATIONS
Interveners

FACTUM OF THE INTERVENER, MÉTIS NATIONAL COUNCIL
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

MÉTIS NATIONAL COUNCIL
201-350 Sparks Street
Ottawa, Ontario
K1R 7S8
Tel: (613) 232-3216
Fax: (613) 232-4262
E-mail: clemc@metisnation.ca
E-mail: marcleclair@videotron.ca
E-mail: kathyhs@shaw.ca

Clement Chartier, Q.C.
Marc LeClair
Kathy L. Hodgson-Smith

Counsel for the Intervener,
Métis National Council

MACLAREN CORLETT LLP
Barristers and Solicitors
1625-50 O'Connor Street
Ottawa, Ontario
K1P 6L2
Tel: (613) 233-1146
Fax: (613) 233-7190
E-mail: ggreenwood@macorlaw.com

Gordon B. Greenwood

Ottawa Agent for Counsel for the
Intervener, Métis National Council

ROSENBLOOM ALDRIDGE BARTLEY & ROSLING
Barristers and Solicitors
440-355 Burrard Street
Vancouver, British Columbia
V6C 2G8
Tel: (604) 684-1311
Fax: (604) 684-6402

Thomas R. Berger, Q.C.
James Aldridge, Q.C.
Harley Schachter
Counsel for the Appellants

BURKE-ROBERTSON
Barristers and Solicitors
70 Gloucester Street
Ottawa, Ontario
K2P 0A2
Tel: (613) 236-9665
Fax: (613) 235-4430
E-mail: rhouston@burkerobertson.com

Robert E. Houston, Q.C.
Ottawa Agent for Counsel for the Appellants

ATTORNEY GENERAL OF CANADA
301-310 Broadway Avenue
Centennial House
Winnipeg, Manitoba
R3C 0S6
Tel: (306) 975-4765
Fax: (306) 975-5013
E-mail: mark.kindrachuk@justice.gc.ca

Mark Kindrachuk
Counsel for the Respondent, Attorney General of Canada

ATTORNEY GENERAL OF CANADA
Bank of Canada Building – East Tower
234 Wellington Street, Room 216
Ottawa, Ontario
K1A 0H8
Tel: (613) 941-2351
Fax: (613) 954-1920
E-mail: christopher.rupar@justice.gc.ca

Christopher M. Rupar
Ottawa Agent for Counsel for the Respondent, Attorney General of Canada

ATTORNEY GENERAL OF MANITOBA
1205-405 Broadway
Winnipeg, Manitoba
R3C 3L6
Tel: (204) 945-0679
Fax: (204) 945-0053
E-mail: heather.leonoff@gov.mb.ca
E-mail: Michael.conner@gov.mb.ca

Heather Leonoff, Q.C.
Michael Conner
Counsel for the Respondent, Attorney General of Manitoba

GOWLING LAFLEUR HENDERSON
2600-160 Elgin Street
P.O. Box 466, Stn “D”
Ottawa, Ontario
K1P 1C3
Tel: (613) 233-1781
Fax: (613) 563-9869
E-mail: henry.brown@gowlings.com

Henry S. Brown, Q.C.
Ottawa Agent for Counsel for the Respondent, Attorney General of Manitoba

ALBERTA JUSTICE ABORIGINAL LAW
1000 10025 102A Avenue
Edmonton, Alberta
T5J 2Z2
Tel: (780) 643-0858
Fax: (780) 643-0852
E-mail: doug.titosky@gov.ab.ca

Douglas B. Titosky
Counsel for the Intervener, Attorney General of Alberta

GOWLING LAFLEUR HENDERSON
2600-160 Elgin Street
P.O. Box 466, Stn "D"
Ottawa, Ontario
K1P 1C3
Tel: (613) 233-1781
Fax: (613) 563-9869
E-mail: henry.brown@gowlings.com

Henry S. Brown, Q.C.
Ottawa Agent for Counsel for the Intervener, Attorney General of Alberta

