Federal Court of Appeal  Cour d'appel fédérale

Date: 20140417

Docket: A-49-13

Citation: 2014 FCA 101

CORAM: **NOËL J.A.**
DAWSON J.A.
TRUDEL J.A.

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

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

Interveners

Heard at Ottawa, Ontario, on October 29 and 30, 2013.

Judgment delivered at Ottawa, Ontario, on April 17, 2014.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: NOËL J.A.
TRUDEL J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20140417

Docket: A-49-13

Citation: 2014 FCA 101

CORAM: **NOËL J.A.**
DAWSON J.A.
TRUDEL J.A.

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

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

Interveners

REASONS FOR JUDGMENT

Table of Contents (by paragraph numbers)

DAWSON J.A.

1. Introduction

[1] The issue raised in this appeal is whether the federal government has jurisdiction over Métis and non-status Indians pursuant to section 91(24) of the *Constitution Act, 1867*. For reasons reported as 2013 FC 6, [2013] 2 F.C.R. 268, a judge of the Federal Court declared that "those persons who are Métis and those who are non-status Indians as set forth in the Reasons for Judgment are 'Indians' within the meaning of the expression 'Indians and Lands reserved for the Indians' contained in s 91(24) of the *Constitution Act, 1867*."

[2] In this appeal, the Crown appellants ask that the declaration be set aside. This position is supported by the Attorney General of Alberta, an intervener. The respondents, who were the plaintiffs below, ask that the appeal be dismissed with costs. As well, the respondents cross-appeal

from the decision of the Federal Court not to grant two additional declarations sought by them at trial. The respondents ask that the following two declarations be granted:

(i) The Crown in right of Canada owes a fiduciary duty to Métis and non-status Indians as Aboriginal peoples (second declaration).

(ii) The Métis and non-status Indian peoples of Canada have the right to be consulted and negotiated with, in good faith, by the federal government on a collective basis through representatives of their choice respecting their rights, interests and needs as Aboriginal peoples (third declaration).

[3] The respondents' position with respect to the appeal and cross-appeal is supported by two interveners: the Métis Settlements General Council and the Métis National Council. The intervener Gift Lake Métis Settlement asks that both the appeal and the cross-appeal be dismissed. The intervener the Manitoba Métis Federation asks that the appeal be dismissed, but that the Judge's declaration be restated to separate reference to non-status Indians from the declaration. It would restate the declaration as follows: "The Court declares that the Métis are included as 'Indians' within the meaning of s. 91(24) of the *Constitution Act, 1867*." The intervener the Métis Nation of Ontario asks that the appeal be dismissed and that the Court decline to define the Métis other than to say that the individuals included as Métis within section 91(24) are the members of the Métis peoples of Canada.

[4] The appellants and the Attorney General of Alberta also ask that the cross-appeal be dismissed.

[5] For the reasons that follow, I would allow the appeal in part by deleting reference in the declaration to non-status Indians and would restate the declaration as proposed by the Manitoba Métis Federation. I would dismiss the cross-appeal, reserving the issue of the costs of the appeal and cross-appeal between the appellants and respondents.

2. Factual Background

[6] The facts are carefully and extensively reviewed in the reasons of the Federal Court. The following brief review is sufficient to situate the appeal and the cross-appeal in their context.

(i) The respondents

[7] The four individual respondents are, or were, closely connected to their Aboriginal cultures.

[8] The late Harry Daniels identified as Métis and was a president of the Congress of Aboriginal Peoples. He was a recognized advocate for Métis rights. Gabriel Daniels is his son, and he also identifies as Métis. He testified as to his Métis cultural roots, his involvement in Métis gatherings and his long involvement in First Nations' activities. Leah Gardner is a non-status Indian from Ontario. She identifies as a Métis without status, but prefers "Anishanabe without status". She testified that she participates in both Métis and First Nation cultural events. Terry Joudrey is a non-status Mi'kmaq Indian from Nova Scotia. He testified he uses his Aboriginal Treaty Rights Association membership card as if it were a licence to hunt and fish, and that he associates those activities with native traditions. All of the individual respondents sued in the Federal Court in their personal capacities.

[9] The respondent Congress of Aboriginal Peoples is a corporation which represents Métis and non-status Indian peoples throughout Canada. As the trial judge noted, it is not the sole recognized voice of the Métis peoples. The Congress of Aboriginal Peoples sued as a public interest plaintiff.

(ii) The nature of the action below

[10] In their claim, the respondents did not challenge any specific legislation or government action. Rather, they sought resolution of the issue as to which of Canada or the provinces has jurisdiction over the Métis and non-status Indian peoples.

[11] The respondents asserted, and the Judge accepted (reasons, paragraphs 86 to 110) that provincial and federal governments treat the Métis as "political footballs". The Judge found that "the political/policy wrangling between the federal and provincial governments has produced a large population of collaterally damaged [Métis and non-status Indians]". He further found that, as a result, Métis and non-status Indians have been deprived of programs, services and intangible benefits all governments recognize are needed (reasons, paragraph 108).

[12] The Judge concluded that the resolution of constitutional responsibility "has the potential to bring clarity to the respective responsibilities of the different levels of government" (reasons, paragraph 110).

3. Issues Raised on the Appeal and Cross-Appeal

[13] In the appeal, the appellants do not allege that the Judge committed any palpable and overriding error in his numerous findings of fact. They assert three errors of law:

1. The Judge erred in law by granting a declaration that lacked any practical utility.

2. The Judge erred because the declaration is unfounded in fact and law.

3. The Judge erred by attempting to define the core meaning of the constitutional term "Indian" in the abstract.

[14] In the cross-appeal, the respondents assert that the Judge erred in principle by failing to grant the second and third declarations.

[15] I would frame the issues to be decided as follows:

1. Did the Federal Court err by issuing the declaration in respect of the Métis?

2. Did the Federal Court err by issuing the declaration in respect of non-status Indians?

3. Is the declaration as it relates to the Métis unfounded in fact and law?

4. Did the Federal Court err by failing to issue the second and third declarations?

4. Applicable legislation

(i) The *Constitution Act, 1867*

[16] This is a division of powers case about the interpretation of section 91(24) of the *Constitution Act, 1867*:

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to	91. Il sera loisible à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par la présente loi exclusivement assignés aux législatures des provinces; mais, pour plus de garantie, sans toutefois

restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,	restreindre la généralité des termes ci-haut employés dans le présent article, il est par la présente déclaré que (nonobstant toute disposition contraire énoncée dans la présente loi) l'autorité législative exclusive du parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets ci-dessous énumérés, savoir :
[…]	[…]
24. Indians and Lands reserved for the Indians.	24. Les Indiens et les terres réservées pour les Indiens.

(ii) The *Constitution Act, 1982*

[17] Although not directly at issue, section 35 of the *Constitution Act, 1982* entrenches the existing Aboriginal and treaty rights of Aboriginal peoples. It is, therefore, a useful interpretative aid:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.	35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.
(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.	(2) Dans la présente loi, « peuples autochtones du Canada » s'entend notamment des Indiens, des Inuit et des Métis du Canada.

5. Federal Court Decision

[18] The Judge began his reasons by framing the issue as whether non-status Indians and Métis are identified as "Indians" under section 91(24) of the *Constitution Act, 1867*. He then went on to set out the applicable legislation, describe the declarations sought by the plaintiffs, and summarize the basis of the plaintiffs' claim and the defendants' defence. After giving a summary of his conclusions the Judge turned to the first issue to be decided.

[19] The first issue to be decided was whether the plaintiffs had established a basis on which declaratory relief could be granted. The defendants argued that the requested declarations should not be granted because the plaintiffs raised a theoretical issue which, if decided, would not resolve anything and would lead to further litigation. The Court was urged not to exercise its discretion to grant any of the requested declarations.

