Court File No. A-49-13

FEDERAL COURT OF APPEAL

BETWEEN:

HER MAJESTY THE QUEEN, as represented by THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT and THE ATTORNEY GENERAL OF CANADA

Appellants

- and -

HARRY DANIELS, GABRIEL DANIELS, LEAH GARDNER, TERRY JOUDREY and THE CONGRESS OF ABORIGINAL PEOPLES

Respondents

- and -

ATTORNY GENERAL OF ALBERTA, MÉTIS SETTLEMENTS GENERAL COUNCIL, GIFT LAKE MÉTIS, MÉTIS NATIONAL COUNCIL, MANITOBA MÉTIS FEDERATION, and MÉTIS NATION OF ONTARIO

Interveners

MEMORANDUM OF FACT AND LAW OF THE INTERVENER MÉTIS NATION OF ONTARIO

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TABLE OF CONTENTS

1. INTRODUCTION

1) This appeal concerns an action brought by the Congress of Aboriginal Peoples and three individual plaintiffs seeking a declaration, which the trial judge granted, that Métis and non-status Indians are within federal jurisdiction pursuant to s. 91(24) of the *Constitution Act, 1867*.

2) Justice Phelan was cognizant of the fact that the Congress of Aboriginal Peoples is not the sole representative of the Métis and that the Métis National Council, which represents the Métis Nation, was not a participant in the trial.[1] The Métis Nation is the aboriginal people of the Canadian Northwest that has been recognized historically, in law, and by the Royal Commission on Aboriginal Peoples as one of the aboriginal peoples of Canada.[2] The Supreme Court of Canada has recognized that the Métis Nation of the Northwest is a distinct rights-bearing aboriginal people, that they are not simply individuals of mixed ancestry, that they are not to be reduced to a people who are simply seen as derivative of their Indian ancestors, and that it is their association with their unique culture that distinguishes them.[3]

3) This Intervener, the Métis Nation of Ontario (the "MNO") represents Métis citizens of the Métis Nation who live in, use and occupy Ontario. The MNO does not represent non-status Indians and confines its submissions to the Métis. The MNO submits that the trial judge was correct in finding that the Métis are within the jurisdiction of s. 91(24) of the *Constitution Act, 1867*, but submits that he erred in his racial analysis of s. 91(24) and in his definition of Métis.

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[1] Condensed Appeal Book, Vol. 1, Reasons for Judgment, para. 47. (hereinafter "Reasons for Judgment")
[2] *Report of the Royal Commission on Aboriginal Peoples,* Vol. 4, at p. 199 ("*RCAP Report"*);
[3] *R. v. Powley,* [2003] SCJ No. 43, at para. 38 and para. 10 citing *RCAP,* Vol. 4, at p. 202; *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] 2 SCR 670, at para. 69-70; *Manitoba Metis Federation Inc. v. Canada (Attorney General),* [2013] S.C.J. No. 14, at paras. 2 and 21; *R. v. Blais,* [2003] 2 SCR 236, at para 7.

2. ISSUES

4) The MNO submissions address the following issues:

   a) Section 91(24) should not be understood as a race-based provision.

   b) The trial judge erred in defining the Métis.

   c) The appropriate method of determining the scope of jurisdiction under a head of power in the *Constitution Act, 1867*.

3. LAW AND ARGUMENT

(a) Section 91(24) should not be understood as a race-based provision

5) As noted by Professor Hogg, s. 91(24) contains two heads of power. The first power is "Indians." The second power is "Lands reserved for the Indians". This case concerns the first power, "Indians," and is fundamentally about the constitutional recognition of the people who come within that term.

6) Any case that is about recognition requires a cautious approach to language and terminology. The trial judge appears to have understood and been respectful of the terminology and definitional difficulties in this case. However, the trial judge's analysis is based on his finding that s. 91(24) is a race-based provision.[4] With respect, we submit that even if this was the way the provision was understood in the past, this court should take this opportunity to move away from a racial analysis of this constitutional provision.