ATTORNEY GENERAL OF SASKATCHEWAN
ABORIGINAL LAW
820 1874 Scarth Street
Regina, Saskatchewan
S4P 4B2
Tel: (306) 787-7846
Fax: (306) 787-9111
E-mail: Mitch.McAdam@gov.sk.ca

Mitch McAdam
Counsel for the Intervener, Attorney General of Saskatchewan

GOWLING LAFLEUR HENDERSON
2600-160 Elgin Street
P.O. Box 466, Stn "D"
Ottawa, Ontario
K1P 1C3
Tel: (613) 233-1781
Fax: (613) 563-9869
E-mail: henry.brown@gowlings.com

Henry S. Brown, Q.C.
Ottawa Agent for Counsel for the Intervener, Attorney General of Saskatchewan

JTM LAW
28 Hawthorn Avenue
Toronto, Ontario
M4W 2Z2
Tel: (416) 945-7958
Fax: (416) 981-3162
E-mail: jason@jtmlaw.ca

Jason Madden
Counsel for the Intervener, Métis Nation of Alberta

BURKE-ROBERTSON
70 Gloucester Street
Ottawa, Ontario
K2P 0A2
Tel: (613) 236-9665
Fax: (613) 235-4430
E-mail: rhouston@burkerobertson.com

Robert E. Houston, Q.C.
Ottawa Agent for Counsel for the Intervener, Métis Nation of Alberta

PAPE SALTER TEILLET
460-220 Cambie Street
Vancouver, British Columbia
V6B 2M9
Tel: (604) 681-3002
Fax: (604) 681-3050
E-mail: jteillet@pstlaw.ca

Jean Teillet
Counsel for the Intervener, Métis Nation of Ontario

NELLIGAN O'BRIEN PAYNE LLP
1500-50 O'Connor Street
Ottawa, Ontario
K1P 6L2
Tel: (613) 231-8210
Fax: (613) 788-3661
E-mail: dougald.brown@nelligan.ca

Dougald E. Brown
Ottawa Agent for Counsel for the Intervener, Métis Nation of Ontario

RATH & COMPANY
Box 44 Site 8 RR1
Priddis, Alberta
T0L 1W0
Tel: (403) 931-4047
Fax: (403) 931-4048
E-mail: jrath@rathandcompany.com

Jeffrey R. W. Rath
Counsel for the Intervener, Treaty One First Nations

MCMILLAN LLP
300-50 O'Connor Street
Ottawa, Ontario
K1P 6L2
Tel: (613) 232-7171
Fax: (613) 231-3191
E-mail: marie-france.major@mcmillan.ca

Marie-France Major
Ottawa Agent for Counsel for the Intervener, Treaty One First Nations

ARVAY FINLAY
1350 355 Burrard Street
Vancouver, British Columbia
V6C 2G8
Tel: (604) 689-4421
Fax: (604) 687-1941
E-mail: jarvay@arvayfinlay.com

Joseph J. Arvay, Q.C.
Counsel for the Intervener, Assembly of First Nations

MCMILLAN LLP
300-50 O'Connor Street
Ottawa, Ontario
K1P 6L2
Tel: (613) 232-7171
Fax: (613) 231-3191
E-mail: jbeedell@mcmillan.ca

Jeffrey Beedell
Ottawa Agent for Counsel for the Intervener, Assembly of First Nations

TABLE OF CONTENTS

TAB **PAGE**

1 FACTUM OF THE INTERVENER, MÉTIS NATIONAL COUNCIL 1

Part I – Statement of Facts.....1
Part II – Issues.....1
Part III – Argument 1

A. Honour of the Crown 1

i. Purpose of the honour of the Crown is reconciliation 3

ii. Interpretation and application of the honour of the Crown 3

iii. Honour of the Crown as an independent basis for relief 4

iv. Honour of the Crown as a principle of interpretation...4

v. Nature of Crown duty under current circumstances 6

B. Constitutional Principles 6

i. Sections 31 and 32 of the *Manitoba Act* must be interpreted in accordance with constitutional principles 6

ii. Context of the *Manitoba Act* and sections 31 and 32 7

iii. Federalism requires accommodation and reconciliation.....8

iv. The rule of law requires the law to be honoured 9

v. Respect for minorities requires that their rights be protected.....10

Part IV - Submissions in Support of Costs 10
Part V - Orders Sought 10
Part VI - Table of Authorities 12
Part VII - Legislation.....13

001

PART I –STATEMENT OF FACTS

1. The Métis National Council ("MNC") represents the rights and interests of the Métis Nation in Canada. The lands referred to in sections 31 and 32 of the *Manitoba Act* are encompassed in the traditional homeland and birthplace of the Métis Nation.

