File No. 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 ALLAIRE, CELIA KLASSEN, ALMA BELHUMEUR, STAN GUIBOCHE, JEANNE PERRAULT, MARIE BANKS DUCHARME and EARL HENDERSON

Appellants
(Appellants)

- and -

ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF MANITOBA

Respondents
(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,
THE ATTORNEY GENERAL OF ALBERTA
Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*

ALBERTA JUSTICE
ABORIGINAL LAW
1000 10025 102A Ave
Edmonton AB T5J 2Z2
Telephone: (780) 643-0858
Facsimile: (780) 643-0852
Email: doug.titosky@gov.ab.ca

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

GOWLING LAFLEUR HENDERSON LLP
Barristers & Solicitors
26 Fl 160 Elgin St
Ottawa ON K1P 1C3
Telephone: (613) 786-0139
Facsimile: (613) 788-3433
Email: henry.brown@gowlings.com

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

ROSENBLOOM, ALDRIDGE, BARTLEY & ROSLING
Barristers & Solicitors
440 355 Burrard St
Vancouver BC V6C 2G8
Telephone: (604) 684-1311
Facsimile: (604) 684-6402

Thomas R. Berger, Q.C.
Counsel for the Appellants
Manitoba Métis Federation et al.

BURKE-ROBERTSON
Barristers & Solicitors
70 Gloucester St
Ottawa ON K2P 0A2
Telephone: (613) 236-9665
Facsimile: (613) 235-4430
Email: rhouston@burkerobertson.com

Robert E. Houston, Q.C.
Ottawa Agents for the Appellants
Manitoba Métis Federation et al.

ATTORNEY GENERAL OF MANITOBA
Department of Justice
Constitutional Law Branch
1205 405 Broadway Ave
Winnipeg MB R3C 3L6
Telephone: (204) 945-0679
Facsimile: (204) 945-0053
Email: heather.Leonoff@gov.mb.ca

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

GOWLING LAFLEUR HENDERSON LLP
Barristers & Solicitors
26 Fl 160 Elgin St
Ottawa ON K1P 1C3
Telephone: (613) 786-0139
Facsimile: (613) 788-3433
Email: henry.brown@gowlings.com

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

MYLES J. KIRVAN
DEPUTY ATTORNEY GENERAL OF CANADA
Department of Justice
Prairie Region
301 310 Broadway Ave
Winnipeg MB R3C 0S6
Telephone: (204) 983-0873
Facsimile: (204) 984-5910
Email: mark.kindrachuk@justice.gc.ca

Mark Kindrachuk
Counsel for the Respondent,
Attorney General of Canada

MYLES J. KIRVAN
DEPUTY ATTORNEY GENERAL OF CANADA
Department of Justice
Prairie Region
Rm 1216 234 Wellington St
Ottawa ON K1A 0H8
Telephone: (613) 941-2351
Facsimile: (613) 954-1920
Email: christopher.rupar@justice.gc.ca

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

ATTORNEY GENERAL OF
SASKATCHEWAN
ABORIGINAL LAW
820 1874 Scarth St
Regina SK S4P 4B3
Telephone: (306) 787-7846
Facsimile: (306) 787-9111
Email: Mitch.McAdam@gov.sk.ca

Mitch McAdam
Counsel for the Intervener
Attorney General of Saskatchewan

GOWLING LAFLEUR HENDERSON LLP
Barristers & Solicitors
26 Fl 160 Elgin St
Ottawa ON K1P 1C3
Telephone: (613) 786-0139
Facsimile: (613) 788-3433
Email: henry.brown@gowlings.com

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

MÉTIS NATIONAL COUNCIL
201 350 Sparks St
Ottawa ON K1R 7S8
Telephone: (613) 232-3216
Facsimile: (613) 232-4262
Email: clemc@metisnation.ca

Clement Chartier, Q.C.
Counsel for the Intervener
Metis National Council

MACLAREN CORTLETT LLP
Barristers & Solicitors
1625 50 O'Connor St
Ottawa ON K1P 1C3
Telephone: (613) 233-1146
Facsimile: (613) 233-7190
Email: ggreenwood@macorlaw.com

Gordon B. Greenwood
Ottawa Agents for the Intervener
Métis National Coucil

JTM LAW
Barristers & Solicitors
28 Hawthorn Ave
Toronto ON M4W 2Z2
Telephone: (416) 945-7958
Facsimile: (416) 981-3162
Email: jason@jtmlaw.ca