7) The trial judge resorted to a racial analysis in part because he was searching for a national way to define Métis and because he conflated Métis and non-status Indians into "one group" (the "MNSI") based solely on Indian ancestry. He described the MNSI as follows:

> The cumulative effects over time of these parentage relations and legislative and administrative events produced, by evolution, a group called Métis and non-status Indians. Because of their community of interest as people of Indian ancestry, their grievances against government, and their

[4] Reasons for Judgment, para. 568.

> adverse social and economic circumstances, the group has been able to maintain its identity and for national, provincial and regional associations claiming a potential membership of approximately 1,000,000 people.[5]

8) Our submission begins with the problematic language used by the trial judge. MNO respectfully disagrees that Métis should be conflated into one group with non-status Indians and we object to the use of the term "MNSI." We submit that this conflation of fact, history and law is part of the underlying reason that the trial judge erred in defining the Métis (the definition problem is further discussed below).

9) The *Report of the Royal Commission on Aboriginal Peoples* drew attention to this problem.

> The Métis are a distinct nation of Aboriginal people. We see ourselves separately from Indians and Inuit. We have a unique, colourful, valuable history and culture. What happens is that we are lumped together with the other Aboriginal groups under the term 'Aboriginal' or 'Native'. The effect of this lumping of Aboriginal peoples is that Métis issues, concerns and priorities are lost, the issues that affect us left unattended.[6]

10) This, it is submitted, is precisely what happened in this trial. The trial judge adopted the long-standing practice of the federal government of conflating Métis into one group with non-status Indians. In so doing, Métis "issues, concerns and priorities" and their very identity as a distinct aboriginal people were lost. It is submitted that Métis should not be conflated into one group with non-status Indians.

11) The Métis are one of the aboriginal peoples of Canada. The aboriginal peoples of Canada are polities or peoples. In fact, none of the aboriginal peoples of Canada are racial groups. It is submitted that Métis, for s. 91(24), are not aboriginal individuals with some degree of Indian blood or connection to the Indian race. In the absence of an historic Métis collective, the simple fact that an individual has aboriginal ancestry does not make that person "Métis".

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[5] Reasons for Judgment, para. 94.
[6] *RCAP Report*, Vol. 1, p. 683.

Historical references to 'half-breeds' or to the fact that Indians are not "pure-bloods" should not be taken to mean that these individuals are "Métis." A Métis is not an individual who does a genealogy, discovers an "Indian" or "sauvage" ancestor and joins a society. These uses of the term "Métis" diminish the distinctive culture of the Métis people. This type of analysis confuses the courts and the public and reduces Métis to a search for a racial connection to Indians. This we submit is wrong.

12) From paragraphs 211-267 in his reasons for judgment, the trial judge presents his findings of fact with respect to 'half-breeds' in the rest of Canada. There is evidence in the case at trial and in other case law, that there may be another Métis people in Labrador.[7] But other than the Métis Nation and the Labrador Métis, there is no finding of fact that supports the concept that there are Métis collectives elsewhere in Canada.

13) The Métis, for all constitutional purposes, including s. 91(24), are more than their racial connection to their Indian ancestors. The Métis Nation has its own language, culture, kinship connections and territory. In Ontario, there are centuries old Métis settlements, for example, in Penetanguishene, Sault Ste Marie and Rainy River/Rainy Lake. The Métis in Ontario have lengthy and strong kinship, economic, cultural, political and geographic ties with the Métis on the Prairies. It is the combination of these factors makes the Métis Nation one of the aboriginal peoples of Canada. However, if Métis are defined, not by their ethnicity or collectives, but by their racial connection to their Indianness, then the determination of whether Métis are "Indians" within the meaning of s. 91(24) is reduced to a race-based analysis.

[7] Reasons for Judgment, para. 231.

