Court File No. 33880

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE MANITOBA COURT OF APPEAL)

MANITOBA METIS FEDERATION INC., YVON DUMONT, BILLY JO DE LA RONDE, ROY CHARTRAND, RON ERICKSON, CLAIRE RIDDLE, JACK FLEMING, JACK McPHERSON, DON ROULETTE, EDGAR BRUCE JR., FREDA LUNDMARK, MILES ALLARIE, CELIA KLASSEN, ALMA BELHUMEUR, STAN GUIBOCHE, JEANNE PERRAULT, MARIE BANKS DUCHARME, and EARL HENDERSON,

Appellants (Appellants),

- and -

ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF MANITOBA,

Respondents (Respondents).

FACTUM OF THE RESPONDENT THE ATTORNEY GENERAL OF MANITOBA

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PART I
STATEMENT OF FACTS

Overview

1. The nascent Province of Manitoba had a myriad of concerns to address in its first few years of existence, not the least of which were the social issues that accompanied the distribution of the 1.4 million acres of land provided for in s. 31 of the *Manitoba Act, 1870.* The consistent policy of the Manitoba legislature throughout the period of 1870-1885, as expressed in various addresses, letters and statutes, was that the owners of the s. 31 lands should have all of the rights assured to owners of individual property by the common law, including the right to occupy or sell. In furtherance of this policy, Manitoba passed several statutes between 1877 and 1885 that regulated the means by which sales of s. 31 lands could take place by private contract or court order. All of these statutes have been repealed. Thus, the Attorney General of Manitoba submits that the case against it is moot and ought not to be decided on the merits. In alternative, Manitoba submits that its statutes were constitutional and fell squarely within provincial jurisdiction over property and civil rights, matters of a local nature and the administration of civil justice.

The Red River Settlement

2. The Red River settlement of 1869 was a community of approximately 12,000 individuals, numbering close to 10,000 Métis, 1,500 Europeans and 500 Indians.[1] The settlement had grown slowly but steadily from its origins as the home to the Peguis Indian Band and then to the Selkirk Settlers. Its main population growth throughout the mid-nineteenth century was through in-migration of Métis people, both French-Catholics and English-Protestants, who chose Red River as a place to settle.[2]

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[1] Reasons of the Court of Appeal, Appellants' Record, Vol. III, p. 37; Reasons of the Trial Judge, Appellants' Record, Vol. I, p. 56.
[2] Reasons of the Court of Appeal, Appellants' Record, Vol. III, pp. 27-29; Reasons of the Trial Judge, Appellants' Record, Vol. I, p. 16.

3. By 1869, the settlement had well-developed legislative and judicial institutions. From 1835 on, it was governed by the Council of Assiniboia, which was made up of community representatives, many of whom were Métis. The legal system consisted of a General Quarterly Court that exercised civil and criminal jurisdiction as well as magistrates' courts that dealt with minor matters. Métis members of the community participated fully in the legal system as jurors, magistrates and in the case of Dr. John Bunn as the Recorder (or senior judge) of the Quarterly Court.[3]

4. In addition, the Métis played an important role in the economic life at Red River. Many Métis were involved in the buffalo hunt and robe trade which grew in significance over the period of time between the 1840s and 1860s. However, by the early 1860s, the westward retreat of the buffalo made it increasingly difficult to carry on the hunt from Red River, resulting in some out-migration. For example, in 1864 twenty-five French Métis families were reported in the newspaper as having left Red River for Lac La Biche, Alberta in order to be closer to the herds.[4]

5. The buffalo trade was by no means the only occupation of the Red River Métis. The vibrancy of the community and the important role that the Métis played in it is portrayed in the settlement's newspaper, the *Nor'-Wester*, in an article dated July 13, 1867. The article reports:[5]

> . . . the half castes not only far outnumber all the other races put together but engross or did lately all the more important and intellectual offices in the colony; furnishing from their number the sheriff, the principal medical officer, the postmaster, the schoolmasters and teachers through out [sic] the country, a fair portion of the magistrates and clergy and one of the editors and proprietors of the only newspaper of the Hudson's Bay Territories.

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[3] Reasons of the Court of Appeal, Appellants' Record, Vol. III, p. 30; Reasons of the Trial Judge, Appellants' Record, Vol. I, pp. 25 and 187. The Council laws are in Exhibit 1-2005, Appellants' Record, Vol. XXIII, for example at pp. 156-172.

[4] Reasons of the Court of Appeal, Appellants' Record, Vol. III, p. 30; Reasons of the Trial Judge, Appellants' Record, Vol. I, pp. 21-23; Exhibit TE 14, Appellants' Record, Vol. XXV, pp. 110, 111; Exhibit TE 35, Appellants' Record, Vol. XXVII, pp. 109, 113, 114; Exhibit 1-0254, Respondent's Record, p. 61.

[5] Reasons of the Court of Appeal, Appellants' Record, Vol. III, p. 31; Exhibit 1-0263, Appellants' Record, Vol. VII, p. 3.

6. The Métis at Red River did not live a communal lifestyle. They owned land on an individual basis. The Selkirk Treaty of 1817 had secured for settlement the land along the Red and Assiniboine Rivers, extending back for two miles, and lots had been laid out along this tract. Ownership and transfer of ownership of these lots took place according to local custom, sometimes being recorded in the settlement's land registry book, called Register B, and sometimes occurring through occupation. Starting in about 1839, the Council of Assiniboia passed laws that gave the landowners within the portion of the settlement referred to as the settlement belt, the exclusive right to cut hay on the two miles of land directly behind their river lots.[6]

7. Even the buffalo hunt was carried out on an individual basis, with each hunter retaining personal ownership of the animals he killed and using his family members to prepare the skins for sale.[7]

The Entry of Manitoba into Confederation

8. In 1868 and 1869, Canada and Britain entered into discussions about the possible transfer of Rupert's Land and the Northwestern Territories to Canada. This caused a high level of anxiety in the Red River settlement and the Red River resistance followed.[8]

9. At Louis Riel's instigation, the community came together in November 1869 at the Convention of Twenty-Four and in January 1870 at the Convention of Forty. Both Métis and non-Métis residents had the opportunity to vote for Convention representatives and the delegates themselves were reflective of the diversity in the community. Following an invitation by Prime Minister Macdonald, the community selected three non-Métis delegates, Father Ritchot,

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[6] Reasons of the Court of Appeal, Appellants' Record, Vol. III, p. 29; Reasons of the Trial Judge, Appellants' Record, Vol. I, pp. 19, 20; Exhibit 1-2005, Appellant's Record, Vol. XXIII, p. 85.
[7] Reasons of the Trial Judge, Appellants' Record, Vol. I, p. 22; Exhibit 1-0236, Appellants' Record, Vol. VI, p. 62; Exhibit 1-0237, Appellants' Record, Vol. VI, p. 67; Exhibit 1-1382, Appellants' Record, Vol. XIX, p. 168.
[8] Reasons of the Court of Appeal, Appellants' Record, Vol. III, pp. 31, 32; Reasons of the Trial Judge, Appellants' Record, Vol. I, p. 26.

Judge Black and businessman Alfred Scott to travel to Ottawa to represent the settlement in discussions with Canada.[9]

10. In March 1870, the Red River settlement formed a Provisional Government that came into session under the name of the Legislative Assembly of Assiniboia. A Constitution was enacted with the voting franchise being given to men resident in Assiniboia for a minimum of five years with "rateable property to the amount of £200 sterling"; a court system was organized with Métis James Ross being appointed Chief Justice of Assiniboia;[10] laws were passed, a postal system was put in place and customs duties were enforced.[11]

11. By letter dated March 22, 1870, Thomas Bunn, on behalf of the Provisional Government provided instructions to the three delegates. They were advised "that [they were] not empowered to conclude finally any arrangements with the Canadian Government" and "that any conclusions arrived at . . . must first be certified by the Provisional Government before Assiniboia [would] become a province of the Confederation."[12] Further, the delegates carried with them two List of Rights that sought, among other matters, that the settlement enter Confederation as a province and that the local legislature have control over the public lands.[13]

12. The Red River delegates began their meetings with Prime Minister Macdonald and the Honourable George-Étienne Cartier on April 25, 1870. Macdonald and Cartier accepted the demand for the creation of a new province but would not accede to the demand for transfer of control of the Crown land. The idea for a land grant to the Métis children then arose and ultimately resulted in s. 31 of the *Manitoba Act, 1870.*[14]

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[9] Reasons of the Court of Appeal, Appellants' Record, Vol. III, pp. 34-36; Reasons of the Trial Judge, Appellants' Record, Vol. I, pp. 29-36; Exhibit TE 16, Appellants' Record, Vol. XXV, p. 160; Evidence of C.L. Macdonald, April 19, 2006, Appellants' Record, Vol. V, Tab L, pp. 97, 98.
[10] Exhibit 1-0408, Appellants' Record, Vol. IX, pp. 8, 9, 11.
[11] Exhibit 1-0434, Respondent's Record, pp. 63-108.
[12] Exhibit 1-0424, Appellants' Record, Vol. IX, pp. 115, 116.
[13] Exhibits 1-0422, 1-0424, 1-0431, Appellants' Record, Vol. IX, pp. 112, 116-120, 151, 152.
[14] Reasons of the Court of Appeal, Appellants' Record, Vol. III, p. 38; Reasons of the Trial Judge, Appellants' Record, Vol. I, pp. 38-40.

13. The *Manitoba Act, 1870* was passed by Parliament on May 10, 1870 and received Royal Assent two days later. On June 23, 1870, the Imperial Government passed an *Order-in-Council* admitting Rupert's Land and the Northwestern Territories into Canada, effective July 15, 1870.[15]

14. On June 24, 1870, Father Ritchot addressed the Legislative Assembly of Assiniboia and advised the members of the outcome of the discussions with Canada. Following his presentation, the Assembly voted unanimously to accept the terms of the *Manitoba Act*.[16]

The Manitoba Legislature and the Implementation of the Section 31 Land Grants within the Province

15. The first election in the province of Manitoba was held on December 30, 1870. By virtue of s. 17 of the *Manitoba Act, 1870*, eligible voters had to have been resident in the settlement before the passage of the *Act.* Thus, the electorate for this first election was very reflective of the same individuals who had created the provisional government and who had voted to accept the terms of the *Manitoba Act.* Twenty-four members were elected, of whom eleven or twelve were Métis and four were French Canadian supporters of the Métis.[17]

16. On April 25, 1871, Canada passed the *Order-in-Council* that set the basic scheme for the distribution of the lands authorized by s. 31 of the *Manitoba Act.* The *OIC* indicated that the lands were to be distributed by random draw among "every half-breed resident in the province of Manitoba" as of July 15, 1870.