Jason Madden
Counsel for the Intervener
Métis Nation of Alberta

BURKE-ROBERTSON
Barristers & Solicitors
70 Gloucester St
Ottawa ON K2P 0A2
Telephone: (613) 236-9665
Facsimile: (613) 235-4430
Email: rhouston@burkerobertson.com

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

PAPE SALTER TEILLET
Barristers & Solicitors
460 220 Cambie St
Vancouver BC V6B 2M9
Telephone: (604) 681-3002
Facsimile: (604) 681-3050
Email: jteillet@pstlaw.ca

Jean Teillet
Counsel for the Intervener
Métis Nation of Ontario

NELLIGAN O'BRIEN PAYNE LLP
Barristers & Solicitors
1500 50 O'Connor St
Ottawa ON K1P 6L2
Telephone: (613) 231-8210
Facsimile: (613) 788-3661
Email: dougald.brown@nelligan.ca

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

RATH & COMPANY
Barristers & Solicitors
Box 44 Site 8 RR1
Priddis AB T0L 1W0
Telephone: (403) 931-4047
Facsimile: (403) 931-4048
Email: jrath@rathandcompany.com

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

MCMILLAN LLP
Barristers & Solicitors
300 50 O'Connor St
Ottawa ON K1P 6L2
Telephone: (613) 232-7171
Facsimile: (613) 231-3191
Email: marie-france.major@mcmillan.ca

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

ARVAY FINLAY
Barristers & Solicitors
1350 355 Burrard St
Vancouver BC V6C 2G8
Telephone: (604) 689.4421
Facsimile: (604) 687.1941
Email: jarvay@arvayfinlay.com

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

MCMILLAN LLP
Barristers & Solicitors
300 50 O'Connor St
Ottawa ON K1P 6L2
Telephone: (613) 232-7171
Facsimile: (613) 231-3191
Email: jbeedell@mcmcillan.ca

Jeffrey Beedell
Counsel for the Intervener
Assembly of First Nations

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PART I. OVERVIEW AND FACTS

1. The Métis have a unique status – aboriginal yet neither Indian nor Inuit. As such they should not be considered Indians for purposes of section 91(24) of the *Constitution Act, 1867* nor should they be considered Indians for purposes of determining whether they are in a fiduciary relationship with the Crown.

2. Alberta accepts the facts as set out by Manitoba and Canada in their respective facta.

PART II. STATEMENT OF POSITION ON APPELLANTS' QUESTIONS

3. The Attorney General of Alberta will address the following issues raised by the Appellants:

a. Constitutionality of Provincial Legislation

If it is necessary for the Court to consider this issue the provincial legislation impugned by the Appellants was valid legislation within provincial competence. The legislation did not address matters that fall within the scope of section 91(24) of the *Constitution Act, 1867*.

b. Fiduciary Relationship and Fiduciary Obligations

If it is necessary for the Court to address this issue there is no basis for a finding that a fiduciary relationship exists and consequently no basis for a finding that fiduciary obligations were owed.

PART III. STATEMENT OF ARGUMENT

A. Métis and Lands to be Provided to Métis are not within "Indians, and Lands reserved for the Indians" Under Section 91(24) of the *Constitution Act, 1867*

4. A finding that Manitoba's legislation is unconstitutional based on section 91(24) of the *Constitution Act, 1867* (hereafter 91(24)) could have an impact on the validity of Alberta's legislation dealing with Métis and Métis settlements.

5. The Appellants challenge the constitutionality of eight Manitoba statutes[1] and have put forward the position that the Métis children and the lands to be provided to them under section 31 of the *Manitoba Act* "qualified under 91(24) as "Indians and Lands reserved for the Indians". Even though the Appellants indicate they are not seeking a ruling that "generally speaking" the Métis are "Indians" under 91(24)[2], the effect of the ruling they are seeking is just that.

6. The first step in an analysis of the constitutionality of legislation is to consider the pith and substance of the provisions of the legislation in issue. Once the pith and substance is ascertained it is necessary to classify that essential character of the legislation by reference to provincial and federal classes of subjects in sections 91 or 92 to determine if the law is within the jurisdiction of the enacting legislature.[3]

7. Alberta agrees with Manitoba's position that the pith and substance of the legislation in issue is property and civil rights and is within section 92 of the *Constitution Act, 1867*. In the event that the Court determines otherwise and considers that the pith and substance is something other than property and civil rights it will be necessary to determine the scope of 91(24). Alberta agrees with Manitoba that it is not necessary for the Court to decide this issue in the present case. If the Court does determine that it is necessary to decide the issue, Alberta agrees with the position put forward by Manitoba that the Manitoba Métis were not within 91(24).