14) It is submitted that this court should avoid any reference to Métis and Indians as racial terms. Métis, as noted above, should be solely connected with collectives, polities or aboriginal peoples. Indian, is a legal term that refers to the members of the aboriginal peoples of Canada. As noted by Professor Grammond, a witness at trial, the underlying historical assumption for the *Indian Act* and the *Manitoba Act* was "one of racial identity" with its implied suggestion of racial superiority.[8] But it "is now almost universally accepted that … racial conceptions of ethnic identity…are now rejected."[9]

15) The *Report of the Royal Commission on Aboriginal Peoples* noted that the notion of 'race' has not always been part of Canada's history with respect to defining Indians[10] and suggests that we must divest ourselves of "the accumulated baggage of our past" in order to affect reconciliation.[11]

16) The trial judge held that "s. 91(24) is a race-based power" while at the same time holding that racial stereo-typing is not a proper basis for constitutional interpretation.[12] We submit that all concepts of race should be avoided. We strongly disagree with the trial judge when he held that Métis are connected to "the racial classification Indian" in s. 91(24).[13] With respect, we submit that language that relies on "Indianness", "pure blood", "mixed ancestry" and "mixed blood" unfortunately leads us into a racial discourse.[14]

17) It is submitted that language that locates s. 91(24) within the discourse of race is part of the baggage that must be abandoned. Thus, the search to understand who is an "Indian" within

[8] Appeal Book, Vol. 34, *Grammond Report*, p. 9537, para. 25.
[9] Appeal Book, Vol. 34, *Grammond Report*, p. 9534, para. 15(a)
[10] *RCAP Report,* Vol. 1, p. 270.
[11] *RCAP Report,* Vol. 1, p. 677.
[12] Reasons for Judgment, para. 568, 378 and 538.
[13] Reasons for Judgment, paras. 531-532.
[14] Reasons for Judgment, paras. 216, 219, 240, 250, 283, 286, 287,

the meaning of s. 91(24) is not a search to find "Indianness" which requires an analysis simply of blood or genealogical connections divorced from any cultural or ethnic analysis. Rather, the better view is that "Indians" within the meaning of s. 91(24) includes the members of all of the aboriginal peoples or polities within Canada.[15] This, it is submitted, will change the dialogue away from a racial analysis.

18) While the Supreme Court of Canada has, from time to time, discussed s. 91(24) in terms of race, we submit that the addition of s. 35 to the *Constitution Act, 1982,* which recognizes aboriginal "peoples," provides this court with a new opportunity to change the discourse and to enable courts and Canadians generally to see aboriginal peoples as polities not as races.[16]

19) It is submitted that this court can and should take this opportunity to change the discourse that analyzes s. 91(24) as a race-based provision. In the 21st Century, we submit this is an inappropriate foundation for a constitutional provision. In addition, the MNO asks this court to exercise particular caution in its use of language, not to conflate Métis and non-status Indians into one group or use the term MNSI, and to deal with Métis separately from non-status Indians.

(b) Defining Métis

20) While this Intervener supports the conclusion of the trial judge that Métis are within the scope of s. 91(24), it is submitted that the trial judge erred in defining the Métis.

21) At paragraph 130 of his reasons for judgment, Justice Phelan held that it is the "persons described in paragraph 117 who are the Métis for purposes of the declaration which the

[15] *RCAP Report,* Vol. 1, p. 261.
[16] *Canard v. Canada (Attorney General)*, [1976] 1 SCR 170, at para. 79; *Gosselin (Tutor of) v. Quebec (A.G.)*, [2005] 1 SCR 238 at para. 14. The Supreme Court said that s. 91(24) was protected by the principle that the right to equality in s. 15(1) cannot nullify group rights specifically protected elsewhere in the Constitution.

Plaintiffs seek." However, paragraph 117 comes under the heading "Non-status Indians" and is as follows:

> In the modern era, the difficulty of definition in part has been addressed. As indicated earlier, the government in 1980 defined the core group of MNSI as a group of native people who maintained a strong affinity for their Indian heritage without possessing Indian status. Their "Indianness" was based on self identification and group recognition. That group was estimated at between 300,000 and 450,000. [emphasis added]

22) The Appellants say that the trial judge erred by incorporating a definition of Métis that was inconsistent with jurisprudence of the Supreme Court of Canada.[17] The Respondents say this mischaracterizes what the trial judge actually did. They say the trial judge did not purport to define Métis; that he referred to language in a federal government document that "described" Métis.