17. In the spring of 1871, new immigrants began to arrive in Manitoba, with 1,500 arriving that year.[18] The arrival of the new immigrants raised concerns among the Métis. In response, seven members of the Manitoba legislature wrote to Lieutenant Governor Archibald on May 24, 1871 in an effort to "tranquilize the public mind" and requested assurances on behalf of "the

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[15] Reasons of the Court of Appeal, Appellants' Record, Vol. III, p. 37; Reasons of the Trial Judge, Appellants' Record, Vol. I, pp. 49, 53.
[16] Reasons of the Court of Appeal, Appellants' Record, Vol. III, p. 43; Reasons of the Trial Judge, Appellants' Record, Vol. I, p. 53; Exhibit 1-0408, Appellants' Record, Vol. IX, p. 52.
[17] Exhibit 1-0554, Appellants' Record, Vol. XIII, p. 138; Evidence of G. Ens, May 18, 2006, Appellants' Record, Vol. V, Tab N, pp. 173-175.
[18] Exhibit 1-0664, Appellants' Record, Vol. XIV, p. 163.

half-breed population" in respect of "the lands which are guaranteed to them by the Act of Manitoba."[19]

18. On June 9, 1871, Lieutenant Governor Archibald replied and indicated that if "any parish of half-breeds, or any body of half-breeds" was to select land that he would "adopt, as far as possible the selections made by the half-breeds."[20] As a result of this letter, the parishes did select lands which were set aside and from which, to a large extent, the s. 31 lands were ultimately granted.[21] Bishop Taché wrote to the Prime Minister on January 23, 1872 stating that the Lieutenant Governor had acted "to please the half-breeds". He further indicated his approval of the *OIC April 25, 1871*, asking that it be "maintained", and praised the Lieutenant Governor for acting "wisely and in the interests of the Canadian Government as well as the Province of Manitoba".[22]

19. In August 1871, Canada entered into Treaties 1 and 2 which extinguished Indian title throughout the original boundaries of the province and cleared the way for the s. 31 grants to occur.[23] Given Canada's flexible policy, Métis were given the option to enter treaty if they so desired.[24]

20. In response to continued anxiety concerning the s. 31 grants, the Legislative Council and Legislative Assembly of Manitoba sent a letter dated February 8, 1872 to the Governor

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[19] Reasons of the Court of Appeal, Appellants' Record, Vol. III, p. 49; Reasons of the Trial Judge, Appellants' Record, Vol. I, p. 61; Exhibit 1-0620, Appellants' Record, Vol. XIV, p. 44.
[20] Reasons of the Court of Appeal, Appellants' Record, Vol. III, p. 49; Reasons of the Trial Judge, Appellants' Record, Vol. I, p. 62; Exhibit 1-0620, Appellants' Record, Vol. XIV, pp. 44, 45.
[21] Reasons of the Court of Appeal, Appellants' Record, Vol. III, pp. 49, 54; Reasons of the Trial Judge, Appellants' Record, Vol. II, p. 139; Exhibit TE 25, Appellants' Record, Vol. XXVII, p. 69.
[22] Reasons of the Court of Appeal, Appellants' Record, Vol. III, p. 52; Reasons of the Trial Judge, Appellants' Record, Vol. I, p. 64; Exhibit 1-0680, Appellants' Record, Vol. XIV, p. 183.
[23] Reasons of the Court of Appeal, Appellants' Record, Vol. III, p. 51.
[24] The evidence at trial showed one such situation. Angelique Richard (*nee* Roulette) an ancestor of one of the appellants entered treaty in 1874 at age 12, presumably with her parents. She later withdrew from treaty in 1886 and received supplementary scrip, see Exhibit TE 02, Appellants' Record, Vol. XXV, p. 39. There is no evidence in the record as to how many Red River Métis chose Indian status but the fact that some did is one explanation for the smaller number of Métis identified in 1875 when the Machar-Ryan survey was undertaken (see paragraph 28 in the factum below).

General, requesting that Canada honour the "reserves in block taken by the Half-Breed population" in response to Lieutenant Governors Archibald's offer and further asserting:[25]

> That this grant constitutes an absolute right of property in favour of the recipients, and that the considerations for which the grant was given entitle the recipients to the rights assured by common law to the owners of individual property.

21. In February of 1873, Canada began to allot the s. 31 lands but then concerns surfaced as to whether Canada had been correct in including the Métis heads of families in the grant. In some personal notes, Father Ritchot described a public assembly held on February 13, 1873, which resulted in a resolution being passed and forwarded to the Governor General that called for distribution of the s. 31 lands "among the children of the family heads and not the heads of families."[26] Robert Cunningham, the Member of Parliament for Marquette, raised the matter in the House of Commons and ultimately the Prime Minister indicated that the government had come to the conclusion that the lands should only be distributed among the children. The Métis of St. Vital wrote to Cunningham on July 23, 1873 thanking him for his efforts and telling him that his "name is already written for ever in our grateful memory."[27] Canada subsequently passed legislation to clarify the grant and to define the recipients, not by age but as "all those of mixed blood, partly white and partly Indian, and who are not heads of families": *An Act to remove doubts as to the construction of section 31 of the Act 33 Victoria, chapter 3 and to amend section 108 of the Dominion Lands Act*, S.C. 1873 (36 Vict.), c. 38.[28]

22. At around the same time, Bishop Taché and Father Ritchot met with Lieutenant Governor Morris to request that the s. 31 lands be entailed. However, this was not in accordance with the wishes of the Métis stakeholders. The Lieutenant Governor wrote to Prime Minister Macdonald

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[25] Reasons of the Court of Appeal, Appellants' Record, Vol. III, p. 52; Reasons of the Trial Judge, Appellants' Record, Vol. I, pp. 65, 66; Exhibit 1-0687, Appellants' Record, Vol. XIV, p. 191.
[26] Exhibit 1-0834, Appellants' Record, Vol. XV, p. 156.
[27] Exhibit 1-0891, Appellants' Record, Vol. XVI, p. 66.
[28] Reasons of the Court of Appeal, Appellants' Record, Vol. III, p. 56; Reasons of the Trial Judge, Appellants' Record, Vol. I, p. 72.

on February 14, 1873, indicating that "I think [the proposal to entail] is dead already. I had a deputation from St. Norbert yesterday to oppose it."[29]

23. On March 8, 1873, Manitoba passed *The Half-Breed Land Grant Protection Act*, S.M. 1873 (37 Vict.), c. 44.[30] The preamble to this *Act* acknowledged that many people had been entering into contracts to sell their s. 31 interests, often for inadequate consideration. The *Act* made any contracts that had been entered into for the sale of s. 31 interests voidable at the behest of the Métis vendor, prevented the Métis vendor from being sued for breach of contract and provided that any money paid prior to the passage of the *Act* was a recoverable debt. No further provincial legislation dealing with s. 31 interests was passed until 1877, thus effectively creating a seven year "cooling off" period in which any contract for the sale of such an interest could be voided. The Lieutenant Governor reserved royal assent on the basis that the *Act* was "novel and retroactive". Ultimately the Governor General, on the recommendation of the federal Minister of Justice, concluded that since the *Act* was beneficial to the Métis it ought to be proclaimed.[31]

24. Father Ritchot travelled to Ottawa in May 1873 to continue his advocacy in respect of the s. 31 grants. He wrote to Bishop Taché on May 12, 1873 and expressed approval for Canada's decision to remove the heads of families from the grant. He also indicated that he would continue his lobbying efforts with ministers concerning outstanding issues regarding the two miles of hay lands situated beyond the river lots.[32] Ultimately, Canada agreed that the outer two miles ought to be removed from the inventory of lands available for distribution under s. 31 and passed *OIC September 6, 1873* to that effect. The hay lands were then dealt with in accordance with s. 32 of the *Manitoba Act.*

25. The Manitoba legislature had been anxious to secure a benefit for the original European settlers and had included a request for such a benefit in the February 8, 1872 letter to the

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[29] Reasons of the Court of Appeal, Appellants' Record, Vol. III, p. 56; Exhibit 1-0818, Appellants' Record, Vol. XV, p. 134.
[30] *The Half-Breed Land Grant Protection Act*, S.M. 1873 (37 Vict.), c. 44 [Manitoba's Authorities, Vol. II, Tab 54].
[31] Reasons of the Court of Appeal, Appellants' Record, Vol. III, pp. 58, 59; Reasons of the Trial Judge, Appellants' Record, Vol. I, pp. 74-77; Exhibit 1-0955, Appellants' Record, Vol. XVI, p. 156.
[32] Exhibit 1-0878, Appellants' Record, Vol. XVI, p. 62.

Governor General.[33] In 1874, Canada enacted legislation that gave scrip for 160 acres to the "original white settlers" and compensated the Métis heads of families for their removal from the s. 31 scheme with a similar grant: *An Act respecting the appropriation of certain Dominion Lands in Manitoba*, S.C. 1874 (37 Vict.), c. 20. A total of 3,186 scrip certificates were issued to Métis heads of families and 800 scrip certificates to the original white settlers.[34]

26. The second provincial election was held in December 1874. Of the twenty-four members elected to the Assembly, eight were Métis and four were French Canadian supporters of the Métis.[35]

27. By 1875, frustration was growing within Manitoba at the length of time it was taking to complete the distribution of the s. 31 lands. Four Manitoba parishes, St. Paul's, Kildonan, St. Andrew's North and St. Andrew's South, sent petitions signed by a large number of Métis residents to the Governor General complaining about the delay and its effect on the prosperity of the province. The petitioners sought to have Canada expedite the process so as to get the land into "the hands of the Half-breeds, either to cultivate or dispose of."[36] These petitions were followed up by an address to the Governor General from the Legislative Council and Legislative Assembly of Manitoba dated May 11, 1875, that urged Canada to move forward with the process.[37]

28. During the summer and fall of 1875, the Machar and Ryan Commission operated within Manitoba to verify the claimants of the s. 31 grants. In addition, the Commissioners enumerated those entitled to scrip as an original white settler or as a Métis head of family. The Commission identified 5,088 Métis children.[38]

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[33] Exhibit 1-0687, Appellants; Record, Vol. XIV, p. 191.
[34] Reasons of the Court of Appeal, Appellants' Record, Vol. III, p. 57.
[35] Reasons of the Court of Appeal, Appellants' Record, Vol. III, p. 60; Evidence of G. Ens, May 18, 2006, Appellants' Record, Vol. V, Tab N, pp. 175-176; Exhibit TE 38, Respondent's Record, p. 132.
[36] Exhibits 1-1034, 1-1039, 1-1040, 1-1041, Appellants' Record, Vol. XVII, pp. 63, 76, 90, 100; Reasons of the Court of Appeal, Appellants' Record, Vol. III, p. 60; Reasons of the Trial Judge, Appellants' Record, Vol. II, pp. 121, 123.
[37] Exhibit 1-1025, Appellants' Record, Vol. XVII, p. 57.
[38] Reasons of the Court of Appeal, Appellants' Record, Vol. III, pp. 61, 62, 132; Reasons of the Trial Judge, Appellants' Record, Vol. I, p. 77.