[20] The Judge found that the record was replete with references to the jurisdictional uncertainty between Canada and the provinces over which level of government had jurisdiction to legislate with respect to Métis and non-status Indians. Canada had sometimes accepted, but sometimes rejected, the view that it had jurisdiction under section 91(24) (reasons, paragraph 55). The Judge concluded that the Court had jurisdiction over the case, the question before the Court was real and the persons raising the issue had a real interest to raise it (reasons, paragraph 82). Thus, the Judge decided that he would determine the case on its merits. He would not dismiss the action on the basis of the discretionary nature of declaratory relief. The Judge also rejected the defendants' argument that the plaintiffs' case was a private reference which should not be heard. The Judge highlighted the prejudice both the plaintiffs and the defendants would suffer if 12 years of publicly funded litigation was dismissed without adjudication on the merits (reasons, paragraphs 77 to 80).

[21] Having decided to determine the case on its merits it was necessary for the Judge to decide what was meant by the terms "non-status Indians" and "Métis" for the purpose of the division of powers analysis.

(i) The definitional issue

[22] The Judge began his analysis of the definitional issue by considering what was meant by the term "non-status Indians". At paragraph 116 of his reasons he noted that non-status Indians as a group must have two essential qualities: they must be Indians and have no status under the *Indian Act*, R.S.C. 1985, c. I-5. He considered that in the modern era the difficulty of definition had been addressed in part because in 1980 the federal government defined the core group of Métis and non-status Indians as a group of native people who maintained a strong affinity for their Indian heritage without possessing Indian status (reasons, paragraph 117). Ultimately, the Judge concluded that the group of people characterized as "non-status Indians" are "those to whom status could be granted by federal legislation. They would be people who had ancestral connection not necessarily genetic to those considered as 'Indians' either in law or fact or any person who self-identifies as an Indian and is accepted as such by the Indian community, or a locally organized community, branch or council of an Indian association or organization [with] which that person wishes to be associated" (reasons, paragraph 122).

[23] The Judge next considered what was meant by the term "Métis". He noted that in *R. v Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207 the Supreme Court did not attempt to define the outer limits of the Métis people but instead set out a method for determining who is a member of the Métis people for the purpose of section 35 of the *Constitution Act, 1982*. The Supreme Court determined that a Métis is a person of mixed Aboriginal and non-Aboriginal ancestry who has some ancestral family connection (not necessarily genetic), identifies himself or herself as Métis, and is accepted by the Métis community or locally organized community branch, chapter or council of a Métis Association or organization with which that person wishes to be associated. The Judge was

concerned, however, that the decision in *Powley* involved the collective right to hunt. In the Judge's view this made it critical that an individual be accepted by the Métis community. For the purpose of section 91(24), the Judge sought to capture the situation where there is no such community branch, chapter or council but an individual nonetheless participates in Métis cultural events or activities which show objectively how that person subjectively identifies himself or herself as a Métis (reasons, paragraphs 127, 128).

[24] In the result, for the purpose of the declarations which the plaintiffs sought, the Judge decided that the Métis are "a group of native people who maintained a strong affinity for their Indian heritage without possessing Indian status" (reasons, paragraphs 130 and 117).

[25] In the Judge's view these definitions did not decide the "outer limits" of Métis or non-status Indian peoples. They simply established a framework for inclusion under section 91(24) (reasons, paragraph 121).

(ii) The Judge's Findings of Fact

[26] The remainder of the Court's decision dealt with whether Métis and non-status Indians, as defined by the Judge, were "Indians" for the purpose of section 91(24) of the *Constitution Act, 1867*. To do this, the Judge considered the evidence adduced from expert historical witnesses and witnesses knowledgeable about Aboriginal-governmental affairs.

[27] The main historical experts were Dr. William Wicken and Ms. Gwynneth Jones, both called by the plaintiffs, and Dr. Stephen Patterson, called by the defendants. All were found by the Judge

to be credible, well-informed and helpful. However, where Dr. Wicken's evidence conflicted with that of Dr. Patterson, Dr. Wicken's evidence was "generally accepted" as being more relevant to the issue to be determined (reasons, paragraph 150). Mr. Sébastien Grammond, called by the plaintiffs, and Dr. Alexander von Gernet, called by the defendants, were also called as expert witnesses, but the Judge found their testimony to be less helpful, particularly that of Dr. von Gernet whose evidence was given "considerably less weight […] where it contradict[ed] other experts" (reasons, paragraph 182).

[28] With respect to Aboriginal-governmental affairs, the Judge primarily looked to the evidence of Mr. Ian Cowie who held a senior federal government position at the Department of Indian Affairs and Northern Development, and was also a former Deputy Minister of Indian and Native Affairs for Saskatchewan, and Dr. John Leslie, a former manager of the Claims and Historical Research Center at the Department of Indian Affairs and Northern Development (both witnesses were called by the plaintiffs). Their evidence was found to be helpful and credible with Mr. Cowie providing an insider's view of modern native rights policy development, and Dr. Leslie acting as a "business records identifier" a role the Judge noted would not have been necessary if the defendants had admitted the provenance of a number of relevant documents (reasons, paragraph 138).

[29] The Judge divided the historical evidence into six categories which he described as:

(a) Pre-Confederation Era

(b) Confederation

(c) Post-Confederation Era

(d) Other Examples – "Half-breeds" and section 91(24)

(e) Modern Era

(f) Treaties and Half-breeds

[30] The Judge's significant findings made in respect of each category are summarized below.

(a) Pre-Confederation Era

[31] Evidence from this era was directed to what the term "Indian" meant at the time and therefore was likely the meaning that the Fathers of Confederation had in mind when power over Indians was assigned to the federal government (reasons, paragraph 183). The Judge found as a fact that:

(i) The experts treated the situation of the Mi'kmaq in Nova Scotia as being representative of the situation generally in Atlantic Canada (reasons, paragraph 211).

(ii) At least by 1864, most of the Mi'kmaq population was of mixed blood of varying degrees (reasons, paragraph 216).

(iii) Notwithstanding their mixed blood component, the Mi'kmaq were treated as "Indians" and their preference to "wander" had an impact on the creation of the federal Indian Power (reasons, paragraph 219).

(iv) There was a diversity of people in Atlantic Canada with varying degrees of Aboriginal connections who were contemplated by the word "Indian" (reasons, paragraph 218).

(v) Those seeking a power in relation to "Indians" would have needed a broad power (reasons, paragraphs 253 and 323) which included authority over relocation,

settlement, assistance, education, economic reform, social reform and "civilization" (reasons, paragraphs 262 and 323).

(vi) Prior to Confederation, the term "Indian" was understood by the Fathers of Confederation to include "half-breeds" (reasons, paragraphs 265 and 287) and one did not have to live on a reserve or in an Indian community to be an "Indian" (reasons, paragraphs 272 and 323).

(vii) The Fathers of Confederation would have intended the word "Indian" in the Constitution and the power which went with it, to be a broad power capable of dealing with the diversity and complexity of the native population, whatever their percentage mix of blood relationship, their economies, residency or culture (reasons, paragraphs 273, 308, 318, and 323).

(viii) Canada, when acquiring the British power over Indian Affairs would need to be able to, and intended to, address a number of issues including the recognition, pacification, control and dealing with interest in the land of Métis who were seen as distinct in some respects from "Indians", who did not live with Indians, who were not necessarily members of Indian tribes or who did not necessarily follow an "Indian" way of life (reasons, paragraph 317).

(ix) The Fathers of Confederation intended to create a constitutional power which was broader than the statutory definition of Indian (reasons, paragraphs 322 and 323).

(b) Confederation

[32] The Judge found as a fact that the purposes of Confederation relevant to this case are (reasons, paragraph 341):

(i) The expansion of British North America into the Northwest and towards British Columbia in response to the pre-Confederation economic and political crisis.

(ii) The eventual absorption of the Northwest and British Colombia into Confederation.

(iii) Integration of the Atlantic colonies (Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland) with Central Canada. The intent to absorb Newfoundland, Prince Edward Island and British Columbia as well as Rupert's Land and the Northwest Territories is seen in section 146 of the *British North America Act, 1867*.

(iv) To settle the Northwest with farms which would become a new market for Central Canada manufacturing.

(v) The maintenance in the East of the current population and the prevention of out-migration.

(vi) The settlement of British Columbia, particularly Vancouver Island and the Lower Mainland.

(vii) The building of a transcontinental railway which was essential to creating a national economy and to settling the unsettled areas, particularly the Northwest.