23) MNO agrees with the Appellant that the trial judge did define the Métis in his reasons for judgment and that it was his intention to do so. While Justice Phelan was aware of the difficulties inherent in defining terms, the following passages show that he clearly saw definitions as one of the tasks before him.

> It is a definitional minefield to use terms such as "Indian" or "Aboriginal" when the purpose of the litigation is to provide some definition of those words which appear in different places and different contexts in the Constitution.[18]
>
> In these Reasons, the Court has dealt with the Defendants' position that this is too difficult a case to decide, that the definitional difficulties of definition of who falls within the term "Indian" in s 91(24) should preclude a remedy.[19]
>
> There is no question that there are certain definitional difficulties in this action but there is evidence that this can be resolved. Further, the Supreme Court in R v Powley … dealing with who are Métis, held that difficulties of definition are not to be exaggerated as a basis for defeating constitutional rights.[20]
>
> In Powley… in identifying who is a "Métis", the Court did not set out a rigid test or explore the outer limits of the definition but outlined a method of determining the question on an individual basis. This

[17] Respondents Factum, para. 65.
[18] Reasons for Judgment, para. 7.
[19] Reasons for Judgment, para. 13.
[20] Reasons for Judgment, para. 74.

> Court will not try, in defining non-status Indians, to do more than the Supreme Court did with Métis.[21]

24) The Respondents say that we must not take paragraph 117 out of context and that "on any fair reading of his reasons as a whole" the trial judge recognized "the great diversity among Canada's Aboriginal peoples."[22] They also say that the trial judge was "fully aware of the Supreme Court's decisions in *Powley, Blais* and *Cunningham*" and that his definition of Métis is not inconsistent with *MMF* or *Cunningham*.[23]

25) With respect, recognition of diversity among aboriginal peoples is not the same thing as recognizing that the Métis Nation is a distinct people. While the Respondents may be correct that the trial judge was fully aware of the Supreme Court of Canada's decisions in other Métis cases, he clearly did not agree that he was bound by those decisions in defining the Métis for the purposes of his declaration.

26) The MNO submits that there is no need to define Métis in order to determine whether they are within the meaning of s. 91(24). There is no definition of "Indians" in s. 91(24). The Supreme Court of Canada did not define "Eskimos" when determining that they were included in s. 91(24). Courts in the past have cautioned against setting precise or fixed terms to a head of power that would have the effect of making "it incapable of application to changing or unforeseen circumstances."[24]

27) It is submitted that the better approach is to simply clarify that the Métis included in s. 91(24) are the members of the Métis peoples of Canada. If this court determines that there is a need

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[21] Reasons for Judgment, para. 121.
[22] Appellants Factum, para. 82.
[23] Appellants Factum, paras. 65 and 107.
[24] *R. v. Crown Zellerbach Canada Ltd,* [1988] 1 SCR 401, at para. 27.

for any further articulation of the definition, it should apply the definition set out by the Supreme Court of Canada in *R. v. Powley*.[25] In support of this submission, we note that the Supreme Court of Canada in *R. v. Blais* (a case that determined whether Métis were within the meaning of paragraph 13 of the Manitoba Natural Resource Transfer Agreement) applied the *Powley* criteria to its determination as to whether or not Mr. Blais was Métis.[26] While *Blais* clearly did not involve s. 91(24), we suggest that it shows that the court can look to other constitutional provision to provide definitional guidance. We further note that in *Blais* the Court emphasized that Métis have a "group identity separate from their Indian or Inuit and European" ancestors.[27]

28) The Respondents state that the trial judge was fully aware of the existence and circumstances of distinct Métis communities.[28] However, the fact remains that the language of the trial judge's reasons for judgment does not reflect this awareness. The trial judge appears to recognize that the Métis are a distinct people different from non-status Indians. However, as noted above, he then goes on to erroneously merge them into one group and reduce them to individuals in search of a racial connection.[29]

29) It is submitted that the Métis peoples of Canada are within the jurisdiction of the federal government pursuant to s. 91(24). It is further submitted that this Court does not need to define Métis other than to say that the individuals included as Métis within s. 91(24) are the members of the Métis peoples of Canada.