29. On October 30, 1876, Canada began to allot the s. 31 grants and in 1877 the Crown patents began to issue.[39]

30. Shortly after the allotment process began, the Executive Council of Manitoba, consisting of Premier Davis and the Honourable Members Royal and Norquay, sent an address to the Privy Council dated November 18, 1876 requesting that as soon as the allotments were drawn public notice should be made so that children of full age could settle or sell the land without having to wait for the patent to issue.[40] A second address from the Manitoba Legislative Assembly dated February 19, 1877 reiterated this position.[41]

31. Canada, thereafter, decided to make the allotments public and issued posters advising the allottees of the legal description of the parcel that had been assigned to them and for which they ultimately would receive patent.[42] In the end, Canada distributed in excess of 1.4 million acres to 6,034 recipients and 993 scrip certificates to late applicants.[43]

32. On February 28, 1877, the Manitoba legislature passed *An Act to amend the Act passed in the 37th year of Her Majesty's reign, entitled "The Half-Breed Land Grant Protection Act"*, S.M. 1877 (40 Vict.), c. 5. This *Act* provided that sales by deed of s. 31 interests would be "legal and effectual for all purposes . . . and shall transfer to the purchaser the rights of the vendor thereto." This is the first of eight provincial statutes that the appellants allege to be unconstitutional. The remainder were passed between 1878 and 1885 during the premiership of John Norquay (1878-1887). All were repealed prior to the Statement of Claim being issued in this matter.

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[39] Reasons of the Court of Appeal, Appellants' Record, Vol. III, p. 63; Reasons of the Trial Judge, Appellants' Record, Vol. I, p. 84; Exhibit TE 18, Appellants' Record, Vol. XXVI, p. 59.
[40] Exhibit 1-1220, Appellants' Record, Vol. XVIII, pp. 81-83.
[41] Exhibit 1-1255, Appellants' Record, Vol. XVIII, p. 182.
[42] Exhibit 1-0017, Appellants' Record, Vol. VI, pp. 45, 46; Reasons of the Court of Appeal, Appellants' Record, Vol. III, p. 64; Reasons of the Trial Judge, Appellants' Record, Vol. I, pp. 85, 86.
[43] Reasons of the Court of Appeal, Appellants' Record, Vol. IV, p. 34; Exhibit TE 18, Appellants' Record, Vol. XXVI, pp. 59, 64. See the evidence concerning Madeline Sayiese, Theophile Richard and Angelique Richard for three examples of individuals who received scrip; Exhibit TE 02, Appellants' Record, Vol. XXIV, p. 160 and Exhibit 1-1682, Appellants' Record, Vol. XXII, pp. 95-97; Exhibit TE 02, Appellants' Record, Vol. XXV, p. 39 and Exhibit 1-0052, Appellants' Record, Vol. VI, pp. 47, 48; Exhibit TE 02, Appellants' Record, Vol. XXV, p. 39 and Exhibit 1-0053, Appellants' Record, Vol. VI, pp. 49, 50.

33. The trial Judge found the Manitoba statutes to be constitutional as falling within provincial power under property and civil rights, s. 92(13) and the administration of justice, s. 92(14) of the *Constitution Act, 1867*. He further found that the doctrine of laches applied and that there was no reasonable explanation for the gross delay in bringing the claim. He concluded that Manitoba had been prejudiced by the delay in that it had been deprived of the opportunity to amend its statutes if the court concluded that this was necessary to restore constitutional order.[44] The Manitoba Court of Appeal declined to rule on the constitutionality of the Manitoba statutes on the basis that the appeal was moot.[45] Leave to appeal to this Court was granted on February 10, 2011. A motion by the appellants to state constitutional questions in respect of the Manitoba statutes under Supreme Court Rule 60 was denied by the Chief Justice on May 13, 2011.

[44] Reasons of the Trial Judge, Appellants' Record, Vol. I, pp. 159-164.
[45] Reasons of the Court of Appeal, Appellants' Record, Vol. III, pp. 150, 151.

PART II

QUESTIONS IN ISSUE

34. The Attorney General of Manitoba will address the following issues raised by the appellants:

Mootness:

The Attorney General of Manitoba submits that the Court of Appeal was correct in applying the doctrine of mootness and declining to rule on the constitutionality of repealed legislation.

Standing:

The Attorney General of Manitoba submits that there was no palpable and overriding error in denying standing to the Manitoba Metis Federation Inc. to bring the claim.

Provincial Legislation:

The Attorney General of Manitoba submits that the impugned statutes were *intra vires* as falling within provincial jurisdiction over property and civil rights, matters of a local nature and the administration of civil justice. Moreover, there was no conflicting federal legislation that rendered the statutes inoperative by virtue of the doctrine of federal paramountcy.

PART III

ARGUMENT

A. The Appeal is Moot and Ought Not to be Decided on its Merits

35. The appellants challenge eight Manitoba statutes on the basis that they were, at the time of their operation, *ultra vires* the province or in the alternative that they were inoperative due to paramount historical federal legislation. The statutes, reproduced in Part VII of the factum, are as follows:

> *An Act to amend the Act passed in the 37th year of Her Majesty's reign, entitled "The Half-Breed Land Grant Protection Act"*, S.M. 1877 (40 Vict.), c. 5 [Part VII, Tab 1]
>
> *An Act to enable certain children of Half-breed heads of families to convey their land,* S.M. 1878 (41 Vict.), c. 20 [Part VII, Tab 2]
>
> *An Act to amend the Act intituled: An Act to enable certain children of Half-breed heads of families to convey their land*, S.M. 1879 (42 Vict.), c. 11 [Part VII, Tab 3]
>
> *An Act respecting Half-Breed lands and quieting certain titles thereto,* S.M. 1881 (44 Vict. 3rd Sess.), c. 19 [Part VII, Tab 4]
>
> *An Act to explain certain portions of the Half-Breed Lands Act*, S.M. 1883 (46 & 47 Vict.), c. 29 [Part VII, Tab 5]
>
> *An Act relating to the Titles of Half-Breed Lands,* S.M. 1885 (48 Vict.), c. 30 [Part VII, Tab 6]
>
> *An Act concerning Decrees and Orders on the Equity Side of the Court of Queen's Bench, Manitoba,* S.M. 1884 (47 Vict.), c. 8 [Part VII, Tab 7]
>
> *An Act to provide for the payment to Half-Breeds of the amounts to which they are entitled, and which are invested in securities which cannot be realized,* S.M. 1885 (48 Vict.), c. 34 [Part VII, Tab 8].

36. The first six of these statutes were consolidated in *The Half Breed Lands Act,* R.S.M. 1891, c. 67.[46] This *Act* was continued in various consolidations through to *The Half-Breed Lands Act,* R.S.M. 1954, c. 109.[47] It was finally repealed by *The Statute Law Revision and Statute Law Amendment Act, 1969,* S.M. 1969, c. 34, s. 31.[48] The last two statutes were repealed in 1892 by *An Act Respecting the Revised Statutes of Manitoba,* S.M. 1892 (55 Vict.), c. 41.[49]

37. The Manitoba Court of Appeal declined to rule on the constitutionality of the provincial statutes on the basis that the issue was moot. More specifically, Scott C.J.M. concluded: [50]

> In my opinion, the appellants are essentially seeking a private reference regarding the constitutionality of certain spent, repealed provisions. . .
>
> [I]f this court were to exercise its discretion to decide these moot constitutional issues, it could open up other spent or repealed constitutional statutes to judicial review. . .
>
> In my opinion, the fact that the only relief sought is a declaration in aid of extra-judicial political relief weighs in favour of this court declining to exercise its jurisdiction to decide these moot matters.

38. Manitoba submits that this case raises squarely the role of the courts and more particularly whether the courts ought to provide general legal opinions to private parties for the sole purpose of influencing political and policy outcomes.

39. The Manitoba Court of Appeal relied on this Court's decision in *Borowski v. Canada (Attorney General)*[51] in declining to rule on the constitutionality of Manitoba's repealed statutes.

40. In *Borowski*, this Court discussed the doctrine of mootness and the two-step analysis involved in its application. The first step entails an inquiry into whether a live dispute exists

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[46] *The Half Breed Lands Act,* R.S.M. 1891, c. 67 [Manitoba's Authorities, Vol. II, Tab 55].
[47] *The Half-Breed Lands Act,* R.S.M. 1954, c. 109 [Manitoba's Authorities, Vol. II, Tab 56].
[48] *The Statute Law Revision and Statute Law Amendment Act, 1969,* S.M. 1969, c. 34 [Manitoba's Authorities, Vol. II, Tab 64].
[49] *An Act Respecting the Revised Statutes of Manitoba,* S.M. 1892 (55 Vict.), c. 41 [Manitoba's Authorities, Vol. II, Tab 63].
[50] Reasons of the Court of Appeal, Appellants' Record, Vol. III, pp. 150, 151, paras. 368, 372, 373.
[51] *Borowski v. Canada (Attorney General),* [1989] 1 S.C.R. 342 [*Borowski*] [Appellants' Authorities, Vol. I, Tab 8].

between the parties. The Court relied on two earlier decisions, *Moir v. The Corporation of the Village of Huntingdon*[52] and *Attorney-General for Alberta v. Attorney-General for Canada,*[53] for the proposition that once legislation has been repealed a legal challenge is moot. Based on these decisions, this Court ruled that the *Borowski* appeal was moot since the substratum of the appeal had disappeared.