8. It is Alberta's position that the Métis and lands provided to the Métis are not within the legislative authority of Parliament of Canada under 91(24) as the Métis are not Indians nor are the lands provided to (or lands to be provided to) them "Lands reserved for the Indians".

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[1] See Respondent, Manitoba's Factum at para 35.
[2] See Appellants' Factum at para 238.
[3] *Chatterjee v Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 SCR 624, 2009 CarswellOnt 1949 at para 16 [Manitoba's Authorities, Vol. II Tab 10]; *Kitkatla Band v British Columbia (Minister of Small Business, Tourism & Culture)*, 2002 SCC 31, [2002] 2 SCR 146, 2002 CarswellBC 617 at paras 52 & 65 [Alberta's Authorities Tab 5].

9. This Court has not previously considered the question of whether the Métis are "Indians" under 91(24), however, this Court has considered the distinctions between the Métis and Indians in other constitutional instruments.

10. Section 91(24) must be read in context and must be placed in its proper linguistic, philosophic and historical contexts. In *Consolidated Fastfrate Inc. v Western Canada Council of Teamsters* this Court endorsed this approach and used it to determine the scope of section 92(10) of the *Constitution Act, 1867*[4]. In *R v Blais* (*Blais*) this Court considered and applied this approach in interpreting the Manitoba *Natural Resources Transfer Agreement (NRTA)* (incorporated as Schedule 1 to the *Constitution Act, 1930*).[5] In doing so the Court relied upon the decision in *R. v Big M Drug Mart* where this approach was used in the context of determining the meaning of the Charter right to freedom of religion.[6]

- **Historical context**

11. In *Blais* this Court considered, "whether the Métis are 'Indians' under the hunting rights provisions of the Manitoba *Natural Resources Transfer Agreement (NRTA)*".[7] The Court concluded that they are not. Although this Court expressly stated that it was not deciding whether the term "Indians" under 91(24) includes Métis, the case does provide guidance for the interpretation principles applicable and an example of their application.

12. The Court also concluded that the difference between Indians and Métis was widely recognized and understood by the mid 19th Century; they were viewed as distinct groups. The Manitoba Métis were not considered wards of the Crown. Many if not most of the members of the Manitoba government at the time of its entry into Confederation were Métis. The Court also stated that the fact a Métis person could self identify as either Métis or Indian and claim the respective benefits supports the view that there was a

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[4] *Consolidated Fastfrate Inc. v Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 SCR 407, 2009 CarswellAlta 1891 at para 32 [Alberta's Authorities Tab 3].
[5] *R. v Blais*, 2003 SCC 44, [2003] 2 SCR 236, 2003 CarswellMan 386 at para 17 [Manitoba's Authorities, Vol. II Tab 34].
[6] *R. v Big M Drug Mart Ltd.*, [1985] 1 SCR 295, 60 AR 161, 1985 CarswellAlta 316 [Manitoba's Authorities, Vol. II Tab 33].
[7] *Supra* note 5 at para 1 [Manitoba's Authorities, Vol. II Tab 34].

distinction between the groups historically.[8] In the historical context "Indians" did not include Métis.

13. Manitoba has reviewed the historic facts with reference to the trial exhibits in this case at paragraphs 133, 136, 137 of its factum. In addition to those documents that were referred to in the *Blais* decision, Manitoba has identified additional documents that are in the trial record that provide the historical context.

14. The Trial Judge, Justice MacInnes, found that the evidence in this case was "overwhelming that the Métis were not Indians. They did not consider themselves to be Indians. They saw themselves and wanted to be seen, as civilized and fully enfranchised citizens".[9] The Métis were recorded in the census as separate from Indians. They clearly distinguished themselves from Indians as is evident from the list of rights, the debates concerning the list of rights and the laws that were passed by the local legislature after 1870. Indians were not enfranchised, were not able to hold property individually and were not treated as citizens. Not so the Métis. The Métis did not view themselves as vulnerable people, nor did Canada treat them as such.[10]

15. Placed in its proper historical context the term Indians in 91(24) does not include Métis.

- **Linguistic context**

16. In considering the linguistic context of the provision in issue guidance can be obtained from the *Constitution Act, 1867* itself. This Court applied this approach in the case of *Consolidated Fastfrate*.[11] Section 91(24) specifically refers to Indians and lands reserved for the Indians. The distinction between the terms, Indian and Métis or Half-breed was well known at the time and is evidenced by the use of the different terminology in many situations.