[33] The building of the transcontinental railway was particularly integral to the Fathers' of Confederation intentions at the time of Confederation (reasons, paragraph 342).

[34] Finally, the Judge found (reasons, paragraph 351) that:

(i) In the Northwest in particular, a large nomadic native population potentially stood in the way of expansion, settlement and railway construction.

(ii) The relationship between the purpose of Confederation (in terms of settlement and expansion) and the native people was critical to Confederation.

(iii) The idea of railway construction and federal responsibility for "Indians" were interconnected.

(iv) The Fathers of Confederation needed to be able to reconcile native people to the building of the railway and other measures which the federal government would have to take.

(v) Maintaining peaceful relations with the "Indians" would protect the railway from attack.

(vi) Natives needed to be reconciled with the expansion westward to ensure the larger development of the nation.

(vii) The lands occupied by natives would have to be surrendered in some fashion.

[35] The Judge went on to accept the evidence of the plaintiffs' expert historians on the purposes of section 91(24) from the viewpoint of those creating the power (reasons, paragraph 354).

[36] In Dr. Wicken's view, the purpose of section 91(24) was:

(i) To control native people and communities where necessary to facilitate development of the Dominion.

(ii) To honour the obligations to natives that the Dominion inherited from Britain while extinguishing interests that stood in the way of the objects of Confederation.

(iii) Eventually to "civilize" and assimilate native people (reasons, paragraph 353).

[37] In Ms. Jones' view, the purpose of section 91(24) was integral to the central government's plan to develop and settle lands in the North-Western Territory. The Canadian Government at Confederation inherited principles and practices of Crown-Aboriginal relations that had been embedded in British North America for well over 100 years. These included the recognition of Aboriginal title in the "Indian territories" and protocols recognizing the relationship between Aboriginal nations and the Crown. Canada also inherited a British policy of "civilization" of the Indians, in place since the 1830s (reasons, paragraph 353).

(c) Post-Confederation Era

[38] The Judge found that it was critical to the newly confederated Canada to create an environment of safety and security for settlers. Part of creating that environment was the extinguishment of Indian land claims; Canada required possession of lands for the construction of the transcontinental railway and also for the settlement and development of the West (reasons, paragraph 359).

[39] The Judge also found that the Aboriginal population was mixed, varied and interrelated. It was not possible to draw a bright line between half-breeds/Métis and Indians (reasons, paragraph 381). Immediately post-Confederation, persons referred to as half-breeds were considered to be closely associated with "Indians" and part of the problem that needed to be addressed to permit expansion, settlement and the building of the railway, all as contemplated by the *British North America Act, 1867* (reasons, paragraph 412).

[40] Ultimately, the Judge concluded that the early post-1867 evidence established that half-breeds were considered to be at least a subset of a wider group of Aboriginal-based people called "Indians". What the evidence showed was that Canada was prepared to exercise jurisdiction over half-breeds, to use Indian power like methods and to justify such exercises of jurisdiction as the exercise of the section 91(24) power coupled with the power to control Dominion lands (reasons, paragraph 420).

(d) Other Examples - "Half-breeds" and Section 91(24)

[41] Under this heading the Court looked to a number of post-Confederation events that connected the Métis to section 91(24).

[42] The Judge began by considering the request, made prior to the Treaty 3 negotiations, that 15 families of half-breeds living on the Rainy River be included in the treaty. Thereafter, the *Indian Act, 1876* was passed and the Indian Affairs branch took the position that the department could not "recognize separate Half breeds bands". As a result, the Rainy River half-breeds were given a reserve, but were required to join a First Nations band for which an adjacent reserve had been surveyed. The Judge found that this adhesion to Treaty 3 was an instance where the federal government treated the half-breeds/Métis group as if it had a claim to Indian title, and gave the group a reserve as part of the surrender of that claim. It was a further instance of the federal government exercising jurisdiction over a Métis group based not on their connection to European ancestors, but on their connection to their Indian ancestry (reasons, paragraphs 424, 430, and 434).

[43] The Judge next considered the petition made in 1895 by Father Lacombe to the federal government that destitute “Half-breeds” receive land on which to settle. A reserve was proposed, consisting of four townships to be established, together with an industrial school. The proposal was approved, and a reserve and industrial school were established at St. Paul de Métis in Alberta. The reserve was established exclusively for Métis; title to the reserve was held by the federal Crown. The Judge found that this project was not a policy accident. Rather, it was the use of powers similar to or arising from those exercised in regard to “Indians” under section 91(24) (reasons, paragraphs 437, 439, and 441).

[44] Next, the Judge considered federal liquor policy. In 1894, Parliament amended the *Indian Act* to broaden the specific provision dealing with persons who sold intoxicating liquor to an “Indian”. The problem Parliament sought to resolve was the difficulty encountered by the North-West Mounted Police in distinguishing between “Half-breeds and Indians in prosecutions for giving liquor to the latter”. The provision against the sale of intoxicating liquor was amended by adding “… shall extend to and include any person … who follows the Indian mode of life”. The Judge found this policy again confirmed that the federal government exercised jurisdiction over Métis and non-status Indians regardless of mixed ancestry, residence, membership or purported membership in a band or tribe (reasons, paragraphs 444, 446, 447, and 451).

[45] The 1958 amendment to the *Indian Act*, dealing with “half-breeds” whose ancestors took scrip was found by the Judge to be another example of federal legislation affecting Métis as a group or class which was founded on section 91(24) (reasons, paragraphs 453, 454, 457, and 458).

[46] Finally, the Judge accepted numerous examples of the federal government exercising jurisdiction over a broad range of persons with native ancestry, notwithstanding their lack of status under the *Indian Act*. One example the Court referenced was "red ticket Indians" who were excluded from the *Indian Act* in 1951 and later readmitted in 1985. Another example was the inclusion in 1984 of Aboriginal persons under the *Indian Act* who had been enfranchised (and therefore not given status) when Newfoundland and Labrador joined Confederation (reasons, paragraphs 460, 461 and 466 to 467).

[47] The Judge found that this exercise of jurisdiction over non-status Indians and half-breeds, including Métis was based upon the understanding and acceptance by the Euro-Canadian population that the federal power could exercise jurisdiction over this wide range of people as "Indians". In the Judge's words, the "foregoing, established by conduct, the meaning of 'Indian' within s 91(24)" (reasons, paragraph 468).

(e) Modern Era

[48] The Court's overview of Modern Era evidence primarily involved examining government documents which set out various positions as to whether section 91(24) extended to Métis and non-status Indians. The Judge cautioned, however, that this evidence was of less relevance because his determination of the meaning and scope of section 91(24) was based principally on the analysis of pre- and post-Confederation facts and the manner in which the federal government dealt with Métis and non-status Indians (reasons, paragraph 470).

[49] Based on his review of the evidence the Judge concluded that post-patriation of the Constitution, the trend was for the federal government to generally accept that it had power to legislate in all domains in respect of Métis and non-status Indians under section 91(24) of the *Constitution Act, 1867* (reasons, paragraphs 492 and 493). The government's position hardened in or about 1984, and its position became that section 91(24) did not confer jurisdiction to legislate in respect of Métis and non-status Indians (reasons, paragraphs 501 and 507). Despite this position, the government continued to move certain Aboriginal people in and out of Indian status, in apparent recognition and exercise of its jurisdiction under section 91(24) (reasons, paragraph 512).

(f) Treaties and Half-breeds

[50] The last historical evidence related to the admission by both parties that half-breeds were from time to time either offered treaty protection in lieu of land grants, or were moved in and out of treaty for various reasons. In the Judge's view, the importance of this evidence was that receiving treaty protection and benefits is directly related to being an "Indian" for purposes of the Constitution. Treaties are not made or implemented with other groups in Canadian society (reasons, paragraph 513).

[51] Ultimately, the Judge found that the weight of the evidence was that Métis were both included and excluded from recognized Indian status in accordance with changing government policies. The Judge further concluded that the federal government adopted these flexible policies because it could and that "it was assumed, implied and accepted that the federal government could do so because Métis were 'Indians' under s 91(24)" (reasons, paragraph 525).