41. The second step in the *Borowski* analysis is for the court to determine whether to hear a case that would otherwise be moot. Sopinka J. cautioned in *Borowski* that the discretion must be "judicially exercised with due regard for established principles."[54] Factors to be considered include whether an adversarial context continues to exist, the need to ration scarce judicial resources and the need for the court to be cognizant of its role as the adjudicative branch within the Canadian political framework.[55]

42. The third of these principles was the factor that influenced the Manitoba Court of Appeal in deciding not to determine the constitutionality of the repealed Manitoba legislation. As in *Borowski,* Scott C.J.M. concluded that a court ought not to give a bare legal opinion on a constitutional matter, for to do so would turn the appeal into a private reference. The Manitoba Court of Appeal declined to be co-opted into providing a legal opinion in the absence of a live dispute.

43. Subsequent to *Borowski,* numerous courts have declined to rule on the constitutionality of repealed statutes: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court*

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[52] *Moir v. The Corporation of the Village of Huntingdon* (1891), 19 S.C.R. 363 [Manitoba's Authorities, Vol. I, Tab 25].
[53] *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117 (P.C.) [Manitoba's Authorities, Vol. I, Tab 1].
[54] *Borowski, supra* at 358 [Appellants' Authorities, Vol. I, Tab 8].
[55] *Borowski, supra* at 358-363 [Appellants' Authorities, Vol. I, Tab 8].

of Prince Edward Island,[56] *Kennett v. Manitoba (Attorney General),*[57] *Edmonton (City) v. Grimble,*[58] *Payne v. Wilson,*[59] *L. (C.P.), Re,*[60] *McKenzie v. British Columbia (Ministry of Public Safety and Solicitor General).*[61]

44. The appellants argue that the doctrine of mootness has no application to this case because of the decision of this Court in *Dumont v. Canada (Attorney General).*[62] *Dumont* was rendered on a motion to strike brought by Canada in respect of this litigation. Manitoba did not participate in the motion.

45. *Dumont* was decided a year after *Borowski* but makes no mention of it. Manitoba submits that *Dumont* must be understood as a ruling on a preliminary motion to strike. The conclusion was that the matter should proceed to trial and that "declaratory relief may be granted in the discretion of the court . . ."[63] In other words, all the Court decided was that it was not plain and obvious that the case would fail. The acknowledgment that discretion rested with the trial judge is an explicit recognition by the Court that all relevant legal principles, including those articulated in *Borowski*, were still to be considered. To interpret the *Dumont* decision in the manner suggested by the appellants amounts to this Court having ordered a private reference, something it had unanimously concluded only one year before was not the proper role for a court.

46. It was, of course, open to the individual appellants' ancestors to challenge the legislation during the years it was operational. There were no legal or practical impediments to such an action. The Métis and their supporters in the Catholic clergy were well aware of how

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[56] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 at para. 249 [Manitoba's Authorities, Vol. II, Tab 41].
[57] *Kennett v. Manitoba* (Attorney General) (1998), 129 Man. R. (2d) 244 (C.A.) [Manitoba's Authorities, Vol. I, Tab 19].
[58] *Edmonton (City) v. Grimble* (1996), 37 Alta. L. R. (3d) 437, 1996 CarswellAlta 159 (C.A.) [Manitoba's Authorities, Vol. I, Tab 14].
[59] *Payne v. Wilson* (2002), 162 O.A.C. 48, 2002 CarswellOnt 2224 (C.A.) [Manitoba's Authorities, Vol. II, Tab 31].
[60] *L. (C.P.), Re* (1993), 112 Nfld. & P.E.I.R. 148, 1993 CarswellNfld 312 (C.A.) [Manitoba's Authorities, Vol. I, Tab 21].
[61] *McKenzie v. British Columbia (Ministry of Public Safety and Solicitor General*), 2007 BCCA 507, 2007 CarswellBC 2501 [Manitoba's Authorities, Vol. I, Tab 23].
[62] *Dumont v. Canada (Attorney General)*, [1990] 1 S.C.R. 279 [*Dumont*] [Appellants' Authorities, Vol. I, Tab 2].
[63] *Ibid.* at 280 [Appellants' Authorities, Vol. I, Tab 2].

to access the upper echelons of government if there were issues to be resolved. They had already been successful in having the Lieutenant Governor set aside their lands for allotment on a parish-by-parish basis, and they had successfully lobbied Canada to reverse its decision to include the heads of family in the s. 31 distribution. They had secured an *ex gratia* scrip allocation for heads of family as compensation for their removal from the s. 31 scheme. They had persuaded Canada to remove the outer two miles of hay land behind the river lots from the land available for distribution under s. 31. But the Métis did not lobby the province to amend or repeal the impugned legislation, the inference being that it met with their general approval.

47. In addition to lobbying, the Métis and their leaders also had the option of petitioning the Governor General to disallow the legislation. This was an accepted, inexpensive and frequently used method of obtaining a constitutional remedy during the nineteenth century.[64] But no petition was brought seeking the Governor General's intervention.

48. Nor was any action brought in court to challenge the constitutionality of the legislation. This is in sharp contrast to what occurred a few years later when the province passed legislation dealing with denominational schools. The Catholic community mobilized in opposition and pursued the matter to the Privy Council. When that result was not deemed satisfactory, the community, under the leadership of Archbishop Taché, collected over 4,257 names on a petition and convinced the Governor General to submit a reference to the Supreme Court of Canada. This case was also appealed to the Privy Council. The trial Judge concluded that it was "safe to infer that many of the signatories [to the petition] would have been Métis" and that it was "clear that those members of the community including their leadership were alive to their rights . . . and of the remedies they had in the event of an occurrence which they considered to be a breach."[65]

49. While the trial Judge did not rely on the doctrine of mootness, he did conclude that the doctrine of laches was a full defence to the claim. More particularly, he concluded that there

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[64] Exhibit 1-0259, Appellants' Record, Vol. VI, pp. 173, 191-193.

[65] Reasons of the Trial Judge, Appellants' Record, Vol. I, p. 152, para. 435; *Barrett v. City of Winnipeg*, [1892] A.C. 445 (P.C.) [Manitoba's Authorities, Vol. I, Tab 3]; *Brophy and Others v. Attorney-General of Manitoba*, [1895] A.C. 202 (P.C.) [Manitoba's Authorities, Vol. I, Tab 5]. The petition is included in the Supreme Court of Canada reasons: see *In re Certain Statutes of the Province of Manitoba Relating to Education* (1894), 22 S.C.R. 577 at 601-605 [Manitoba's Authorities, Vol. I, Tab 18].

was gross delay on the part of the appellants in pursuing the claim and that Manitoba was prejudiced by the delay in that it had been deprived of an opportunity to take direction from the courts and amend its statutes.[66] While directed to the doctrine of laches, the trial Judge's comments are equally relevant to the doctrine of mootness and the exercise of discretion as contemplated in the second stage of the *Borowski* analysis.

50. The role of the courts in the constitutional context is to restore constitutional order by striking down offending legislation and in so doing to pronounce on relevant constitutional principles. This, in turn, permits the legislative branches to respond accordingly. As this Court observed in *Vriend v. Alberta*:[67]

> As I view the matter, the *Charter* has given rise to a more dynamic interaction among the branches of governance. This interaction has been aptly described as a "dialogue" by some (see e.g. Hogg and Bushell, *supra*). In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches. As has been pointed out, most of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives (see Hogg and Bushell, *supra*, at p. 82). By doing this, the legislature responds to the courts; hence the dialogue among the branches.
>
> To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the *Charter*). This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.

51. Manitoba submits that a ruling on the constitutionality of the impugned statutes at this late date would amount to a significant departure from this Court's legitimate role in the constitutional framework. Such a ruling would not be for the purpose of restoring constitutional order, since the statutes are no longer in existence. Nor would it be for the purpose of furthering a dialogue with the Manitoba legislature, since the objectives of the impugned statutes are no

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[66] Reasons of the Trial Judge, Appellants' Record, Vol. I, pp. 157-164, paras. 449-460.
[67] *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at paras. 138-139 [Manitoba's Authorities, Vol. II, Tab 49].

longer relevant. Nothing that the Court is being asked to decide in respect of the Manitoba statutes has any legal impact going forward. Rather, a decision on the merits would be a bare legal opinion designed to strengthen the bargaining power of one side or the other in a potential land claim negotiation, which the appellants have identified as the purpose of this litigation in paragraph 11 of the Amended Statement of Claim.

52. The *Dumont* decision does recognize that a declaration may be granted in aid of extra-judicial relief in an appropriate case. Placed in the context of a motion to strike, that comment must be understood as meaning that the mere fact that the Statement of Claim articulates this as the purpose of the declaration should not be determinative of the motion. However, nothing in the *Dumont* decision indicates that the trial judge should refrain from applying all relevant legal principles, including exercising restraint so as to maintain the court's proper role within Canada's constitutional democracy.

53. The recent decision of *Canada (Prime Minister) v. Khadr*[68] is an example of this Court making a bare declaration of a violation of constitutional rights, the sole purpose of which was to influence the actions of the federal executive branch in its relations with the United States government. That declaration, however, involved a live controversy as to whether there was an ongoing violation of *Charter* rights. After a full review of the relevant legal principles, this Court concluded that "courts possess a narrow power to review and intervene on matters of foreign affairs to ensure the constitutionality of executive action . . ."[69] In other words, the case had a real, practical and legal effect on continuing government action. In contrast, the legislation and any activities governed by it in the case at bar are long since spent.

54. It is of course true that there has already been full argument on the constitutionality of the impugned statutes at both trial and on appeal, but this does not justify this Court departing

[68] *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44 [Manitoba's Authorities, Vol. I, Tab 7].
[69] *Ibid*. at para. 38.

from its traditional role. This Court was faced with the same reality in *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy).*[70] The majority judgment, per Sopinka J., stated:[71]

> In *Borowski*, although the appeal was fully argued on the merits in the Court of Appeal and in this Court, it was dismissed on the ground of mootness. I cannot, therefore, agree with my colleague Cory J. that the fact that the case was fully argued in the Nova Scotia Court of Appeal and in this Court is sufficient to warrant deciding difficult *Charter* issues and laying down guidelines with respect to future public inquiries simply because to do so might be "helpful".