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[8] *Ibid* at paras 20-26 [Manitoba's Authorities, Vol. II Tab 34].
[9] Reasons for Judgment of the Court of Queen's Bench of Manitoba [MBQB Reasons] at para 600, Appellants' Record [AR] Vol II at 11.
[10] MBQB Reasons at paras 610, 614 & 615, AR Vol II at 14-15, 16.
[11] *Supra* note 4 [Alberta's Authorities Tab 3].

17. In *Re Eskimo* the Court determined that the Inuit (Eskimo) are within 91(24).[12] The majority decision reviewed the historic sources for the use of the term "Indians" and concluded that it included the Eskimo as well as the other aborigines. Justice Cannon, in separate reasons from the majority but concurring in the result, considered the language of 91(24) including the French version and concluded that it includes all of the "aborigine native subjects of the proposed Confederation".[13] Justice Kerwin, also in separate reasons from the majority but concurring in the result, reviewed extensively the definitions of Indian and Esquimaux that were extant at or around the time of the *Constitution Act, 1867*.[14] Justice Kerwin indicated that "the majority of authoritative publications, and particularly those that one would expect to be in common use in 1867, adopt the interpretation that the term "Indians" includes all the aborigines of the territory subsequently included in the Dominion".[15]

18. The Court in *Blais* also concluded that based on the language used in the NRTA, the term "Indians" did not include Métis. The Court considered terminology utilized in some of the contemporary documents including the Hudson's Bay Company's 1856-57 census of the population in North America which identified the number of Indians and also separately identified the number of whites and half-breeds. The Court also noted the different terms that were utilized in the Lists of Rights referred to in para 14 above.[16]

19. The historic record reviewed by the Trial Justice and by the Court of Appeal is replete with references to Indians and "half-breeds or Metis. The terminology used was dependent upon the group being identified. The terms were not used interchangeably.[17]

20. In 1876 the *Indian Act* was amended to define Indians as excluding the Métis who either took land or scrip under the *Manitoba Act*. [18]

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[12] *Reference re Term "Indians"*, [1939] SCR 104, (*sub nom. Eskimos, Re*) [1939] 2 DLR 417, 1939 CarswellNat 48 [Alberta's Authorities Tab 9].
[13] *Ibid* at para 49 [Alberta's Authorities Tab 9].
[14] *Ibid* at para 53-55 [Alberta's Authorities Tab 9].
[15] *Ibid* at para 55 [Alberta's Authorities Tab 9].
[16] *Supra* at note 5 at paras 27 & 28 [Manitoba's Authorities, Vol. II Tab 34].
[17] MBCA Reasons at paras 32 & 58, AR Vol III at 31 & 37; MBQB Reasons at paras 162-163 & 183, AR Vol I at 54-55 & 66.
[18] *Indian Act*, 1876, SC 1876, c 18 [Alberta's Authorities Tab 10].

21. Placed in its proper linguistic context, the term Indians in 91(24) does not include Métis.

- **Philosophic context**

22. The Indians were considered to be wards of the state while the Métis were not. The Métis could hold property individually, they were able to vote, they held office, they were not viewed or treated as a vulnerable people and they formed the majority of the population in Manitoba at the time. [19]

23. In *Blais* the Court found that the objectives of the NRTA also led to the conclusion that Métis were not intended to be included in section 13 of the NRTA. As the Court stated, "the stark historic fact is that the Crown viewed its obligations to Indians, whom it considered its wards, as different from its obligations to the Métis who were its negotiating partners in the entry of Manitoba into Confederation."[20] It would not make practical sense for them to negotiate the entry of Manitoba into Confederation only to have the vast majority of the new province's inhabitants under federal jurisdiction.