(iii) The Judge's Analysis

[52] Relying upon *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698, the Judge found that the purposive approach (which the Judge referred to as the "living tree" doctrine) provided the correct approach to interpreting section 91(24) (reasons, paragraph 538).

[53] Applying the purposive approach in the light of the decision in *Reference re: British North America Act, 1867 (U.K.), s. 91*, [1939] S.C.R. 104 (*Re Eskimo Reference*), the Judge accepted that the purposes of the Indian Power included:

- The intent to control all people of Aboriginal heritage in the new territories of Canada.
- Assisting with the expansion and settlement of the West, including the construction of the transcontinental railway.

[54] Absent a broad power over a broad range of people sharing a native hereditary base, the federal government would have had difficulty accomplishing the expansion and settlement of the West (reasons, paragraph 566).

[55] Relying upon *Canard v. Canada (Attorney General)*, [1976] 1 S.C.R. 170, 52 D.L.R. (3d) 548 at page 207 of the Supreme Court Reports, the Judge viewed section 91(24) as a race-based power (reasons, paragraph 568); both non-status Indians and Métis were found to be connected to the racial classification Indian by way of marriage, filiation and most clearly, intermarriage (reasons, paragraph 531). In the Judge's further view, the single most distinguishing feature of non-

status Indians and Métis is that of their "Indianness" not language, religion or connection to European heritage (reasons, paragraph 532).

[56] The Judge then distinguished *R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236 on the ground that in its decision the Supreme Court expressly left open for another day the question of whether the term "Indians" in section 91(24) includes the Métis (reasons, paragraphs 573 to 574). The Judge also found that the decision in *Blais* was limited in *Reference Re Same Sex Marriage*, above, as a decision based on a constitutional agreement and not a head of power, which involves different considerations and interpretative principles: in particular, a purposive, progressive approach (reasons, paragraph 578).

[57] Finally, the Judge rejected the defendants' argument that the Métis could not be included within section 91(24) because they were separately enumerated in section 35 of the *Constitution Act, 1982*. The Judge concluded that while Inuit are also separately enumerated in section 35, there was no reason to believe that *Re Eskimo Reference* was no longer sound law. Further, in the Judge's view the Supreme Court's recent decision in *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, [2011] 2 S.C.R. 670 supported the distinction between section 91(24) and section 35 (reasons, paragraphs 593 to 598).

[58] Ultimately the Judge concluded that the "case for inclusion of non-status Indians in s 91(24) is more direct and clear than in respect of Métis. The situation of the Métis is more complex and more diverse and must be viewed from a broad perspective. On balance, the Court also concludes

that Métis are included in s 91(24)" (reasons, paragraph 600). As a result, the plaintiffs were granted a declaration to that effect.

[59] The Judge then went on to consider the second and third declarations sought by the plaintiffs.

[60] In respect of the declaration that the federal Crown owed a fiduciary duty to the Métis and non-status Indians, the Judge noted that there was no dispute that the Crown is in a fiduciary relationship with Aboriginal people pursuant to section 35 of the *Constitution Act, 1982*. This duty also flowed from the declaration that Métis and non-status Indians are "Indians" within section 91(24), because such relationships engage the honour of the Crown. However, the Judge noted that not every aspect of a fiduciary relationship results in a fiduciary duty. It was problematic that the declaration sought by the plaintiffs was made without reference to what duty was breached. In the absence of such specification, the second declaration would have no utility, and the Judge was not prepared to make a general statement about fiduciary duties. Thus, the Judge refused to grant the second declaration (reasons, paragraphs 602 to 609).

[61] Finally, the Judge also found insufficient context to make any declaration on Canada's duty to negotiate and consult with the Métis and non-status Indians. Without reference to a specific matter to be consulted on, or negotiated with, the Judge concluded that a general declaration would be abstract and not useful. Thus, the third declaration was also refused (reasons, paragraphs 610 to 617).

6. Consideration of the Issues

(i) Did the Federal Court err by issuing the declaration in respect of either the Métis or non-status Indians?

(a) Applicable Legal Principles

[62] Declaratory relief is a discretionary remedy (*Solosky v. Her Majesty The Queen*, [1980] 1 S.C.R. 821 at pages 832 to 833). The test for appellate review of judicial discretion is whether the judge at first instance gave sufficient weight to all of the relevant considerations (*MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6 at paragraph 43).

[63] In exercising its discretion, a court is to be influenced by two factors: the utility of the remedy, if granted, and whether the declaration will settle a real issue between the parties (*Solosky*, at page 832).

[64] To obtain declaratory relief a party must establish:

i) The Court has jurisdiction over the issue.

ii) The question before the Court is real and not theoretical.

iii) The party has a genuine interest to raise the question.

(*Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44 at paragraph 46).

(ii) Did the Federal Court err by issuing the declaration in respect of the Métis?

(a) Did the declaration lack practical utility?

[65] The appellants argue that the declaration lacks practical utility because:

- It does not relate to the constitutionality of actual or proposed legislation.
- It does not settle the issue of constitutional responsibility because section 91(24) does not create responsibilities or obligations to legislate, nor does it compel the federal government to provide the Métis access to the same programs and services as status Indians.
- With or without the declaration, the federal government has the authority to extend programs and resources to the Métis under the federal spending power.

[66] I begin consideration of this issue by noting that the appellants do not allege that the Judge erred in law in setting out the factors which were to guide his discretion. Instead, they challenge his exercise of discretion on the ground that the declaration lacks practical utility. It follows that this Court may only intervene if the Judge gave insufficient weight to all of the relevant considerations. For the four reasons that follow, the appellants have failed to establish any reviewable error in the Judge's exercise of discretion not to withhold declaratory relief in respect of the Métis.

[67] First, I accept the submission of the respondents that the first declaration is similar to the declaration granted by the Supreme Court of Canada in *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, 291 Man. R. (2d) 1.

[68] In *Manitoba Métis Federation*, the plaintiffs advanced a collective claim for declaratory relief. The majority of the Court noted that, in an appropriate case, a declaration may be granted in aid of extra-judicial relief. The majority of the Court went on to find that in the case before it the plaintiffs sought declaratory relief in order to assist them in extra-judicial negotiations with the Crown in pursuit of the overarching constitutional goal of reconciliation reflected in section 35 of

the *Constitution Act, 1982*. Ultimately, the majority concluded that the plaintiffs were entitled to a declaration that the federal Crown had failed to implement the land grant provision contained in section 31 of the *Manitoba Act, 1870* in accordance with the honour of the Crown.

[69] It follows from this decision that, as a matter of law, a challenge to the constitutionality of actual or proposed legislation is not a condition precedent to the issuance of a declaration. Similarly, a declaration does not lack practical utility simply because it does not create an enforceable obligation to enact legislation.

[70] Second, the appellants' argument that the declaration lacks practical utility is contradicted by findings of fact made by the Judge that are not challenged on appeal. Those findings include:

- The federal government acknowledged:

> The Métis and non-status Indian people, lacking even the protection of the Department of Indian Affairs and Northern Development, are far more exposed to discrimination and other social disabilities. It is true to say that in the absence of Federal initiative in this field they are the most disadvantaged of all Canadian citizens.
>
> (reasons, paragraph 26)

- The federal government largely accepted constitutional jurisdiction over the Métis until the mid-1980s, when matters of policy and financial concerns changed that acceptance (reasons, paragraph 27).
- The Royal Commission on Aboriginal Peoples recognized the existence of a real jurisdictional issue and called for the federal government to bring a reference, particularly in respect of the Métis, to determine whether section 91(24) applied to the Métis people (reasons, paragraph 57).

- A government document entitled "Royal Commission on Aboriginal Peoples Final Report Comprehensive Assessment for Cabinet Purposes" concluded that it would be premature to embrace the Commission's recommendation to negotiate Métis claims to lands and resources in the absence of a higher court decision on, among other things, the division of federal-provincial liability (reasons, paragraph 58).
- The Métis and non-status Indians were not supplied with services while governments fought about jurisdiction, principally a fight about who bore financial responsibility (reasons, paragraphs 87 and 107).
- The political/policy wrangling between the federal and provincial governments produced a large population of collaterally damaged Métis and non-status Indians. As a result, they are deprived of programs, services and intangible benefits all governments recognize are needed (reasons, paragraph 108).
- The resolution of constitutional responsibility has the potential to bring clarity to the respective responsibilities of the different levels of government (reasons, paragraph 110).
- The recognition of Métis as Indians under section 91(24) should accord a further level of respect and reconciliation by removing the constitutional uncertainty surrounding the Métis (reasons, paragraph 568).