PART II – ISSUES

2. The intervener Métis National Council takes the following positions with respect to the issues raised by this appeal:

   a. **Fiduciary duty**: The MNC agrees with the facts and legal arguments of the appellants in that a fiduciary duty was owed.

   b. **Honour of the Crown**: the MNC submits that the Court of Appeal erred in law in its interpretation of the honour of the Crown and failed to apply it to the interpretation and administration of ss. 31 and 32.

   c. Constitutional principles: the MNC submits that the Court of Appeal erred in law by failing to apply the proper constitutional principles to the interpretation of ss. 31 and 32, which required a purposive interpretation, with regard to federalism, the rule of law, and respect for minorities.

PART III – ARGUMENT

A. Honour of the Crown

3. The Métis National Council ("MNC") intervenes to seek an order declaring that the Federal Crown did not implement the land provisions of the *Manitoba Act* (sections 31 and 32) in accordance with the honour of the Crown.

4. The intervener respectfully submits that the Manitoba Court of Appeal erred in both its interpretation and application of the honour of the Crown and failed to give effect to the Honour of the Crown by a) failing to use it as an interpretive principle in respect of sections 31 and 32 and b) by failing to apply the honour of the Crown to reconcile the historic and contemporary land interests of the Métis.

5. The intervener supports the position of the appellants as summarized by the trial judge and set out by the Court of Appeal at paragraph 393 of its Reasons for Decision:

> the honour of the Crown must be observed in all of its dealings with aboriginal peoples, that it precedes and is the foundation of the Crown's fiduciary duty, and

> that it is a source of independent obligation which continues throughout all dealings between the Crown and aboriginal people whether or not a fiduciary duty arises.

The intervener also supports the appellant's arguments made below that the honour of the Crown goes beyond the duty to consult with Aboriginal people and may give rise to a fiduciary obligation.

6. The intervener argues that where the Crown purports to extinguish Aboriginal title and to confirm this in a constitutional document such as the *Manitoba Act*, there is a duty on the Crown to ensure that its conduct in fulfilling its obligations is held to a standard befitting the promises made. That is, it has to uphold the honour of the Crown by keeping its promises and legal commitments. *Carmacks First Nation*, 2010 SCC 53 (at para. 42).

7. The honour of the Crown is a unique.. In *Beckman v. Little Salmon* explained:

> The obligation of honourable dealing was recognized from the outset by the Crown itself in the *Royal Proclamation of 1763* (reproduced in R.S.C. 1985, App. II, No. 1), in which the British Crown pledged its honour to the protection of Aboriginal peoples from exploitation by non-Aboriginal peoples. [Emphasis added]

8. The content or effect of the honour of the Crown may differ depending on the circumstances. As McLachlin C.J.C. wrote at para. 16 of *Haida Nation v. British Columbia*, [2004] 3 SCR 511, it is "a core precept that finds its application in concrete practices."

9. The honour of the Crown is always at stake in the Aboriginal context but even more so in circumstances such as those in the case at bar where there is an written provision purporting to extinguish the Indian title held by the Métis, the clause is included in a constitutional document, and the Crown reserves for itself the discretion as to how to fulfill the constitutional promise to provide land that it freely and admittedly made.

10. The intervener agrees with the Manitoba Court of Appeal that:

- "both precedent and principle demonstrate that the Métis are part of the *sui generis* fiduciary relationship between the Crown and Aboriginal peoples of Canada" (Para 443);
- the "honour of the Crown was at stake with respect to s. 31 of the *Act*" (para 405); and
- "honour of the Crown gives rise to different duties in different circumstances" (para. 422).