55. To decide a case where there is no live legal dispute risks the neutrality and thus the reputation of the court. David Mullan and Andrew Roman have argued: [72]

> [T]he more a court is willing to enter into broad moral or policy discussions with limited legal underpinnings, the more it runs the danger of politicizing its role inappropriately and ultimately losing respect as a neutral arbiter of concrete disputes. Moreover, if the Court only responds in situations where there is a real *lis*, it preserves the appearance of neutrality far more than it does by engaging in apparent case selection or agenda management by allowing some members of the public to invoke its jurisdiction in the absence of a *lis.*

56. A ruling on the constitutionality of long-repealed legislation would effectively grant certain members of the public access to this Court in the absence of a *lis.* This is an appropriate case to apply the doctrine of mootness. The doctrine is one way that courts exercise restraint to maintain their proper function. As this Court stated in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*:[73]

> Concern for the limits of the judicial role is interwoven throughout the law. The development of the doctrines of justiciability, and to a great extent mootness, standing, and ripeness resulted from concerns about the courts

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[70] *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 [Manitoba's Authorities, Vol. II, Tab 32].
[71] *Ibid*. at para. 13.
[72] *Mullan and Roman, Minister of Justice of Canada v. Borowski: The Extent of the Citizen's Right to Litigate the Lawfulness of Government Action,* (1984) 4 Windsor Yearbook of Access to Justice 303 at 335 [Manitoba's Authorities, Vol. II, Tab 67].
[73] *Doucet-Boudreau v. Nova Scotia (Minister of Education),* [2003] 3 S.C.R. 3 at para. 34 [Manitoba's Authorities, Vol. I, Tab 13].

> overstepping the bounds of the judicial function and their role *vis-à-vis* other branches of government.

57. It would overstep the judicial function to determine the constitutionality of the impugned legislation at this late date. The Attorney General of Manitoba submits that this Court ought not to offer a private reference in this case or in any of the other myriad of situations where modern-day litigants seek to redress perceived historical wrongs. The role of the courts in Canadian constitutional democracy is to restore constitutional order. To the extent that there was ever "constitutional disorder" it was remedied on the repeal of the statutes. There is no opportunity for a constitutional dialogue at this time since there are no statutes for Manitoba to amend. As such, the Attorney General of Manitoba submits that this Court ought to decline to rule on the *vires* of the impugned statutes.

B. The Alternative Argument - The Manitoba Statutes Were Constitutional

58. The appellants challenge the constitutionality of the Manitoba statutes on the basis that they trench on federal power under s. 91(1A) or s. 91(24) of the *Constitution Act, 1867*. Manitoba submits that the statutes fall squarely within its jurisdiction under ss. 92(13), 92(14) and 92(16).

1. **Standing to Challenge the Constitutionality**

59. The Attorney General of Manitoba did not challenge the standing of the individual appellants to bring this action. The evidence established that twelve of these seventeen individuals had ancestors entitled to benefits under s. 31 of the *Manitoba Act*. Information was located on twenty-three land transactions involving the initial sale of these benefits.[74] These transactions would have been governed by the impugned statutes and Manitoba accepted that this provided sufficient connection to ground standing.

60. Manitoba did challenge the standing of the Manitoba Metis Federation Inc. The s. 31 grants were provided to individuals, not to a collective and not to any precursor of a corporate

[74] Reasons of the Trial Judge, Appellants' Record, Vol. I, p. 119, paras. 344, 345; Vol. II, p. 66, para. 772.

entity. The trial Judge concluded that the appellants' claim was "fundamentally flawed" because they sought relief that was "in essence of a collective nature" when, in fact, s. 31 provided for individual grants.[75] Thus, the trial Judge ruled that the Manitoba Metis Federation Inc. did not have standing on the basis that its membership was not co-extensive with those individuals whose ancestors received benefits under the *Manitoba Act* and it did not qualify for public interest standing within the test set out in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration).*[76]

61. A determination of public interest standing is discretionary and ought not to be interfered with in the absence of palpable and overriding error. The Court of Appeal concluded that there was no justification for interfering with the trial Judge's discretion.[77]

62. Similarly, the Attorney General of Manitoba submits that this Court ought not to interfere with the discretion of the trial Judge.

2. **An Overview of the Statutes**

63. The young province of Manitoba faced many daunting hurdles in its first few years. It had to put into place all of its fundamental institutions. It had to address its economic stability, particularly since its major pre-Confederation industry, the Red River-based buffalo hunt, was no longer viable.[78] It needed to absorb new immigrants and it needed to address the social reality of over a million acres of land coming into the possession of its residents under the provisions of s. 31 of the *Manitoba Act*.

64. Immediately upon the passage of the *Manitoba Act*, sales of statutory entitlements to land began. This is not surprising, given that the Métis had always enjoyed the right to manage their individual affairs. Further, there was no dispute in Manitoba that the s. 31 grants were to be treated as any other property. For example, an article in the *Manitoban* newspaper on

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[75] Reasons of the Trial Judge, Appellants' Record, Vol. II, p. 195, paras. 1196-1200.
[76] Reasons of the Trial Judge, Appellants' Record, Vol. I, pp. 138, 139, paras. 399, 400; *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 [Manitoba's Authorities, Vol. I, Tab 8].
[77] Reasons of the Court of Appeal, Appellants' Record, Vol. III, pp. 107, 108, para. 268.
[78] Exhibit TE 35, Appellants' Record, Vol. XXVII, pp. 113, 114.

December 7, 1872 advised the Métis to "hold onto your lands. It may be that you mean to sell ultimately. That's all well. But wait a little. Don't throw it away. By holding on for a year or two, you will in many cases get a great deal more for it that you would readily imagine."[79] The Manitoba legislature also reflected this view when it sent an address dated February 8, 1872 to the Governor General asserting that the recipients of the s. 31 grants were entitled to "the rights assured by common law to the owners of individual property".[80] Bishop Taché and Father Ritchot appreciated that, in the absence of specific legislation imposing an entail, the lands would be alienable under the common law.[81] While the Manitoba legislature had the constitutional jurisdiction to prohibit sales, such a course of action was never contemplated by the Métis leadership as a preferred public policy.

65. However, by 1873, concerns arose that many improvident contracts had been entered into. The Manitoba Legislature addressed this problem by passing *The Half-Breed Land Grant Protection Act*, S.M. 1873 (37 Vict.), c. 44[82] ("*HBLGPA, 1873"*). This *Act* permitted Métis vendors to repudiate any contracts for the sale of s. 31 interests that were entered into prior to the receipt of the patent. This *Act* slowed but did not altogether stop sales.[83]

66. By 1877, the grants of land were starting to flow to the s. 31 recipients. Canada had acceded to Manitoba's request that the allottees be advised of their parcel in advance of the patent. Since the beneficiaries knew their precise lots, Manitoba chose to revisit the issue of the sale of s. 31 lands and to reconsider the absolute right of repudiation of the sale contracts.

Half-Breed Land Grant Act, 1877

67. Creating a more equitable environment for transactions involving s. 31 interests appears to have been the motivation for *An Act to amend the Act passed in the 37th year of Her Majesty's reign, entitled "The Half-Breed Land Grant Protection Act*", S.M. 1877 (40 Vict.), c. 5 ("*HBLGA, 1877"*). In introducing the *Act*, Premier Davis advised that its purpose was to "give

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[79] Exhibit 1-0757, Appellants' Record, Vol. XV, p. 121.
[80] Exhibit 1-0687, Appellants' Record, Vol. XIV, p. 191.
[81] Exhibit 1-0818, Appellants, Record, Vol. XV, p. 134.
[82] *The Half-Breed Land Grant Protection Act*, S.M. 1873 (37 Vict.), c. 44 [Manitoba's Authorities, Vol. II, Tab 54].
[83] Reasons of the Court of Appeal, Appellants' Record, Vol. III, p. 59, para. 121.

satisfaction to the greatest number" and on seconding the motion, Mr. Norquay indicated it was designed to remove a barrier.[84]

68. The method chosen by the legislature to accomplish this goal was to modify the existing law so as to remove the absolute right of repudiation contained in the *HBLGPA, 1873* and to allow binding contracts to be made for the sale of s. 31 interests. The *HBLGA, 1877* specified that the contract had to be by deed, a document under seal. The requirement for a deed created some formality in the creation of the contract, as contrasted with a "memorandum in writing" which could be used to sell other lands in the province.[85]

69. The legislation specified that a contract by deed for the sale of s. 31 interests "shall be held to be legal and effectual for all purposes whatsoever, and shall transfer to the purchaser the rights of the vendor thereto." The legislation, by its very terms and by constitutional necessity, applied to the private property rights of purchasers and vendors and did not in any manner affect the legal title or rights of Canada to public lands in the province.

Half-Breed Land Grant Act, 1878

70. At common law a minor's contract to sell land is not void but voidable within a reasonable time after reaching majority.[86] The reality faced by the Manitoba legislature in 1878 was that minors were selling their s. 31 grants, often with their parents providing mortgages on their own lands as security in the event the contract was voided.[87]

71. The Manitoba legislature chose to address this reality in 1878 with the passage of *An Act to enable certain children of Half-breed heads of families to convey their land*, S.M. 1878 (41 Vict.), c. 20 ("*HBLGA, 1878"*). The *Act* applied to vendors between the ages of eighteen

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[84] Exhibit 1-1257, Appellants' Record, Vol. XIX, p. 3.
[85] *An Act for the Prevention of Frauds and Perjuries*, S.M. 1871 (34 Vict.), c. 3, s. 1 [Manitoba's Authorities, Vol. II, Tab 60].
[86] V. Di Castri, *The Law of Vendor and Purchaser: The Law and Practice Relating to Contracts for Sale of Land in the Common Law Provinces of Canada*, 2nd ed. (Toronto: Carswell, 1976) at 64 [Manitoba's Authorities, Vol. II, Tab 69]; D.W. Waters, *Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984) at 92 [Manitoba's Authorities, Vol. II, Tab 66].
[87] Reasons of the Court of Appeal, Appellants' Record, Vol. III, p. 58, para. 118; Reasons of the Trial Judge, Appellants' Record, Vol. I, p. 74, para. 209.

and under twenty-one. It varied the common law by removing the right of repudiation and replaced it with two other safeguards: the requirement of parental consent to the contract and confirmation by a judge or two justices of the peace that the transaction was voluntary on the part of the child.