[71] Third, the appellants' assertion that the federal government has authority to extend programs and resources to the Métis under the federal spending power is undercut by the Judge's finding of fact that the absence of jurisdictional certainty has led to disputes between the federal and provincial governments that have resulted in the Métis being deprived of many necessary programs and resources.

[72] Finally, the respondents' claim extended beyond a claim to programs and services available under the federal spending power. The claim put in issue, among other things, the failure of the federal government to negotiate or enter treaties with respect to unextinguished Aboriginal rights, or agreements with respect to other Aboriginal matters or interests analogous to those treaties and agreements which the federal government has negotiated and/or entered into with status Indians (Fresh as Amended Statement of Claim, paragraph 26(d)). Related to this aspect of the claim is the evidence, referenced above, that in the absence of higher court authority on the division of federal-provincial liability, the federal government was not prepared to negotiate Métis claims as recommended by the Royal Commission on Aboriginal Peoples.

[73] For these reasons, the Judge did not issue a declaration that lacked practical utility.

(iii) Did the Federal Court err by issuing the declaration in respect of non-status Indians?

(a) Did the declaration lack practical utility?

[74] In my respectful view, when granting the declaration sought by the respondents as it related to non-status Indians, the Judge failed to give adequate consideration to relevant factors that would have led him to conclude the declaration lacked practical utility.

[75] Unlike the Métis, who are a distinct Aboriginal people, it is common ground that non-status Indians are, broadly speaking, Indians without status under the *Indian Act*. During oral argument, counsel for the appellants conceded that the group of people characterized as non-status Indians are those to whom status could be granted by federal legislation, assuming the legislation did not

exceed the limits of section 91(24). The definition as conceded by the appellants in oral argument necessarily includes non-status Indians within that head of power.

[76] Parliament's authority to grant or withhold Indian status arises from section 91(24) (*Canard*, at page 207 of the Supreme Court Reports). In order for Parliament to grant status under the *Indian Act*, the person receiving status must be an Indian under the Constitution. In that sense, the *Indian Act* does not exhaustively define who is an Indian for the purposes of the division of powers; this is exemplified by subsection 4(1) of the *Indian Act*, which withholds status from the Inuit, notwithstanding their inclusion as "Indians" under section 91(24) (see *Re Eskimo Reference*). Therefore, if Parliament can grant status to a person under section 91(24), that person is necessarily an "Indian" within the meaning of that section. In the result, a declaration that non-status Indians who could be granted status through section 91(24) are Indians for the purpose of that section is redundant and lacks practical utility.

[77] It is also inappropriate to grant a declaration clarifying the limits of who may be considered an Indian notwithstanding their exclusion from the *Indian Act.* The reasons for excluding people from Indian status are complex, far-ranging and often unrelated to one another. As the Judge noted at paragraph 115 of his reasons, one situation which created non-status Indians were problems recording names during the treaty process and fear of the treaty process itself. The result was that some names were not recorded and those individuals were not recognized as having status under the *Indian Act*. Other people were recognized as having status, but lost or gave up that status for various reasons, such as the many Indian women who lost status by marrying non-Aboriginal men.

[78] In that regard, to determine the limits of the word “Indian” as it pertains to non-status Indians under the division of powers it is necessary to analyze the reason each class of individual was excluded from the *Indian Act* on a case-by-case basis. To the extent that exclusions, or for that matter inclusions, are within the limits of section 91(24) of the *Constitution Act, 1867*, they can be validly imposed. Otherwise such exclusions are outside the limits of Parliament’s powers and are, therefore, invalid. This question can only be answered after reviewing the particular reason for each exclusion.

[79] It follows that non-status Indians as a group do not lend themselves to the declaration of general application sought by the respondents. However the matter is considered, no purpose is served by addressing the question on the generic basis proposed: the declaration lacks utility and will not settle any issue between non-status Indians and the federal government. In consequence, the Judge ought not to have granted the declaration as it pertains to non-status Indians. I would therefore set aside the declaration as it applies to non-status Indians.

(iv) Is the declaration as it relates to the Métis unfounded in fact and law?

(a) Standard of review

[80] The scope of section 91(24) is a question of law reviewable for correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2. S.C.R. 235 at paragraphs 36 and 37). Determining if the definition of Métis adopted by the Judge accords with Supreme Court jurisprudence is an extricable question of law which is also reviewed on the correctness standard (*R. v. Hirsekorn*, 2012 ABCA 21, 59 Alta. L.R. (5th) 209 at paragraph 14).

(b) The asserted errors

[81] In support of their submission that the declaration is unfounded in fact and law, the appellants assert the Judge erred in:

- adopting a definition of Métis that is contrary to history and the jurisprudence of the Supreme Court;
- failing to follow the proper approach to constitutional analysis mandated by the Supreme Court; and
- granting a declaration that will create uncertainty about the jurisdiction of Parliament and the provincial legislatures.

[82] For the reasons that follow, these assertions are unfounded.

(c) Did the Judge adopt a definition of Métis that is contrary to history and the jurisprudence of the Supreme Court?

[83] The parties disagree on how the Judge defined Métis. In particular, the appellants argue the Judge defined Métis at paragraph 117 of his reasons, while the respondents submit this paragraph simply described a definition offered in a federal government document; according to the respondents, this description focused on the factual existence of a "core group" of Métis and non-status Indians, and did not constitute a legal definition.

[84] At paragraph 130 of his reasons, the Judge stated that the persons described in paragraph 117 of his reasons are Métis for the purpose of the requested declarations. Paragraph 117, in turn, described "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." In my opinion, paragraph 130 makes it clear that the Judge defined Métis in these terms, at least for the purpose of the relief he ultimately granted.

[85] In that regard, the appellants submit that the Supreme Court has previously concluded that history demonstrates the Métis are a distinct Aboriginal people, related to, but different from, their Indian forbearers. The appellants further submit that by defining the Métis in relation to their "Indianness", the Judge's definition is contrary to the notion of the Métis as a distinct Aboriginal people and inconsistent with four decisions of the Supreme Court: *Powley*, *Blais*, *Cunningham*, and *Manitoba Métis Federation*.

[86] With respect, the appellants' submissions misread the Judge's reasons.

Powley, Cunningham and Manitoba Métis Federation

[87] To date, *Powley* is the leading authority on the meaning of Métis. At paragraph 10 of its reasons the Supreme Court concluded that the term Métis as used in section 35 of the *Constitution Act, 1982* does not encompass all individuals with mixed Indian and European heritage. Rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life and recognizable group identity separate from their Indian or Inuit and European forbearers. This was reaffirmed in *Cunningham* and *Manitoba Métis Federation*.

[88] I agree with the appellants that the definition advanced by the Judge is problematic. It lacks clarity and is open to at least three interpretations, one of which I believe is contrary to history and the jurisprudence of the Supreme Court.

[89] The first potential interpretation is that "Indian heritage" meant descent from members of the "Indian race".

[90] The second potential interpretation is that advanced by the appellants: the Judge equated "Indian heritage" with "First Nations heritage". If that is what the Judge meant, it is, in my view, contrary to history and the jurisprudence of the Supreme Court and must be rejected.

[91] The third potential interpretation is that by using the phrase "Indian heritage" the Judge meant to refer to indigenousness or Aboriginal heritage; broader concepts than First Nations heritage.

[92] I reject the interpretation that by using the term "Indian heritage", the Judge meant descent from members of the "Indian race" for the following reasons.

[93] First, this interpretation is not consistent with the entirety of the Judge's reasons.

[94] Second, I acknowledge that historically section 91(24) was viewed to be a race-based head of power. Thus, in *Canard* at page 207, Justice Beetz wrote that by using the word "Indians" in section 91(24), the *Constitution Act, 1867* created a racial classification and referred to a racial group that could receive special treatment.