11. The intervener submits however, that the Court of Appeal erred by suggesting the appellants were not entitled to a declaration that the honour of the Crown was breached based on the failure of the Crown to fulfill its duty to provide land to the children of the Métis effectively.

12. The intervener believes such a finding is consistent with the logic and principles of the existing jurisprudence in respect of the honour of the Crown, which has at its heart the need to reconcile past and future relationships between the Crown and Aboriginal people.

i. Purpose of the honour of the Crown is reconciliation

13. The honour of the Crown is a principle of reconciliation: the doctrine provides a basis on which to reconcile historical and future relationships between the Crown and Aboriginal peoples. The Métis were a pre-existent Aboriginal society before the enactment of the *Manitoba Act*. The fact of prior Métis occupation and, ultimately, control, defined Canada's approach to its acquisition of sovereignty over the territory.

14. While the Court of Appeal decided that the honour of the Crown was at stake with respect to section 31, it did not give any effect to the doctrine and did not take into account the underlying purpose of reconciliation between the Crown and Métis. Reconciliation requires the doctrine to take full effect:

> In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown." [Emphasis added.] ***Haida Nation***, supra, para. 17

ii. Interpretation and application of the honour of the Crown

15. The honour of the Crown must be interpreted generously in order to achieve the reconciliatory function that is at its core.

> The Province's submissions represent an impoverished vision of the honour of the Crown and all that it implies… The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).
> ***Taku River Tlingit First Nation v. BC,* [2004] 3 S.C.R. 550,** para. 24

This is further elaborated upon in *Stoney Band*:

> The honour of the Crown may also be manifest in the generous interpretation of treaty rights… generous rules of interpretation are not intended to be after-the-fact largesse. Rather, their purpose is to look for the common intention between the parties as the way to reconcile the interests of the Indians and the Crown.
> ***Stoney Band v. Canada*, 2005 FCA 15,** para. 15

iii. Honour of the Crown as an independent basis for relief

16. In certain situations as in the case at bar, the honour of the Crown gives rise to an independent basis for relief. The Court of Appeal noted (at para. 420) that "the honour of the Crown has been identified as the source of specific legal obligations owed by the Crown to Aboriginal peoples. The obligations identified thus far include the duty to consult and fiduciary obligations."

17. However, the Court held that the honour of the Crown does not constitute an independent cause of action (even though it may give rise to the duty to consult or a fiduciary obligation), and thus does not provide an independent basis for the relief sought by the appellants (at paras. 427-428).

18. "The honour of the Crown gives rise to different duties in different circumstances" (*Haida Nation*, supra, at para. 18). It is up to the courts to identify the situations in which duties arise. The intervener submits that the honour of the Crown gives rise to a duty to keep its constitutionally-protected promises to the Métis, and a ruling to that effect would not constitute a significant expansion of the jurisprudence. In its decision, the Court of Appeal implies that it will be the role of the Supreme Court to apply the doctrine of the honour of the Crown more widely than the two categories of fiduciary duty and consultation.

iv. Honour of the Crown as a principle of interpretation

19. The honour of the Crown is an established interpretive principle.

> I conclude that, with respect to the honour of the Crown, the concrete practices required of the Crown so far identified by the Supreme Court of Canada in the Aboriginal context are: acting appropriately as a fiduciary; interpreting treaties and documents generously; negotiating, and where appropriate, consulting with and accommodating Aboriginal interests; and justifying legislative objectives when

> Aboriginal rights are infringed. However, I do not suggest that this is an exhaustive list of the ways in which the honour of the Crown may be manifest. [emphasis added]
> ***Stoney Band*, supra,** para. 18

> The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing."
> ***Haida Nation*, supra**, para. 19 (citing *Badger*)

20. Sections 31 and 32 of the *Manitoba Act* are the product of an agreement between the Crown and the Métis. They epitomize the Crown-Aboriginal relationship that is protected by the honour of the Crown. Reconciliation demands that the *Act* be interpreted in accordance with that honour.
21. The Court of Appeal (at para. 419) agreed with the trial judge that the honour of the Crown "functions as an interpretive principle in approaching treaties and statutory provisions that have an impact upon treaty and Aboriginal rights." Section 31 of the *Manitoba Act* is exactly such a provision. However, the Court of Appeal did not apply the honour of the Crown in interpreting section 31, particularly as it relates to the "Indian title held by the Métis."