72. The *Acts* of 1877 and 1878 jointly governed the initial sale of s. 31 interests by the Métis vendors until their repeal in 1969. Individuals twenty-one and over who wished to sell did so by deed in accordance with the general common law. Individuals between eighteen and under twenty-one who wished to make a binding contract could do so with parental consent and judicial supervision.

73. Parents and guardians also had the option of selling their children's lands through a court order obtained under *An Act respecting Infants and their Estates*, S.M. 1878 (41 Vict.), c. 7.[88] The appellants have not challenged this legislation.

Half-Breed Land Grant Act, 1879; Half-Breed Land Grant Act, 1883

74. The *Acts* of 1879 and 1883 made minor amendments to the *HBLGA, 1878* in order to clarify who was required to give consent to the sale of s. 31 interests by individuals between eighteen and under twenty-one. *An Act to amend the Act intituled: An Act to enable certain children of Half-breed families to convey their land*, S.M. 1879 (42 Vict.), c. 11 ("*HBLGA 1879*") clarified that consent to the sale was required from the mother and father if both were living, from the surviving parent if one was deceased or from the spouse if the child was married. The 1883 *Act* clarified that illegitimate children and unmarried orphans did not require consent: *An Act to explain certain portions of the Half-Breed Lands Act*, S.M. 1883 (46 & 47 Vict.), c. 29.

[88] *An Act respecting Infants and their Estates*, S.M. 1878 (41 Vict.), c. 7 [*The Infants Estates Act*] [Manitoba's Authorities, Vol. II, Tab 58].

Quieting Titles Act, 1881

75. In 1881, the legislature passed *An Act respecting Half-Breed lands and quieting certain titles thereto,* S.M. 1881 (44 Vict. 3rd Sess.), c. 19 (*"The Quieting Titles Act, 1881").* The preamble to this *Act* sets out its purpose. It indicated that there had been a "difference of opinion as to the proper interpretation and effect of certain statutes." Thus the legislature stepped in to clarify its own statutes.

76. The confusion arose because the *HBLGPA, 1873,* which allowed any contract entered into before patent to be voided, had not been repealed. Therefore, it was unclear whether contracts entered into after 1877 for sales in advance of receipt of the patent were binding under the *HBLGA, 1877* or voidable under the *HBLGPA, 1873*. The matter was discussed in *Sutherland v. Thibeaudeau,*[89] with Chief Justice Wood concluding that sales by deed were binding but that sales by "promise or agreement" as set out in the 1873 *Act* were still voidable.

77. Section 1 of *The Quieting Titles Act, 1881* clarified that contracts by deed made before or after patent were binding. Other issues dealt with in the *Act* included the validity of documents signed with a mark and the right of a married woman to sell without her husband's consent. Section 8 made clear that *The Quieting Titles Act, 1881* did not "take away any disability or . . . prevent the operation of any causes such as would invalidate or would have invalidated" any contract. In other words, binding contracts could be made by deed but the *Act* did not validate contracts that were otherwise invalid at common law.

78. The appellants argue at paragraph 187 of their factum that *The Quieting Titles Act, 1881* had the effect of giving the purchaser the right to receive the patent from the Crown. The *Act* does not speak to the issue of the right to receive the Crown patent and there is not a shred of evidence that it was ever interpreted in such a fashion. Properly interpreted, the *Act* addressed the contractual relationship between vendor and purchaser and had no application to the federal Crown. Even if the *Act* was capable of the interpretation that the appellants assert, the

[89] *Sutherland v. Thibeaudeau*, (28 March 1879), Winnipeg (Man. Q.B.) [Manitoba's Authorities, Vol. II, Tab 48].

presumption of compliance with constitutional authority would dictate that it be read down so as to be *intra vires: R. v. McKay et al.*,[90] *R. v. Sharpe*.[91]

Quieting Titles Act, 1885

79. *An Act relating to the Titles of Half-Breed Lands*, S.M. 1885 (48 Vict.), c. 30 ("*The Quieting Titles Act, 1885*") was passed on the same day as the legislation that introduced the Torrens system to Manitoba. Its objective was twofold. First, according to the Queen's Bench jurisprudence from the time, it cured technical defects in documentation in respect of sales that took place pursuant to a Queen's Bench order, but did not validate transactions that were in any manner illegal or void: see *Barber v. Proudfoot*[92] and *Hardy v. Desjarlais*[93] discussed below. Second, it gave to the registrar of land titles the right to rely on documents such as birth certificates and marriage certificates as conclusive proof of the facts therein stated, although these documents were only *prima facie* evidence in the event of litigation.

Decrees and Orders Act, 1884; Payment of Securities Act, 1885

80. *An Act concerning Decrees and Orders on the Equity Side of the Court of Queen's Bench, Manitoba*, S.M. 1884 (47 Vict.), c. 8 ("*The Decrees and Orders Act, 1884*") was not specific to s. 31 lands. It was a general law that regularized orders of the Queen's Bench that were issued or signed by various court officials. Presumably there had been some confusion as to procedure and this *Act* clarified that the orders were valid regardless of who issued or signed them.

81. *An Act to provide for the payment to Half-Breeds of the amounts to which they are entitled, and which are invested in securities which cannot be realized*, S.M. 1885 (48 Vict.), c. 34 ("*The Payment of Securities Act, 1885*") addressed the fact that money which had been paid into court and invested in mortgages on behalf of Métis minors could not be realized. The *Act*

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[90] *R. v. McKay et al.*, [1965] S.C.R. 798 at 803, 804 [Manitoba's Authorities, Vol. II, Tab 35].
[91] *R. v. Sharpe*, [2001] 1 S.C.R. 45 at 75 [Manitoba's Authorities, Vol. II, Tab 36].
[92] *Barber v. Proudfoot* (1889), [1890-91] 1 Western Law Times 144 (Man. Q.B) [Manitoba's Authorities, Vol. I, Tab 2].
[93] *Hardy v. Desjarlais* (1892), 8 Man. R. 550 (Q.B. *en banc*) [Manitoba's Authorities, Vol. I, Tab 16].

ensured that the children received their money by authorizing payment out of the province's consolidated revenue fund.

3. **Analysis of the Constitutionality of the Impugned Statutes**

3.1 Characterizing the Legislative Scheme

82. It is well established that the determination of the constitutionality of legislation under the division of powers begins with an analysis of its pith and substance. This concept was succinctly explained by McLachlin C.J. in *Reference re Assisted Human Reproduction Act*[94] as requiring one to ask "[w]hat in fact does the law do and why?"[95] It involves consideration of both the purpose and effect of the legislative scheme: see also *Canadian Western Bank v. Alberta*[96]*, Chatterjee v. Ontario (Attorney General),*[97] and *Reference re Firearms Act (Can.).*[98]

Purpose

83. The purpose of the Manitoba legislation can be gleaned from the words of the statutes themselves. Taken together, the *Acts* accomplished five things. First, they directed that the sale of s. 31 interests must occur by deed under seal as opposed to other less formal documents such as promises, agreements or memoranda in writing. Second, they altered the common law by allowing individuals between the ages of eighteen and under twenty-one to make binding contracts for the sale of their s. 31 interests, provided there was parental or spousal consent and judicial supervision. Third, they cured technical defects in Queen's Bench orders. Fourth, they ensured that children who had sold by court order received the funds that had been invested on their behalf and fifth they allowed the registrar of land titles to rely on recitals and certificates for their truth prior to issuing a Torrens title.

84. Why did the Manitoba legislature pass such laws? These laws were passed to address the legal and practical reality that the recipients of the s. 31 grants had full civil rights, including the

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[94] *Reference re Assisted Human Reproduction Act*, [2010] 3 S.C.R. 457 [Manitoba's Authorities, Vol. II, Tab 39].
[95] *Ibid*. at para. 22.
[96] *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 at paras. 25-27 [Manitoba's Authorities, Vol. I, Tab 9].
[97] *Chatterjee v. Ontario (Attorney General)*, [2009] 1 S.C.R. 624 at para. 16 [Manitoba's Authorities, Vol. I, Tab 10].
[98] *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783 at paras. 16-18 [Manitoba's Authorities, Vol. II, Tab 40].

common law right to contract, and that many of the recipients chose to exercise this right. In the absence of the impugned provincial laws, adults could have sold exactly as they did under the impugned laws, except perhaps with somewhat less formal documentation. Individuals over eighteen could have sold by their parents obtaining a court order under *The Infants Estates Act*, or by a giving a mortgage on their parents' property as security against rescission, or perhaps through such vehicles as a long-term lease with an option to purchase. But the sales would have occurred whether the Manitoba legislature chose to stand mute or whether it passed the legislation now under review. The purpose, therefore, of the legislation was to bring some order, safeguards and direction to these sales.

85. Why did people sell? Of course, at this late date, over 140 years after the fact, we are largely left to speculate. The reality, however, was that many families received hundreds of acres of land at a period in history when most farms had only a few acres under cultivation. A typical Métis family owned two miles of land along the river, which was more than enough land to settle one's children and perhaps grandchildren.[99] The family also received scrip for 160 acres for each of the mother and father. Many families received land or scrip to compensate for the hay privilege. In addition, each child received a s. 31 grant of 240 acres. Given the typical size of families in the Red River settlement, the s. 31 grants alone would have approached or exceeded one thousand acres per family. It is not difficult to surmise that this was significantly more land than the typical family required, resulting in a strong market in surplus land.[100]

86. The only direct evidence in the record as to why people may have sold is found in two letters located among the papers of Premier Norquay. In 1881, Joseph Norquay (perhaps a cousin of the Premier) wrote to the Premier asking his assistance in selling one of his children's grants. The land was rented out, but Joseph Norquay wished to sell it because he was in "a little trubel (sic)".[101] In 1884, the Premier's niece wrote to her uncle and requested assistance in selling her grant because she wished to help her mother with the mortgage payments so as "to

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[99] Yvon Dumont testified that the river lot owned by his ancestor Pierre Chartrand was subdivided by his children for their use and remains in the family to the present: Evidence from the Exams for Discovery as read in at trial, May 31, 2006, Respondent's Record, pp. 55-59.