[95] However, the Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life (*Reference re Same-Sex Marriage*, at

paragraph 22). This is particularly so when dealing with the heads of power enumerated in sections 91 and 92 of the *Constitution Act, 1867* as they must continually adapt to cover new realities (*Reference re Same-Sex Marriage*, at paragraph 30).

[96] I accept the submission of the Intervener Métis Nation of Ontario that a progressive interpretation of section 91(24) requires the term Métis to mean more than individuals' racial connection to their Indian ancestors. The Métis have their own language, culture, kinship connections and territory. It is these factors that make the Métis one of the Aboriginal peoples of Canada.

[97] This is reflected in the jurisprudence of the Supreme Court of Canada in *Powley*, *Cunningham* and *Manitoba Métis Federation*. In *Powley*, the Supreme Court did not exhaustively define who were included in the term Métis for the purpose of section 35 of the *Constitution Act, 1982*. However, as discussed above, the Court rejected the notion that the term Métis encompassed all individuals with mixed Indian and European heritage. Instead, the term refers to a distinctive group of people who developed separate and distinct identities. The three broad factors that are the indicia of Métis identity for the purpose of claiming Métis rights under section 35 were found to be: self-identification, ancestral connection and community acceptance (*Powley,* at paragraphs 31 to 33).

[98] While these comments were made with reference to section 35 of the Charter, individual elements of the Constitution are linked to one another and must be interpreted by reference to the structure of the Constitution as a whole (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at

paragraph 50). In *Reference re: Firearms Act (Can.)*, 1998 ABCA 305, 164 D.L.R. (4th) 513, at paragraph 35, the Alberta Court of Appeal found there was no reason to exclude the Charter from an interpretation of the division of powers provisions in the *Constitution Act, 1867*. I agree.

[99] It follows that the criteria identified by the Supreme Court in *Powley* inform the understanding of who the Métis people are for the purpose of the division of powers analysis. The *Powley* criteria are inconsistent with a race-based identification of the Métis.

[100] I also conclude that, read fairly, the Judge did not mean to equate "Indian heritage" with "First Nations heritage". Instead, what the Judge intended was that "Indian heritage" means indigenousness or Aboriginal heritage. I reach this conclusion for the following reasons.

[101] First, this interpretation is consistent with language used by the Judge in other passages in his reasons. To illustrate, at paragraph 420, referring to the post-1867 historical evidence, the Judge noted the evidence "shows that half-breeds were considered as at least a subset of a wider group of aboriginal-based people called 'Indians'." This is explicit recognition by the Judge that the Métis and Indian peoples are distinct in that the Métis were a distinct subset of the Aboriginal population.

[102] Later, at paragraph 544, the Judge wrote:

> Both in principle and in practice, one of the essential elements of the Indian power was to vest in the federal government the power to legislate in relation to people who are defined, at least in a significant way, by their native heredity. As said earlier, the factor which distinguishes both non-status Indians and Métis from the rest of Canadians (and has done so when this country was less culturally and ethnicly diverse) is that native heritage - their "Indianess".

[103] This paragraph reflects the Judge's view that "Indianness" is synonymous with native or Aboriginal heritage or indigenousness.

[104] Second, the interpretation that the Judge meant "Indian heritage" to mean "Aboriginal heritage" or "indigenousness", in my view explains why, after separately defining non-status Indians and Métis, the Judge grouped them together for the remainder of his analysis; they could be grouped together because a person who met either definition would satisfy the requirement of having a strong affinity for their Aboriginal heritage.

[105] Finally, at paragraph 117 of his reasons the Judge held that for both non-status Indians and Métis their "Indianness" was based on self-identification and group recognition. Then, at paragraph 127 when considering the Métis, he set out the test outlined in *Powley* for determining Métis entitlement to section 35 aboriginal rights.

[106] Those three factors relate to self-identification and group recognition.

[107] If the Judge intended that "Indian heritage" and "Indianness" only related to First Nations heritage and culture, he would not have recited the *Powley* test.

[108] Having concluded that the Judge meant Indian heritage to mean indigenousness or Aboriginal heritage, and considering the definition given by the Judge at paragraph 117 of his reasons, it follows that the Judge considered the Métis to be a group of native or Aboriginal people who maintain a strong affinity for their Aboriginal heritage or indigenousness without possessing

Indian status. The Métis Aboriginal heritage or indigenousness is based upon self-identification and group recognition as Métis, not First Nations. It follows from this that the Judge recognized the Métis to be a distinct people.

[109] Properly understood, the Judge's conception of the Métis was not contrary to history or the decisions of the Supreme Court in *Powley*, *Cunningham* or *Manitoba Métis Federation*.

[110] That said, I am not satisfied that it is necessary to exhaustively or definitively define the term Métis in order to determine whether the Métis people fall within the scope of section 91(24). The Constitution does not define "Indian" and the Supreme Court did not define "Eskimos" when determining they were included in section 91(24) in *Re Eskimo Reference*.

[111] It is sufficient that the Court not define the term Métis in a manner that is contradictory with history or the jurisprudence of the Supreme Court.

Blais

[112] In *Blais*, the Supreme Court found that the Métis are not "Indians" under the hunting rights provision contained in the Manitoba *Natural Resources Transfer Agreement*, incorporated as Schedule (1) to the *Constitution Act, 1930* (NRTA). To reach this conclusion the Supreme Court referred to the same census prepared by the Hudson's Bay Company relied upon by the Supreme Court in *Re Eskimo Reference*. The census demonstrated that at the time of Confederation the Eskimo were regarded as a type of Indian. In *Blais,* the Supreme Court concluded that the same document "illustrates that the 'Whites and half-breeds' were viewed as an identifiable group,

separate and distinct from the Indians" (at paragraph 27). It followed that the Métis were not "Indians" for the purpose of the NRTA.

[113] The appellants argue that the Judge erred by reaching the contrary conclusion in this case. The appellants also argue that *Blais* illustrates that *Re Eskimo Reference* is authority for the proposition the Métis are not Indians within the contemplation of section 91(24).

[114] The Judge distinguished *Blais* on the ground that in that case the Supreme Court considered the meaning of "Indian" in relation to a particular constitutional agreement as opposed to a head of power (reasons, paragraph 541).

[115] In my view, *Blais* is distinguishable from the present case on the following grounds.

[116] First, at paragraph 36 of its reasons in *Blais,* the Supreme Court stated that it was leaving open for another day the issue of whether the term "Indians" in section 91(24) of the *Constitution Act, 1867* includes the Métis. The Judge did not err by failing to find *Blais* decided this issue.

[117] Second, the findings of fact made at trial in *Blais* are very different from the findings of fact made by the Judge in the present case. To illustrate, in *Blais*, at paragraph 31, the Court found no basis for interfering with the lower courts' finding that, as a general matter, the terms "Indian" and "Métis" were used to refer to separate and distinguishable groups of people in Manitoba from the mid-19th century through to the period in which the NRTA was negotiated and enacted (1930).

[118] In the present case the Judge found:

- Prior to Confederation, the term "Indian" was understood by the Fathers of Confederation to include "half-breeds" (reasons, paragraphs 272 and 323).
- The Fathers of Confederation would have intended the word "Indians" in the Constitution, and the power which went with it, to be a broad power to allow the federal government to deal with the diversity and complexity of the native population, whatever their percentage mix of blood relationship, their economies, residency or culture (reasons, paragraphs 273, 308, 318, and 323).
- The Aboriginal population was mixed, varied and interrelated. It was not possible to draw a bright line between half-breeds/Métis and Indians (reasons, paragraph 381).

[119] Finally, in *Blais* the Court considered the philosophy or objectives lying behind section 13 of the NRTA. It found that the protection afforded by section 13 was predicated on the view that Indians required special protection and assistance. Rightly or wrongly this view did not extend to the Métis.

[120] This is very different from the philosophy or objective of section 91(24) as found by the Judge. Those findings are described in paragraphs 36 and 37 above. The objectives of section 91(24) included the need to control all native people and their communities in order to facilitate the development of the Dominion and to pursue the federal government's plan to develop and settle lands in the North-Western Territory.