22. The Court of Appeal erred in failing to apply the doctrine of the honour of the Crown to its interpretation of the nature of the Métis land interests set out in s. 31 and in evaluating the actions of the Crown in the administration of those interests. The net effect of the Court of Appeal's approach is to ignore the compensatory nature of the proprietary interest which was an essential aspect of the inducement for the Métis to support the *Manitoba Act*. We submit that the honour of the Crown requires this to be taken into account in the interpretation of section 31, and the agreement reflected therein.

23. The Manitoba Court of Appeal left for another day "the question of exactly what does constitute a cognizable Métis interest and whether one exists in this truly unique case…" (para. 509). The Court should have applied the lens of the honour of the Crown at the outset of its analysis, as the day for interpreting section 31 has in fact arrived.

24. The Court of Appeal does say the honour of the Crown has relevance in respect to fiduciary duty: namely, its role is to "flavour the nature and extent of the fiduciary duty" (para. 428).

However, determining this actually falls to the analytical framework of fiduciary duty, so the Court turns to the fiduciary duty jurisprudence. In the end it is not clear what effect, if any, the honour of the Crown has, as it is not explored later in the judgment.

v. **Nature of Crown duty under current circumstances**

25. Current unique circumstances:

- Importance of land to Indigenous people and the protection of a unique Aboriginal national minority (The Métis Nation);
- Promise of land incorporated in the Constitution of Canada, i.e. *Manitoba Act*;
- Land was provided towards the extinguishment of the Indian title held by the Métis ;
- Promise made in negotiations for Manitoba peacefully enter into Confederation
- Deal with the Métis who were the vast majority of the settler population facing an influx of new settlers; and
- the federal Crown unlike in other provinces, reserved for itself ownership of and the power over public lands to administer what became a failed land allotment scheme.

26. What is the duty? We submit that the duty is to reconcile the land interests of the Métis Nation and those of Canada. It is no different than the reconciliation required of governments by virtue of section 35 of the *Constitution Act 1982*.

27. The net effect of the declarations sought by the appellants would be to have the Crown come to the table with the representatives of the Métis Nation to fulfill the promise of land -- land that was guaranteed by the constitution and lands that are required to sustain the identity, culture, language and traditions of one of the most unique indigenous populations of the world. This is a truly Canadian indigenous population whose rights can and should be reconciled with the Crown. The honour of the Crown demands that this ongoing historic duty be recognized and fulfilled.

B. Constitutional Principles

i. Sections 31 and 32 of the *Manitoba Act* must be interpreted in accordance with constitutional principles

28. Section 31 of the *Manitoba Act* is a unique provision as it forms part of the Constitution of Canada and guarantees Métis rights. The great majority of persons with rights under s. 32 were also Métis. Therefore, as argued above, the Act must be interpreted as subject to the honour of the Crown and also in accordance with the proper approach to interpreting constitutional provisions generally.

29. The Court of Appeal erred in failing to interpret the constitutional provision in a way which ensures the "full benefit of the constitutional protection" by interpreting the section "in its proper linguistic, philosophic and historical context."

***R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295**

30. Moreover, the Court of Appeal erred by failing to give effect to the underlying principles of the Canadian Constitution. These constitutional principles have been given their clearest and most comprehensive exposition in the *Secession Reference*, [1998] 2 SCR 217. Federalism, democracy, constitutionalism and rule of law, and respect for minorities are key values, and they become especially important in cases of this nature, where the fate of an historic minority is at stake.