24. In *Alberta (Aboriginal Affairs and Northern Development) v Cunningham* (*Cunningham*) this Court addressed the distinction between Métis and Indians in connection with the *Métis Settlements Act* of Alberta. The Court noted that the definition of Métis in the predecessor legislation excluded Indians and non-treaty Indians as defined in the *Indian Act*, being chapter 98 of the *Revised Statutes of Canada, 1927.*[21] The current legislation, while not defining Métis as excluding Indians, does preclude Indians from being settlement members except in certain limited situations.

25. This Court, in *Cunningham*, recognized the unique identity of the Métis. The Court indicated that the object of the *Métis Settlements Act,* "is to promote Métis identity, culture and self-governance in recognition of their unique status – aboriginal, yet neither Indian nor Inuit."[22] The Court further indicated that the Métis have "claimed an identity

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[19] *Supra* note 10.
[20] *Supra* note 5 at para 33 [Manitoba's Authorities, Vol. II Tab 34].
[21] *Alberta (Aboriginal Affairs & Northern Development) v Cunningham*, 2011 SCC 37, [2011], 334 DLR (4th) 577, 2011 CarswellAlta 1210 at para 10 [Alberta's Authorities Tab 1].
[22] *Ibid* at para 75 [Alberta's Authorities Tab 1].

based on non-Indianness" and they have "persistently distinguished themselves as a people from the other dominant group in their territory – Indians."[23]

26. Alberta passed legislation as early as 1938 with respect to Métis people specifically. The *Métis Settlements Act,* SA 1990, c M 14.3 was passed in 1990 to protect or establish a land base to preserve and enhance Métis identity, culture and self-governance.[24]

27. The Alberta legislation has not been challenged on the basis that it is beyond Alberta's legislative jurisdiction. This Court dismissed the claim in *Cunningham* that the provisions of the *Métis Settlements Act* concerning the definition of Métis (as excluding people registered as Indians or Inuit) are contrary to Section 15(1) of the Charter.[25] There was no challenge to the *Métis Settlements Act* on the basis of 91(24).

28. Placed in its proper philosophic context the term Indians in 91(24) does not include Metis.

- **Conclusion re 91(24)**

29. It is Alberta's position that section 91(24), put in its proper historical, linguistic and philosophic context, does not include Métis. This is consistent with the Court's decisions in *Blais*[26] and *Cunningham*[27]. It recognizes the unique historical background of each group. It is also consistent with the manner in which parties, including governments, have conducted themselves. It preserves the initiatives undertaken by Alberta under the *Métis Settlements Act.*

B. Crown/Métis Relationship is not a *per se* Fiduciary Relationship

30. Alberta agrees with Canada's position that it is not necessary for the Court to address the issue of the nature of the relationship as any claims for breach of fiduciary duties are

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[23] *Ibid* [Alberta's Authorities Tab 1].
[24] *Ibid* at paras 60 & 62[Alberta's Authorities Tab 1].
[25] *Ibid* [Alberta's Authorities Tab 1].
[26] *Supra* note 5 [Manitoba's Authorities, Vol. II Tab 34].
[27] *Supra* note 21 [Alberta's Authorities Tab 1]; See also *R. v Powley*, 2003 SCC 43, [2003] 2 SCR 207, 2003 CarswellOnt 3502, particularly para 10 where the Court referred to the Métis in the context of section 35 of the *Constitution Act, 1982* as a distinctive peoples who, "developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears." [Alberta's Authorities Tab 8].

barred by limitations and laches. If this Court does address this issue, it is Alberta's position that a fiduciary relationship between the Crown and the Métis does not exist.

31. Fiduciary duties do not exist at large; they are confined to specific relationships between particular parties.[28] Certain categories of relationships give rise to fiduciary obligations because of their inherent purpose or their presumed factual or legal incidents. This Court referred to these in *Galambos v Perez* (*Galambos*) as *per se* fiduciary relationships.[29]

32. Although in *Galambos* the Court acknowledged that not every aspect of such a relationship will give rise to fiduciary duties, the fact that a relationship is recognized as a *per se* fiduciary relationship can give rise to a presumption that fiduciary duties are owed.

33. Fiduciary duties can arise in other relationships termed *ad hoc* fiduciary relationships. As this Court stated, the existence of an *ad hoc* fiduciary obligation, "is thus primarily a question of fact to be determined by examining the specific facts and circumstances".[30]

34. It is Alberta's position that the Crown/Métis relationship is not one which gives rise to a *per se* fiduciary relationship, but, rather, can give rise to an *ad hoc* fiduciary relationship depending on (and restricted to) the facts.