[121] Before turning to the next asserted error, for completeness I will deal with the argument that *Re Eskimo Reference* establishes that the Métis are not Indians within the contemplation of section 91(24). There are three brief reasons why I do not accept this submission.

[122] First, as noted above, the Supreme Court expressly left open in *Blais* the question of whether the Métis fall within section 91(24). The Court reached this conclusion notwithstanding that *Re Eskimo Reference* was an authority referenced by the Court in its decision.

[123] Second, the evidentiary record discussed by the Court in *Re Eskimo Reference* would not permit a definitive conclusion concerning the Métis. This is particularly so where the only geographic territory considered was Rupert's Land and the coast of Labrador.

[124] Finally, there is a passage in *Re Eskimo Reference* which supports the inclusion of the Métis in section 91(24). At page 118 of the decision Justice Cannon, writing for himself and Justice Crocket, wrote that Sir John A. Macdonald and Sir Hector Langevin "always understood that the English word 'Indians' was to be construed and translated as 'sauvages' which admittedly did include *all* the aborigines living within the territories in North America under British authority" (emphasis in the original).

(d) Did the Judge fail to follow the approach to constitutional analysis mandated by the Supreme Court?

[125] In their written submissions the appellants argue that the Judge erred by defining the limits of the constitutional term "Indians" contained in section 91(24) in the abstract. The appellants' written submissions are confined to the Judge's definition of non-status Indians. In particular, the

appellants assert the Judge erred at paragraph 122 of his reasons by outlining the features of persons who could be granted status under the *Indian Act*. The appellants say that in the absence of a challenge to actual or proposed legislation a court should be limited to proposing a non-exhaustive list of criteria to guide the interpretation of the term Indian.

[126] Given my finding that the Judge erred by issuing the declaration in respect of non-status Indians, it is not necessary to address the error asserted by the appellants in respect of the Judge's definition of non-status Indians.

[127] In oral argument the appellants submitted that the Judge misapplied the living tree doctrine, as explained by the Supreme Court in *Reference re Same-Sex Marriage*. As explained above, this doctrine posits that the Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the changing realities of modern life. The appellants say the Judge erred in his application of progressive statutory interpretation by failing to identify what changes require a new view of who are included in section 91(24) of the *Constitution Act, 1867*.

[128] The appellants' submission is based on the propositions that the Judge applied the progressive approach to the interpretive exercise and that this approach was necessary because the Métis were not included in section 91(24) at the time of Confederation. On a proper reading of the Judge's reasons, these propositions are incorrect.

Applicable principles of statutory interpretation

[129] In *Reference re Employment Insurance Act (Canada)*, 2005 SCC 56, [2005] 2 S.C.R. 669, the Supreme Court set out the principles of interpretation to be applied when considering the scope of the powers assigned by the *Constitution Act, 1867*. In particular, a court must refer to the way the power was described by the Fathers of Confederation to identify its essential components.

The Judge's approach

[130] At paragraph 538 of his reasons, the Judge accepted "that the purposive approach — the 'living tree' doctrine — is the appropriate approach". This is one source of confusion because the living tree doctrine is an expression of the progressive, not purposive, approach to interpretation.

[131] Notwithstanding, the Judge's reasons evidence a decidedly purposive approach to the interpretive exercise.

[132] There are no contemporary statements or records concerning the purpose of section 91(24). In the absence of such statements or records, the Judge properly made findings of fact about the content of section 91(24) and its essential components.

[133] The Judge made the following findings of fact:

- As early as 1818 the Métis were considered to be Indians (reasons, paragraph 577).
- Prior to Confederation, the Fathers of Confederation understood the term "Indian" to include "half-breeds" (reasons, paragraphs 265 and 287).

- The Fathers of Confederation intended the word “Indian” in the Constitution, and the power which went with it, to apply broadly so that the government could deal with the diversity and complexity of the native population, whatever their percentage of mixed blood, economy, residency, or culture (reasons, paragraphs 273, 318, and 323).
- The relationship between the purpose of Confederation (in terms of settlement and expansion) and the native people was critical to Confederation (reasons, paragraphs 252 and 351).
- The lands occupied by natives would have to be surrendered (reasons, paragraph 351).
- The purpose of section 91(24) was integral to the central government’s plan to develop and settle lands in the North-Western Territory (reasons, paragraphs 353 and 354).

[134] These findings are inconsistent with the submission that the Judge found the Métis were not included in section 91(24) at the time of Confederation. As such, these findings are also inconsistent with the application of the living tree doctrine, since no progression was necessary.

[135] The Judge then went on to make a number of findings of fact that were confirmatory of his view that the section 91(24) power was intended to include the Métis. Those findings included the following:

- Immediately post-Confederation, persons referred to as half-breeds were considered to be closely associated with “Indians” and to be part of the problem that needed to

be addressed by section 91(24) to permit expansion, settlement and the building of the railway (reasons, paragraph 412).

- Early post-1867, half-breeds (as they were then called) were considered to be at least a subset of a wider group of Aboriginal-based people called Indians (reasons, paragraph 420).
- 15 families of half-breeds living on the Rainy River adhered to Treaty 3. The government treated the half-breeds group as if it had a claim to Indian title, and gave the group a reserve as part of the surrender of that claim (reasons, paragraphs 424, 430, and 434).
- A reserve was established at St. Paul de Métis for the exclusive use of the Métis people. This was found by the Judge not to be a policy accident (reasons, paragraphs 437, 439, and 441).
- In 1894 Parliament amended the *Indian Act* to broaden the provision dealing with persons who sold intoxicating liquor to an Indian. The provision was amended to make it an offense to sell alcohol to any person "who follows the Indian mode of life" (reasons, paragraphs 444, 446, and 447).

[136] Applying the purposive approach, and looking primarily to the pre-and post-Confederation facts and the manner in which the government dealt with the Métis, the Judge found the Métis were included in section 91(24) (reasons, paragraph 525).

[137] Other factors support the conclusion that the Métis were a people included in section 91(24) at the time of Confederation.

[138] Importantly, at least three iterations of federal legislation relating to Indians could reasonably be read to have included the Métis.

[139] In 1868, *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordinance Lands*, 31st Victoria 2, c. 42 was enacted. This legislation made the Secretary of State the Superintendent-General of Indian Affairs. The statute dealt with matters such as the holding of lands reserved for Indians, the surrender of Treaty lands, the application of monies resulting from the sale of Indian lands and the penalty for giving or selling liquor to Indians.

[140] Section 15 of the legislation was entitled "What persons only shall be deemed Indians" and stated "[f]or the purpose of determining what persons are entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada, the following persons and classes of persons, and none other, shall be considered as Indians belonging to the tribe, band or body of Indians interested in any such lands or immoveable property:" The second enumerated class of persons deemed to be Indians was "[a]ll persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians or an Indian reputed to belong to the particular tribe, band or body of Indians interested in such lands or immoveable property, and the descendents of all such persons".

[141] This class of persons would include half-breeds if they resided among Indians and their descendents. Since the Act did not impose a generational limit, persons descended from "half-

breeds" would also have been considered Indians, if their parents met that definition. To that end, it stands to reason that a community of half-breeds could have arisen in which all of its members were considered "Indians". And since the Act does not define what constitutes a "body of Indians", this definition could logically include Métis living in their own communities, or any Métis who resided among Indians and their descendents.

[142] Along the same lines, *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act*, 31st Victoria, c. 42, S.C. 1869, c. 6 was passed shortly after Confederation. While this Act did not define the persons it applied to, section 4 of this Act, dealing with the division of annuity money, demonstrates the Act applied to "half-breeds". Section 4 provided that:

4. In the division among the members of any tribe, band, or body of Indians, of any annuity money, interest money or rents, no person of less than one-fourth Indian blood, born after the passing of this Act, shall be deemed entitled to share in any annuity, interest or rents, after a certificate to that effect is given by the Chief or Chiefs of the band or tribe in Council, and sanctioned by the Superintendent General of Indian affairs.	4. Lors de la distribution d'annuités, intérêts ou rentes entre les membres d'une nation, tribu ou peuplade de Sauvages, nulle personne ayant moins d'un quart de sang sauvage et née après la passation du présent acte, n'aura droit de partager dans ces annuités, intérêts ou rentes, après qu'un certificat à cet effet aura été donné par le ou les chefs de la tribu ou peuplade en conseil assemblés et approuvé par le surintendant-général des affaires des Sauvages.