31. The underlying principles of the Canadian Constitution have a direct impact on the interpretation of s. 31 and 32 of the *Manitoba Act*:

> Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force", as we described it in the Patriation Reference, supra, at p. 845), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments. "In other words", as this Court confirmed in the *Manitoba Language Rights Reference*, supra, at p. 752, "in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada." [emphasis added] ***Secession Reference***, supra, at para. 54

32. Similarly to the *Secession Reference* (at para. 25), the Appellants in this case ask the courts to play an advisory role in a matter that has both a legal and political component. A declaration on the legal aspect would lead to negotiation, allowing the matter to be resolved through good faith political processes. The end result would be reconciliation between the Crown and Métis.

ii. Context of the *Manitoba Act* and sections 31 and 32

33. The Métis are a minority who negotiated Manitoba into Confederation and were in fact induced to join confederation on the terms and strength of the promise of implementing the *Manitoba Act* in a manner that reflected the common intention of the parties.

Affidavit of Wenda Watteyne, sworn September 1, 2011, para. 12

34. Although widely recognized as a culturally-distinct Aboriginal peoples living in culturally-distinct communities, the law remained blind to the unique history of the Métis and their unique needs.

***Alberta v. Cunningham 2011* 1 S.C.R. para. 75, 83, 86**

35. The *Manitoba Act* was meant to address the needs of the Métis in order to effect reconciliation (as part of the process of nation-building). The Métis required unique institutions to preserve their culture and way of life.

36. As observed by the Respondent Canada (at para. 101 of their factum), purposive interpretation must reconcile the intentions of the framers and be grounded in the language of the statute. The historical context, outlined above, thus supports an interpretation of s. 31 and 32 that requires the Canadian government to administer those sections in the interests of the Métis as a whole (and in a reasonable time and competent manner). In the language of the statute, s. 31 is expressly "for the benefit of the families of the half-breed residents" [emphasis added].

37. The purposive interpretation of s. 31 and s. 32 is also supported by the constitutional principles expounded upon in the *Secession Reference*, particularly federalism, the rule of law, and minority protection.

iii. Federalism requires accommodation and reconciliation

38. The MNC submits that federalism requires the Constitution to be interpret sections 31 and 32 of the *Manitoba Act* in a manner that reconciles the past and future relationship and interests between the Government of Canada and the Métis Nation.

39. The principal manifestation of federalism is the division of powers between the federal and provincial spheres, but as a principle federalism runs through the entire Constitution. According to this Court in the *Secession Reference* (at para. 43), the rationale for federalism is the accommodation of diversity. "Federalism was the political mechanism by which diversity could be reconciled with unity."

40. The *Manitoba Act* brought the province of Manitoba into existence, as part of the Canadian federation. A vital part of this venture was the accommodation of the main inhabitants at the time, the Red River Métis, through religious and language rights and of course land grants via s. 31 and s. 32. This is the reconciliation of diversity with unity: the Métis people with the Canadian state. The purpose and scheme of the Act was not homogenization, but accommodation.

41. Thus, the principle of federalism requires accommodation with a view to reconciliation. This is especially relevant here given the federative nature of the *Manitoba Act*. The interpretation of s. 31 and s.32 must reflect this.

iv. The rule of law requires the law to be honoured

42. The MNC submits that the rule of law requires the Court to give effect to the language of section 31, particularly on the issue of Indian title (the Métis interest), without regard to theories that its inclusion was a mere "political expedient." The law must mean what it says and the Crown must be bound by it.

43. In the *Secession Reference* (at para. 71), citing the *Manitoba Language Rights Reference*, 1985 1 S.C.R. 721, this Court emphasized that "the rule of law provides that the law is supreme over the acts of both government and private persons." Thus the Crown is constrained by the law – it is not open to the Crown to claim that a law or part of it is a "political expedient" or something meant merely to facilitate Crown objectives. The Courts must enforce this.

44. It would follow that section 31 was concerned with the "Indian title," held by the Metis and accordingly the Métis had land and real proprietary interests that were being settled with as part of a mutual agreement between the Parties. The Courts below chose to read out and ignore this fundamental aspect of the section thus robbing the Metis of the benefits which were clearly guaranteed by the section. These same benefits were the inducement of the Metis to join as partners in Confederation.