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[25] *Powley,* supra, para. 10, 12 and 30-33.
[26] *Blais, supra,* para. 7.
[27] *Blais, supra,* para. 9.
[28] Respondents Factum, para. 34.
[29] Reasons for Judgment, para. 93-94.

(c) Determining the scope of a head of power under the Constitution Act, 1867

The Principle of Exhaustiveness

30) The trial judge noted that pursuant to the principle of exhaustiveness, the totality of legislative power is distributed between the federal Parliament and the provincial legislatures.[30] He included Métis as an appropriate subject for inclusion in the heads of power and assigned them to s. 91(24). MNO supports these findings.

31) The Appellant disregards the exhaustiveness principle and asks this court not to allocate jurisdiction for Métis at all.[31] Métis, according to the Appellant's submissions, fit nowhere in the distribution of legislative power. Under this analysis, the Métis would be the only one of the aboriginal peoples of Canada who are not within s. 91(24).[32]

32) The Appellant asserts that it is not necessary to allocate Métis to s. 91(24) or any other head of power because Canada can, if it so chooses, legislate with respect to Métis and non-status Indians pursuant to other heads of power. The Appellant specifically sites the *Sahtu Dene and Metis Land Claim Settlement Act*, S.C. 1994, c. 27, which is legislation that gave effect to a modern treaty, and implies that the *Sahtu Dene and Métis Land Claim Settlement Act* was enacted pursuant to some other head of power.[33] The Appellant conspicuously fails to identify which head of power, other than s. 91(24), would give Canada jurisdiction to enact a statute that deals with Indians, Métis and treaties.

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[30] Reasons for Judgment, para. 542; Peter Hogg, *Constitutional Law in Canada*, 5th Ed., (Carswell, Toronto, 2007), Chapter 15.9(e), p. 15-46. In making this statement, this Intervener leaves aside for another day the question as to whether aboriginal self-government recognized and affirmed by s. 35 falls within either head of power.
[31] Appellants Factum, para. 101.
[32] In saying this, we are not saying that non-status Indians could not, as individuals, come within s. 91(24). We are simply taking note of the fact that non-status Indians are individual members of various aboriginal collectives and are not one of the "aboriginal peoples of Canada".
[33] Appellants Factum, para. 103.

33) At trial, the Appellant argued that treaty powers with respect to aboriginal peoples are within the Royal Prerogative.[34] The trial judge disagreed and held that treaty powers are within s. 91(24). It is submitted this question is not before this court and in the absence of full legal argument and facts this court should not make any finding on this question. However, if the trial judge is correct, then logically the power to legislate statutes that give effect to treaties also falls within s. 91(24).[35] The Appellant's example of the *Sahtu Dene and Métis Land Claim Settlement Act* therefore, would appear to support the trial judge's finding that Canada has, as recently as 1994, legislated with respect to Métis pursuant to s. 91(24).

34) It is a fact, as the Appellant suggests, that both the federal and provincial governments have the discretion under other heads of power, to spend money, provide housing, grant land, and provide programs and services for Métis, etc. But this is no answer to the jurisdictional question that is actually before this court—whether Métis are within s. 91(24).

Progressive Interpretation

35) The doctrine of progressive interpretation is the means by which the *Constitution Act, 1867* adapts to change. The doctrine stands for the proposition that the general language used in 1867 to describe the heads of power is not frozen in the sense in which it would have been understood at the time of adoption. Many heads of power have changed over time. For example criminal law is not frozen to what was criminal activity in 1867. The words in a

[34] Reasons for Judgment, para. 585.
[35] The Appellant argued at trial that its powers to enter into treaties originate in the Royal Prerogative. The trial judge disagreed and held that such powers had been subsumed in s. 91(24). The Appellant has not chosen to appeal on this issue.

head of power are to be given a progressive interpretation to enable continuous adaptation to new conditions and ideas.[36]

36) It is submitted that while Métis, historically dealt with mainly as individuals, have always been within s. 91(24), there has been a substantial change—the recognition of Métis as one of the "aboriginal peoples of Canada" in s. 35 of the *Constitution Act, 1982*—that merits a progressive interpretation of s. 91(24) to include them as "peoples" not merely individuals.