[100] Reasons of the Court of Appeal, Appellants' Record, Vol. III, p. 66, para. 145; Exhibit TE 18, Appellants' Record, Vol. XXVI, pp. 168, 169. Dr. Flanagan describes one family with three river lots and nine children. This family received 2,754 acres of land and $707 in scrip.

[101] Exhibit 1-1512, Appellants' Record, Vol. XX, p. 132.

secure our home".[102] These two letters show the very human reasons that people sold. They were not motivated by the delay that occurred in distributing the grants or by racism or by the fact that the grants were not given out in family blocks. They sold to assist their families and because the money was more valuable to them at the time than was the land.

87. Moreover, contrary to the assertion of the appellants in their factum at paragraphs 182, 192 and 227 that the Manitoba legislation was "designed to facilitate sales", the reality was that sales occurred long before Manitoba passed any legislation, and thus the need for the *HBLGPA, 1873*. Further, the study by Dr. Ens, *Migration and Persistence of the Red River Métis 1835-1890* showed that the first peak period of Métis migration and resulting land sales occurred between 1872-1875, before any of the impugned Manitoba legislation.[103] Dr. Ens concluded that this wave of migration was a "function of the changing Métis family economy and its involvement in the buffalo robe trade."[104] Further, he determined that the buyers of the family river lots were both Métis and non-Métis and that the two largest buyers were Father Ritchot and Bishop Taché.[105] Dr. Ens explained the significance of this evidence as follows:[106]

> The point here is not to paint Father Ritchot and Bishop Taché as unscrupulous speculators, but to use their high volume buying of Métis river lots as a window on the motivations of Métis sellers in the period prior to 1875. Ritchot and Taché, who were in the forefront of efforts to keep the Métis settled in French and Catholic enclaves within Manitoba, would not have been trying to induce the Métis to sell. They undoubtedly bought these lots because the Métis were going to sell one way or the other, and they generally bought the lands to sell to other French Catholics moving into the province. While this does not speak to the motivation of the sellers, the high volume of sales in St. Norbert in 1873-74 cannot be explained by the delays surrounding the Children's allotments. It more likely represented the desire to move to the Northwest to follow the buffalo, or the need to raise cash in the hard economic times of the early 1870s. Father Ritchot and Taché, like other buyers, responded to opportunities when there was a glut of land on the market that could be bought cheaply. Like other buyers, they bought cheap and sold dear.

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[102] Exhibit 1-1629, Appellants' Record, Vol. XXI, pp. 150, 151.
[103] Exhibit TE 35, Appellants' Record, Vol. XXVII, p. 122.
[104] Exhibit TE 35, Appellants' Record, Vol. XXVII, p. 137.
[105] Exhibit TE 36, Appellants' Record, Vol. XXVIII, p. 22.
[106] Exhibit TE 36, Appellants' Record, Vol. XXVIII, p. 23.

88. Thus, far from "facilitating sales", Manitoba's legislation responded to the social reality of people making personal and voluntary decisions in the best interests of themselves and their families. The purpose of the legislation was to bring order, safeguards and direction to the contracts and court proceedings that were used to effect sales of s. 31 interests.

89. While, with hindsight, some may take exception to policies that permitted parents to obtain court orders on behalf of their children or that permitted minors to consent to sales at the age of eighteen, such opinions are, no doubt, based on life experiences and values that are very different from those of the people at Red River. Moreover, from a legal perspective, policy choices are not relevant to a determination of constitutionality. As this Court observed in *Wells v. Newfoundland:*[107]

> Legislatures are subject to constitutional requirements for valid law-making, but within their constitutional boundaries, they can do as they see fit. The wisdom and value of legislative decisions are subject only to review by the electorate.

Effect

90. The effect of the legislation can be seen by analyzing the land titles files relating to the transactions of the individual appellants' forbearers. Twenty-three transactions involving the initial sale of the s. 31 grant were analyzed.[108] The transactions covered a variety of situations, including sales by adults such as Michel Lavalle, an ancestor of the appellant Roy Chartrand, who was 26 years of age when he sold his land in 1877 for $100;[109] sales by minors with parental consent such as Sarah Carriere, an ancestor of the appellant Yvon Dumont, who was 19 when she sold her land in 1883 for $1200;[110] sales by married people with spousal consent such as Pierre Chaboyer, an ancestor of the appellant Edgar Bruce, who was 18 when he sold his land

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[107] *Wells v. Newfoundland*, [1993] 3 S.C.R. 199 at para. 59 [Manitoba's Authorities, Vol. II, Tab 50]. See also *Reference re Firearms Act (Can.), supra* at para. 2. [Manitoba's Authorities, Vol. II, Tab 40].
[108] Reasons of the Trial Judge, Appellants' Record, Vol. II, p. 66, para. 772.
[109] Exhibit TE 02, Appellants' Record, Vol. XXIV, p. 91; Exhibit 1-1231, Appellants' Record, Vol. XVIII, pp. 89-91.
[110] Exhibit TE 02, Appellants' Record, Vol. XXIV, p. 116; Exhibit 1-0101, Appellants' Record, Vol. VI, p. 51.

in 1883 for $600;[111] and sales by court order such as Didyme Larence, an ancestor of the appellant Edgar Bruce, who was 16 when his parent sold his land in 1881 for $1000.[112]

91. The land titles documents show deeds properly executed and witnessed, parental consents, spousal consents and certification by judicial officers. Queen's Bench orders and certifications confirming payment of money into court were also located. The documents also show that the registrar of land titles was rigorous in ensuring compliance with all laws, at times requiring documents to be re-executed in order to bring them into compliance with provincial legislation.[113]

92. The legislation, therefore, clearly affected process and the technical requirements for valid contracts. This purpose was confirmed by the jurisprudence that interpreted some of the *Acts*. *The Quieting Titles Act, 1885* was discussed by the Manitoba Queen's Bench [Full Court] in *Barber v. Proudfoot.*[114] The plaintiff sought to set aside a sale on the basis that there had been non-compliance with the terms of a court-ordered sale. Taylor C.J. concluded that: [115]

> The object of the statute is to cure defects, irregularities and omissions in connection with the doing of something authorized by the court to be done, not to validate proceedings wholly unauthorized . . .

93. In *Hardy v. Desjarlais,*[116] the deed of sale was executed prior to the court order approving it. The money was not paid into court until the land had been resold at a higher price. Bain J. concluded that *The Quieting Titles Act, 1885* "was never intended to make valid a sale that, at the time it purported to have been made, was wholly illegal and void."[117]

94. *Robinson v. Sutherland*[118] addressed sales under the *HBLGA, 1878* and the amendments thereto. In that case, the Métis minor alleged that her father had forced her to sell her land

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[111] Exhibit TE 02, Appellants' Record, Vol. XXIV, p. 67; Exhibit 1-1574, Appellants' Record, Vol. XXI, pp. 59, 60.
[112] Exhibit TE 02, Appellants' Record, Vol. XXIV, p. 66; Exhibit 1-1517, Vol. XX, pp. 133-136.
[113] Reason of the Trial Judge, Appellants' Record, Vol. II, p. 67, para. 774 and p. 75, para. 804; Evidence of R.E. Davidson, May 29 and 30, 2006, Respondent's Record, pp. 49, 51.
[114] *Barber v. Proudfoot, supra* [Manitoba's Authorities, Vol. I, Tab 2].
[115] *Ibid*. at 146.
[116] *Hardy v. Desjarlais, supra* [Manitoba's Authorities, Vol. I, Tab 16].
[117] *Ibid*. at 577.
[118] *Robinson v. Sutherland* (1893), 9 Man. R. 199 (Q.B.) [Manitoba's Authorities, Vol. II, Tab 43].

contrary to the wishes of her husband. Bain J. concluded that because the transaction was without consent, the documents signed by her "were not binding . . .when she came of age and were voidable at her option . . ."[119] In other words, the common law right to rescind continued to exist if there was not true consent on behalf of the minor.

95. The appellants repeatedly assert throughout their factum that the purpose and effect of Manitoba's statutes was to facilitate the transfer of s. 31 lands into non-Métis ownership. Of course, Manitoba's legislation said nothing about the cultural identity of the purchaser, who certainly could have been, and in many cases was Métis. But, more significantly, Manitoba's legislation did not cure any substantive defects in a contract such as lack of consent, fraud or misrepresentation. The legislation was directed to voluntary transactions between willing sellers and willing buyers.

96. In sum, the pith and substance of the Manitoba statutes can be properly characterized as setting out the technical requirements for the completion of a valid contract for the sale of s. 31 interests, for curing technical defects in the issuing of Queen's Bench orders, for ensuring that children whose money had been invested by the court received their proceeds and for ensuring that the registrar of land titles could presume the truth of documentation when issuing a Torrens title.

3.2 Connecting the Pith and Substance to a Head of Power

The Provincial Heads of Power - ss. 92(13), (14) and (16) of the *Constitution Act, 1867*

97. Property and civil rights as set out in s. 92(13) of the *Constitution Act, 1867* is the most important of the provincial heads of power. As explained in the joint reasons for judgment of LeBel and Deschamps JJ. in *Reference re Assisted Human Reproduction Act,*[120] this head of power covers the field of private law including property and contractual liability. The power of the provinces in relation to matters of a local nature, as set out in s. 92(16), is often invoked in conjunction with s. 92(13) and together the two heads of power give the provinces broad

[119] *Ibid*. at 202.
[120] *Reference re Assisted Human Reproduction Act*, *supra* at para. 262. [Manitoba's Authorities, Vol. II, Tab 39].

jurisdiction. Section 92(14) provides the jurisdiction for the provinces to manage all aspects of the civil court process, including the procedure in those courts.

98. The matters covered by the impugned statutes are quintessentially within provincial jurisdiction. Five of the statutes dealt with the fundamentals of contract – the document that must be used (a deed), the age at which a binding contract could be made that was not subject to a right of rescission (eighteen), the additional safeguards to create a binding contract (parental or spousal consent and judicial supervision for those between eighteen and under twenty-one), and the rights of married women to enter into contracts. These are all matters properly assigned to ss. 92(13) and 92(16).