45. The rationale for the rule of law directly touches on this case: "There are occasions when the majority will be tempted to ignore fundamental rights in order to accomplish

collective goals more easily or effectively," such as quieting the Métis and settling the West. "A constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority."

***Secession Reference*, supra, at para. 74**

46. This was one of the main purposes of the *Manitoba Act*, as far as the Métis were concerned. This leads to the final constitutional principle: respect for minorities.

v. Respect for minorities requires that their rights be protected

47. The protection of minority rights has long been a feature of the Canadian Constitution (*Secession Reference* at paras. 81-82), and the *Manitoba Act* is a prime example of this. Sections 22 and 23 have already been recognized as minority protection provisions (in the *Manitoba Language Reference*, supra). Sections 31 and 32 are part of the same act, and contrary to the assertions of the Respondent Canada (at para. 107), deal with culture: land and place are definitely cultural.

48. The subject of minority protection is dealt with more fully by the Appellants. The MNC will only add that where a constitutional obligation has been breached there is a duty to negotiate with the constitutional minority to uphold principles of respect for both the legality and legitimacy of the Constitution, and to facilitate reconciliation.

PART IV – SUBMISSIONS IN SUPPORT OF COSTS

49. The intervnor has no submission concerning costs.

PART V – ORDERS SOUGHT

50. The intervener requests leave to present oral arguments at the hearing of the appeal.

51. The intervener agrees with the orders sought by the appellants, particularly: a declaration that the federal Crown did not implement the land provisions of the *Manitoba Act* (ss. 31 and 32) in accordance with the honour of the Crown, and a declaration that that the federal Crown was in breach of its constitutional obligations to the Métis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of November, 2011.

_____

Clement Chartier, Q.C.

_____

Marc LeClair

_____

Kathy L. Hodgson-Smith

Counsel for the Intervener, Métis National Council

PART VI – TABLE OF AUTHORITIES

AUTHORITY	PARAGRAPH
Carmacks First Nation, 2010 SCC 53 at para. 42	6
Beckman v. Little Salmon	7
Haida Nation v. British Columbia, [2004] 3 S.C.R. 511 at para. 16	8, 14, 18, 19
Taku River Tlingit First Nation v. British Columbia, [2004] 3 S.C.R. 550 at para. 24	15
Stoney Band v. Canada, 2005 FCA 15 at para. 15	15, 19,
R. v. Big M Drug Mart Ltd., [1958] 1 S.C.R. 295	29
Secession Reference, [1998] 2 S.C.R. 217 at para. 25, 43, 54, 71, 74	30, 31, 32, 37, 39, 43, 45, 47
Alberta v. Cunningham, 2011 S.C.C. 37 at para. 75, 83, 86	34
Manitoba Language Rights Reference, [1985] 1 S.C.R. 721	43, 47

PART VII – LEGISLATION

Manitoba Act, 1870, 33 Vict., c.3 (Canada), (confirmed by the *Constitution Act, 1871*)

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

32. For the quieting of titles, and assuring to the settlers in the Province the peaceable possession of the lands now held by them, it is enacted as follows:--

(1) All grants of land in freehold made by the Hudson's Bay Company up to the eighth day of March, in the year 1869, shall, if required by the owner, be confirmed by grant from the Crown.

(2) All grants of estates less than freehold in land made by the Hudson's Bay Company up to the eighth day of March aforesaid, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.

(3) All titles by occupancy with the sanction and under the license and authority of the Hudson's Bay Company up to the eighth day of March aforesaid, of land in that part of the Province in which the Indian Title has been extinguished, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.

(4) All persons in peaceable possession of tracts of land at the time of the transfer to Canada, in those parts of the Province in which the Indian Title has not been extinguished, shall have the right of pre-emption of the same, on such terms and conditions as may be determined by the Governor in Council.

(5) The Lieutenant-Governor is hereby authorized, under regulations to be made from time to time by the Governor General in Council, to make all such provisions for ascertaining and adjusting, on fair and equitable terms, the rights of Common, and rights of cutting Hay held and enjoyed by the settlers in the Province, and for the commutation of the same by grants of land from the Crown.

The Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.