[143] Finally, *An Act to amend and consolidate the laws respecting Indians, The Indian Act, 1876,* S.C. 1876, c. 18 specifically defined the term "Indian" to include half-breeds, subject to some provisions. Thus, an Indian included any child of any male person of Indian blood reputed to belong to a particular band. One proviso was that "no half-breed in Manitoba who has shared in the distribution of half-breed lands shall be accounted an Indian; and that no half-breed head of a family

(except the widow of an Indian, or a half-breed who has already been admitted into a treaty), shall, unless under very special circumstances, to be determined by the Superintendent-General or his agent, be accounted an Indian, or entitled to be admitted into any Indian treaty." These exceptions prove the rule that half-breeds could be considered Indians, and that apart from accepting scrip, no distinction was drawn between half-breeds maintaining Métis culture and those adopting a First Nations way of life.

[144] Also, in my view, section 35 of the Charter confirms that the Métis were included within section 91(24) from the time of Confederation. Subsections 35(1) and (2) of the Charter are repeated for ease of reference:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.	35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.
(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.	(2) Dans la présente loi, « peuples autochtones du Canada » s'entend notamment des Indiens, des Inuit et des Métis du Canada.

[145] In oral argument, counsel for the appellants conceded that section 35 confirms that the Métis are Aboriginal, that they are in a fiduciary relationship with the Crown, and that the Honour of the Crown is engaged in its dealings with the Métis. These concessions are consistent with the decision of the Supreme Court in *Manitoba Métis Federation*.

[146] Tellingly, counsel for the appellants also conceded that it would be anomalous for the Métis to be included as Aboriginal peoples for the purpose of section 35 of the Charter, and to be the only enumerated Aboriginal peoples not included within section 91(24).

[147] This anomaly disappears when section 91(24) is interpreted to have included the Métis from the time of Confederation.

[148] In the result, there is ample evidence to support the view that Métis were considered within section 91(24) at the time of Confederation. A progressive interpretation was, therefore, unnecessary, and the Judge did not err by failing to address the social changes that would underlie such an interpretation.

(e) Did the Judge grant a declaration that will create uncertainty about the respective jurisdiction of Parliament and the provincial legislatures?

[149] The appellants present speculative, *in terrorem* arguments that granting a declaration that the Métis fall within section 91(24) will make provincial legislation vulnerable to challenge and may also have a detrimental effect on the ability of provincial governments to legislate in the future.

[150] I disagree. In *Reference re Employment Insurance Act (Canada)*, the Supreme Court observed that the power of one level of government to legislate in relation to one aspect of a matter takes nothing away from the power of the other level to control another aspect within its own jurisdiction (Supreme Court reasons, paragraph 8). In my view, this is a complete answer to the appellants' argument. This is particularly so where the Judge found the declaration will have a real and practical utility.

(f) Conclusion as to the validity of the declaration as it relates to the Métis

[151] The appellants do not challenge any of the Judge's detailed findings of fact. I have considered each of the legal errors posited by the appellants and have concluded they have not

demonstrated any error that warrants intervention. I therefore conclude that the declaration, limited to the Métis, is founded in fact and in law.

(v) The cross-appeal: Did the Judge err by refusing to issue the second and third declarations?

(a) The standard of review

[152] As set out at paragraph 62 above, declaratory relief is a discretionary remedy. The test to be applied on appeal is whether the Judge gave sufficient weight to all of the relevant considerations.

(b) The asserted errors

[153] The Judge refused to issue the second and third declarations for the reasons set out at paragraphs 60 and 61 above.

[154] The respondents as appellants by cross-appeal say it was an error of principle to refuse the second declaration because the terminology used in its request has changed over time. Essentially, they argue that at the time the claim was framed, there was no distinction between a fiduciary duty and a fiduciary relationship. In turn, the Judge is said to have failed to properly consider the substance of what was requested: a declaration that the Métis and non-status Indians are in a fiduciary relationship with the Crown.

[155] No particular error is asserted in connection with the third declaration.

(c) Did the Judge err in refusing the second and third declarations?

[156] On the reasons given, the Judge made no error in refusing the second declaration. The Judge recognized that the Crown has a fiduciary relationship with Aboriginal people both historically and pursuant to section 35 of the Charter (reasons, paragraph 604). He also found that a declaration made in the absence of a specific fact scenario would lack utility.

[157] I agree. This is particularly the case where, after the release of the Judge's reasons, the Supreme Court confirmed that the Métis are in a fiduciary relationship with the Crown (*Manitoba Métis Federation*).

[158] No error is alleged with respect to the third declaration. Again, I agree that the declaration was properly withheld, substantially for the reasons given by the Judge.

7. Conclusion and costs

[159] For the above reasons, I would allow the appeal in part by deleting reference in the declaration to non-status Indians. I would restate the declaration as follows: The Court declares that the Métis are included as "Indians" within the meaning of section 91(24) of the *Constitution Act, 1867*.

[160] I would dismiss the cross-appeal.

[161] Finally, I would reserve the issue of the costs of the appeal and cross-appeal. Those costs, between the appellants and respondents, if not agreed, may be addressed in writing. The parties are

requested to suggest a schedule for serving and filing written submissions on costs, such submissions not to exceed 10 pages in length.

"Eleanor R. Dawson"
J.A.

"I agree.
Marc Noël J.A."

"I agree.
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-49-13
STYLE OF CAUSE:	HER MAJESTY THE QUEEN as represented by THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT and THE ATTORNEY GENERAL OF CANADA v. HARRY DANIELS, GABRIEL DANIELS, LEAH GARDNER, TERRY JOUDREY and THE CONGRESS OF ABORIGINAL PEOPLES and ATTORNEY GENERAL OF ALBERTA, MÉTIS SETTLEMENTS GENERAL COUNCIL, GIFT LAKE MÉTIS SETTLEMENT, MÉTIS NATIONAL COUNCIL, MANITOBA MÉTIS FEDERATION, and MÉTIS NATION OF ONTARIO
PLACE OF HEARING:	OTTAWA, ONTARIO
DATES OF HEARING:	OCTOBER 29 AND 30, 2013
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	NOËL J.A. TRUDEL J.A.
DATED:	APRIL 17, 2014

APPEARANCES:

Brian A. McLaughlin Shauna Bedingfield	FOR THE APPELLANTS
Joseph E. Magnet Andrew K. Lokan	FOR THE RESPONDENTS
Angela Edgington	FOR THE INTERVENER (Attorney General of Alberta)
Gary Appelt Keltie Lambert	FOR THE INTERVENER (Métis Settlements General Council)
Maxime Faille Paul Seaman	FOR THE INTERVENER (Gift Lake Métis Settlement)
Clément Chartier Marc LeClair Kathy Hodgson-Smith	FOR THE INTERVENER (Métis National Council)
Jason T. Madden	FOR THE INTERVENER (Manitoba Métis Federation)
Jean Teillet	FOR THE INTERVENER (Métis Nation of Ontario)

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE APPELLANTS
Paliare Roland Rosenberg Rothstein LLP Toronto, Ontario	FOR THE RESPONDENTS
William F. Pentney Deputy Attorney General of Canada	FOR THE INTERVENER (Attorney General of Alberta)
Witten LLP Edmonton, Alberta	FOR THE INTERVENER (Métis Settlements General Council)

Gowlings LLP Ottawa, Ontario	FOR THE INTERVENER (Gift Lake Métis Settlement)
Métis National Council Ottawa, Ontario	FOR THE INTERVENER (Métis National Council)
Pape Salter Teillet LLP Toronto, Ontario	FOR THE INTERVENER (Manitoba Métis Federation)
Pape Salter Teillet LLP Vancouver, British Columbia	FOR THE INTERVENER (Métis Nation of Ontario)