35. Although this Court has on many occasions considered the nature of the relationship between the Federal Crown and the Indians, it has not defined or commented on the nature of the relationship between the Crown and the Métis.

36. This Court has identified the distinction that does exist between the Métis and the Indians. In *R v Powley*,[31] the Court recognized that the Métis history and the reasons for inclusion of the Métis in section 35 of the *Constitution Act, 1982* are quite distinct from those of other aboriginal peoples of Canada.

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[28] *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 SCR 261, 2011 CarswellAlta 763 at para 33 [Alberta's Authorities Tab 2].
[29] *Galambos v Perez*, 2009 SCC 48, [2009] 3 SCR 247, 2009 CarswellBC 2787 at para 36 [Canada's Authorities Tab 21].
[30] *Ibid* at para 48 [Alberta's Authorities Tab 4]. See also *Supra* note 28 at paras 33 & 36 [Alberta's Authorities Tab 2].
[31] *Supra* note 27 at para 16[Alberta's Authorities Tab 8].

37. The difference between the Indians and the Métis was noted as being widely recognized in *Blais*[32]. The Court stated that the Manitoba Métis were not considered wards of the Crown. In *Blais* the Court recognized that Indians were included in section 13 of the NRTA because of their special relationship with the Crown, a relationship that did not extend to the Métis.

38. Most recently this Court recognized the distinction between the Métis and the Indians in *Cunningham*[33], a case dealing with the Alberta Métis Settlement legislation.

39. The cases that refer to the Federal Crown/Aboriginal relationship as unique and historic and as a general fiduciary relationship must be considered in the context of the Court's comments with respect to the Métis above.[34] It would be an error to assume that the Métis are automatically included in any discussion of the Crown/Aboriginal relationship since the Métis have a distinct historic background. Where this Court has described the fiduciary relationship and duties owed by the Federal Crown in the Aboriginal context as a result of the unique and historic nature of the Federal Crown/Aboriginal relations, it would go too far to automatically include the Crown/Métis relationship.

40. The Métis have a different background and the nature of their historic relationship with the Crown is different from other Aboriginal groups. As the Court indicated in *Blais*,[35] the Manitoba Métis were not wards of the Crown. The Métis enjoyed the same rights as other citizens.

41. It is Alberta's position that the Crown/Métis relationship is not a *per se* fiduciary relationship. The Crown/Métis relationship is distinct from the relationship between the Federal Crown and other aboriginal groups due to the distinct historical backgrounds and situations. An *ad hoc* fiduciary relationship could exist between the Crown and the Métis but its existence would be entirely dependent upon and restricted to the facts of that situation.

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[32] *Supra* note 5 at para 33 [Alberta's Authorities Tab 6].
[33] *Supra* note 21 [Alberta's Authorities Tab 1].
[34] See for example *R. v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385, 1990 CarswellBC 105 at 59 [Alberta's Authorities Tab 7]; most recently *Supra* note 12 at para 38-40 [Alberta's Authorities Tab 9].
[35] *Supra* note 5 at para 20 [Manitoba's Authorities, Vol. II Tab 34].

42. Alberta supports the position of Canada that on the facts of this case no fiduciary relationship exists and in the absence of a fiduciary relationship no fiduciary duties were owed.

PART IV. SUBMISSION ON COSTS

43. Alberta does not seek any costs and requests that no order for costs be made against Alberta.

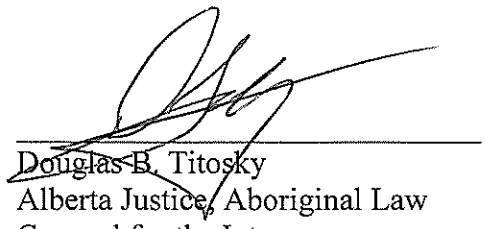
PART V. ORDER SOUGHT

44. Alberta seeks an order permitting it to present oral argument at the hearing of the appeal.

45. Alberta supports the order sought by the Respondents, Canada and Manitoba that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Edmonton, Province of Alberta, this 18 day of November, 2011



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

PART VI. TABLE OF AUTHORITIES

		Location (Paragraph)
A.	**CASE LAW**	
Tab 1	*Alberta (Aboriginal Affairs & Northern Development) v Cunningham*, 2011 SCC 37, [2011], 334 DLR (4th) 577, 2011 CarswellAlta 1210	24, 25, 26, 27 29, 38
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