37) The facts before the court show that Métis individuals have always been included in s. 91(24) and that Parliament has exercised its jurisdiction with respect to Métis individuals. For example, we note that Métis individuals (referred to as "half-breeds") have not always been excluded from the *Indian Act* definition. In the 1927 version, s. 16 expressly excluded some but not all Métis. It excluded any "half-breed in Manitoba who has shared in the distribution of half-breed lands" from being defined as an "Indian."[37] Half-breeds who did not share in the land distribution in Manitoba remained "Indians" within the meaning of the Act, as did half-breeds in other provinces, whether or not they shared in half-breed land distribution.

38) As noted above, if the trial judge is correct and treaty powers are an exercise of s. 91(24) powers, then one historical exercise of federal jurisdiction pursuant to s. 91(24) with respect to a Métis collective was the 1875 Treaty 3 Adhesion with the Halfbreeds of Rainy Lake and Rainy River.[38] Following further on this line of argument, we note that the federal government has exercised its s. 91(24) jurisdiction with respect to Métis collectives, rather

[36] Hogg, *Constitutional Law in Canada*, *supra,* at Chapter 15.9(f), pages 15-47; *Reference Re Same Sex Marriage,* [2004] 3 SCR 698, paras. 21-34.
[37] Condensed Appeal Book, Vol. 5, *Jones Report*, p. 173.
[38] Reasons for Judgment, para. 434; Respondents Factum, para. 47.

than individuals, in the Northwest Territories in the 20th Century when it entered into the Sahtu Dene and Métis Land Claims Agreement in 1994.[39]

39) It is submitted that there has indeed been a substantial change with respect to the Métis—their recognition as one of the "aboriginal peoples of Canada" in s. 35 of the *Constitution Act, 1982* and by the Supreme Court of Canada in *Powley, Blais, Cunningham* and *MMF*. This recognition is a change from the 19th Century view that saw them merely as individuals who were regarded as within s. 91(24) by virtue of their race-based connection with their Indian ancestry. It is submitted that a progressive interpretation of s. 91(24) would abandon the old race-based discourse and acknowledge that it is Métis who are members of Métis collectives that are within s. 91(24).

40) The trial judge listed several reasons for the allocation of jurisdiction for "Indians" to the federal government as a national issue.[40] In support of this, we note that the Métis Nation crosses over provincial boundaries.[41] It is submitted that the reasons for allocating "Indians" to s. 91(24) also apply to the Métis Nation, which should not be left vulnerable to local majorities or jurisdictional avoidance.[42]

41) The Appellant submits that its jurisdiction may be exercised with respect to Indian "individuals with some connection to the various aboriginal collectives who inhabited

[39] Appellants Factum, para. 103.
[40] Reasons for Judgment, para. 539, "These include the acceptance of the Crown's responsibilities to natives, obligations under the Royal Proclamation of 1763, the need for coordinated approach to natives rather than the balkanized colonial regimes and the need to deal with the rapid and forceable expansion into the West including Euro-Canadian settlement and the building of the national railway."
[41] *Blais, supra,* para. 9: *RCAP Report*, Vol. 4, para. 203.
[42] For the story of jurisdictional avoidance with respect to the Métis see Reasons for Judgment, paras. 107-108; Hogg, *Constitutional Law in Canada, supra* at p. 28-2.

Canada prior to European contact or their successors."[43] In this submission, the Appellant appears to be importing the contact test, which will have the affect of excluding Métis from s. 91(24). It is submitted that s. 91(24) is not frozen in time by the application of a contact test, which was created solely for the determination of aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*. It has no place in limiting the scope of s. 91(24).

42) The Supreme Court of Canada in *Re Eskimos* specifically held that s. 91(24) included "all the present and future aborigines native subjects."[44] Further, we note that the Appellant cites no case law to support the importation of the contact test into its jurisdiction under s. 91(24).

The Relationship of Legislated Definitions to Heads of Power

43) In its Memorandum of Fact and Law before this court, Canada appears to be making the argument that the federal government could define "Indian" for constitutional purposes by its own legislation.[45]

44) It is true that the Supreme Court of Canada in *Canard* makes it clear that Parliament can define terms in legislation within constitutional limits.[46] Thus, Parliament can define the term "Indian" in the *Indian Act* as long as the definition is within the scope of the head of power. But Parliament's jurisdiction with respect to defined terms in legislation is not to be confused with defining terms in heads of power. Determination of the scope of a head of power such as s. 91(24) does not lie with Canada. It is submitted that the trial judge was

[43] Appellants Factum, para. 92.
[44] *Reference re: British North America Act*, 1867 (U.K.), s. 91, [1939] SCR 104, p. 12.
[45] Appellants Factum, para. 89.
[46] *Canard, supra,* at p. 207.

correct when he held that it is a settled constitutional principle that no level of government can expand its constitutional jurisdiction by actions or legislation.[47]

45) It is not clear if Canada's submission is that the definition in the *Indian Act* defines the term "Indian" in s. 91(24). If so, then with respect, this Intervener disagrees. It is trite law that a statutory definition cannot define the scope of a head of power. In support of this, it is worth noting that the definition in the current version of the *Indian Act* is tautological, "a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian," and has been described as a "crazy patchwork of regulations."

> These definition sections cannot stand too much analysis before confusion and irreconcilability reigns. Gently put, the drafting of these and other parts of the 1927 Act leave a lot to be desired.[48]

46) The *Indian Act* definition of "Indian" is arbitrary and it is at best, ambiguous. It is inherently ethnocentric and has had to be repeatedly changed to bring it in line with human rights and constitutional principles. It is submitted that the principle that statutory definitions cannot define constitutional provisions should apply even more forcefully to any proposed use of the definition of "Indian" in the *Indian Act*.

4. ORDER SOUGHT

47) That this court dismiss the appeal and uphold the conclusion of the trial judge that Métis are within s. 91(24) of the *Constitution Act, 1867*.

48) That this court decline to define the Métis other than to say that the individuals included as Métis within s. 91(24) are the members of the Métis peoples of Canada.

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[47] Reasons for Judgment, para. 113; *Reference Re Securities Act*, [2011] 3 SCR 837.
[48] *Indian Act*, R.S.C., 1985, c. I-5, s. 2(1); *R. v. Blais*, [1998] M.J. No. 395, (QB) para. 16

Dated, this 29th day of August, 2013

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5. LIST OF AUTHORITIES

#	CASE LAW
1.	*R. v. Powley,* [2003] SCJ No. 43
2.	*Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] 2 SCR 670
3.	*Manitoba Metis Federation Inc. v. Canada (Attorney General),* [2013] S.C.J. No. 14
4.	*R. v. Blais,* [2003] 2 SCR 236
5.	*Canard v. Canada (Attorney General*), [1976] 1 SCR 170
6.	*Gosselin (Tutor of) v. Quebec (A.G.)*, [2005] 1 SCR 238
7.	*R. v. Crown Zellerbach Canada Ltd,* [1988] 1 SCR 401
8.	*Reference Re Same Sex Marriage,* [2004] 3 SCR 698
9.	*Reference re: British North America Act*, 1867 (U.K.), s. 91*,* [1939] SCR 104
10.	*Reference Re Securities Act*, [2011] 3 SCR 837
11.	*R. v. Blais*, [1998] M.J. No. 395 (QB)

#	STATUTES & OTHER AUTHORITIES
	Report of the Royal Commission on Aboriginal Peoples, Vols. 1 and 4
	Peter Hogg, *Constitutional Law in Canada*, 5th Ed., (Carswell, Toronto: 2007)
	Indian Act, R.S.C., 1985, c. I-5