99. Further, *The Decrees and Orders Act, 1884* dealt with Queen's Bench procedure and the validity of court orders signed by various officials. *The Payment of Securities Act, 1885* ensured that beneficiaries received the funds they were due out of the provincial treasury. *The Quieting Titles Act, 1885* provided direction to a provincial employee, the registrar of land titles, as to the effect of recitals in various documents, prior to issuing a title under the provincial Torrens system. These are all matters falling squarely within provincial jurisdiction under ss. 92(13), (14) and (16).

100. Modern statutes exist in every province in Canada to cover these same types of issues. In Manitoba, for example, *The Age of Majority Act*[121] sets the age at which binding contracts can be made without the risk of rescission. *The Law of Property Act*[122] allows a married woman to execute a contract without her husband's consent. *The Homesteads Act*[123] gives the district registrar the power to rely on statements as to marital status as conclusive proof of that status.

101. In sum, the Attorney General of Manitoba submits that the impugned statutes fell squarely within three areas of exclusive provincial jurisdiction: property and civil rights, the administration of civil justice and matters of a local nature.

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[121] *The Age of Majority Act*, C.C.S.M. c. A7 [Manitoba's Authorities, Vol. II, Tab 51].
[122] *The Law of Property Act*, C.C.S.M. c. L90, s. 30(2) [Manitoba's Authorities, Vol. II, Tab 59].
[123] *The Homesteads Act*, C.C.S.M. c. H80, s. 5 [Manitoba's Authorities, Vol. II, Tab 57].

Does the Matter come within s. 91(1A) of the *Constitution Act, 1867*?

102. Section 91(1A) (formerly s. 91(1)) of the *Constitution Act, 1867*, gives to Parliament legislative authority over "The Public Debt and Property". This head of power includes the authority to pass laws in respect of federally owned property: *British Columbia (Attorney General) v. Lafarge Canada Inc.*[124] The appellants argue that the Manitoba legislation trenched on federal jurisdiction over public property.

103. By virtue of s. 30 of the *Manitoba Act*, all Crown lands in Manitoba remained under the administration and control of Canada until 1930, when this authority was transferred to the province by the *Natural Resources Transfer Agreement, 1930*. Thus, Canada had legislative jurisdiction over the s. 31 lands until the fee simple passed into the hands of a private party.

104. The Manitoba laws, however, are not in pith and substance about the interest in land held by the federal Crown. They are in pith and substance about private contracts entered into by persons who wished to buy and sell an interest in land owned by a private party.

105. As soon as s. 31 came into operation, certain Manitoba residents acquired a legal right to obtain a grant. As time passed, this right crystallized into a beneficial interest in a particular parcel of land and ultimately into legal title upon the issuance of the patent. The provincial statutes passed between 1877 and 1885 set out the contractual requirements to transfer to the purchaser the interest held by the vendor. The statutes did not deal with Canada's interests or direct Canada to do anything. If Canada never transferred legal title to the vendor, then the purchaser would never obtain legal title. The Latin maxim, *nemo dat qui non habet* – he who hath not cannot give – is of obvious application.

106. Canada was not constrained by the impugned legislation. Some allotments were cancelled by Canada when it was determined that the person was ineligible to receive the s. 31 land or that the grant was a duplicate.[125] There may be a risk to a purchaser in contracting with a

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[124] *British Columbia (Attorney General) v. Lafarge*, [2007] 2 S.C.R. 86 at para. 56 [Appellants' Authorities, Vol. II, Tab 42].
[125] Evidence of B.G. Morrison, May 16, 2006, Respondent's Record, pp. 45-46.

vendor who is not yet in possession of a patent, but these contracts are legal and it falls within provincial jurisdiction under property and civil rights to legislate in respect of them.

107. *Re Mathers,*[126] decided in 1891, considered the issue of whether Manitoba had the constitutional jurisdiction to tax beneficial interests in s. 31 lands when the legal estate was held by Canada. The case was referred to three judges of the Court of Queen's Bench who concluded that the beneficial interest was a property interest that fell within provincial jurisdiction.

108. This Court addressed a similar issue in *Calgary and Edmonton Land Company v. Attorney General of Alberta.*[127] The lands in question had been granted under federal statutes and title rested in Canada. In determining that Alberta tax legislation applied to the beneficial interests, this Court held, per Davies J., that "the equitable title had become vested in the appellants" and that this "was not exempted under or by virtue of" s. 125 of the *Constitution Act, 1867* from provincial taxation.[128]

109. The same issue returned to this Court in *Smith v. Vermillion Hills Rural Council.*[129] Brodeur J. concluded that "provincial legislatures had the right and the power to authorize the taxation of beneficial or equitable interests in land wherein the Crown in the right of the Dominion of Canada holds some interest and the legal estate."[130] The decision was upheld by the Privy Council.[131]

110. The relevance of these cases is that they establish that the province has constitutional jurisdiction to deal with interests in land held by private citizens even though the legal title to that land is vested in Canada. This is precisely what the impugned provincial legislation did. The statutes set out the contractual requirements for selling beneficial or legal interests in s. 31 lands held by private citizens. *Re Mathers* confirms that there is nothing unique about land

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[126] *Re Mathers* (1891), 7 Man. R. 434 (Q.B. *en banc*) [Appellants' Authorities, Vol. II, Tab 33].
[127] *Calgary and Edmonton Land Company v. Attorney General of Alberta* (1911), 45 S.C.R. 170 [Manitoba's Authorities, Vol. I, Tab 6].
[128] *Ibid.* at 179.
[129] *Smith v. Vermillion Hills Rural Council* (1914), 49 S.C.R. 563 [Manitoba's Authorities, Vol. II, Tab 46].
[130] *Ibid*. at 576.
[131] *Smith v. Vermillion Hills Rural Council*, [1916] 2 A.C. 569 (P.C.) [Manitoba's Authorities, Vol. II, Tab 47].

grants made under s. 31 of the *Manitoba Act* as opposed to any other land in which Canada held the legal title.

111. In their factum at paragraphs 229 to 233, the appellants attempt to distinguish the above cases on the basis that they deal only with taxation of land. But when a province taxes land, it does so under s. 92(2) of the *Constitution Act, 1867*. If a province can tax land then it can exercise all of its powers under s. 92 in respect of that land. The constitutionality of the provincial legislation is determined by its pith and substance. If the pith and substance is contract, as it is in the case at bar, then this is a matter within provincial jurisdiction. The cases establish that this jurisdiction may be exercised in respect of beneficial interests even though Canada possesses legal title.

112. Thus, the Manitoba statutes were not in pith and substance about federal interests in land. They were in pith and substance about the sale of beneficial or legal interests in land held by private citizens and thus fell to regulation by the province under s. 92(13) and s. 92(16) of the *Constitution Act, 1867*.

Does the matter come within s. 91(24) of the *Constitution Act, 1867*?

113. The appellants argue that the impugned statutes were *ultra vires* as trenching on s. 91(24) of the *Constitution Act, 1867*. For the purpose of this part of the argument, Manitoba takes no position on whether the Métis are or are not "Indians" within the meaning of s. 91(24). Nor is it necessary for the Court to decide that issue in the present appeal.

114. Section 91(24), as a head of power, is no different than any other head of power. A pith and substance analysis must be undertaken to determine the purpose and effect of the impugned provisions. The fact that the legislation under consideration refers to "Half Breeds" is insufficient to determine its pith and substance. As this Court noted in *Kitkatla Band v. British*

Columbia (Minister of Small Business, Tourism and Culture),[132] "the mere mention of the word 'aboriginal' in a statutory provision does not render it *ultra vires* the province."

115. The full scope of the federal power under s. 91(24) has not been considered by this Court and it is unnecessary to undertake such an analysis in the present case. According to *Kitkatla,* s. 91(24) serves to protect the "status or capacity of Indians" and the "essential and distinctive core values of Indianness."[133] In the context of interjurisdictional immunity, Justices Binnie and LeBel in *Canadian Western Bank v. Alberta*[134] spoke of s. 91(24) as protecting "matters that could be considered absolutely indispensible and essential to [Indian] cultural survival." Similarly, McLachlin C.J. and Fish J. in *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*[135] defined the core content of s. 91(24) as "matters that go to the status and rights of Indians." Provincial statutes have been ruled *ultra vires* that purported to alter constitutionally protected harvesting rights (*R. v. Sutherland et al.*[136] and *Moosehunter v. The Queen*[137]); were read down so as not to interfere with an adopted child's right to Indian status (*Natural Parents v. Superintendent of Child Welfare et al.*[138]); and were held not to apply to the disposition of assets located on Indian reserves or possession of land on reserves (*Derrickson v. Derrickson,*[139] and *Paul v. Paul*[140]).

116. The pith and substance analysis done above shows that the impugned Manitoba statutes were concerned with the technical requirements for creating a binding contract for the sale of s. 31 interests, the validity of Queen's Bench orders, providing compensation out of the provincial treasury for defaulted mortgages and providing for the registration of documents in the provincial Torrens system. Unlike the examples referred to in the preceding paragraph, the

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[132] *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture),* [2002] 2 S.C.R. 146 at paras. 66, 67 [*Kitkatla*] [Manitoba's Authorities, Vol. I, Tab 20].
[133] *Ibid*. at para. 75.
[134] *Canadian Western Bank v. Alberta*, *supra* at para. 61 [Manitoba's Authorities, Vol. I, Tab 9].
[135] *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, [2010] 2 S.C.R. 696 at para. 70 [*NIL/TU,O*] [Manitoba's Authorities, Vol. I, Tab 28].
[136] *R. v. Sutherland et al.*, [1980] 2 S.C.R. 451 [Manitoba's Authorities, Vol. II, Tab 37].
[137] *Moosehunter v. The Queen*, [1981] 1 S.C.R. 282 [Manitoba's Authorities, Vol. I, Tab 26].
[138] *Natural Parents v. Superintendent of Child Welfare et al.*, [1976] 2 S.C.R. 751 [Manitoba's Authorities, Vol. I, Tab 27].
[139] *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285 [Manitoba's Authorities, Vol. I, Tab 11].
[140] *Paul v. Paul*, [1986] 1 S.C.R. 306 [Manitoba's Authorities, Vol. I, Tab 30].

provincial statutes at issue in the present appeal did not affect Métis status nor did they interfere with any protected Métis aboriginal rights.

117. The appellants argue at paragraph 238 of their factum that the Manitoba statutes "singled out" the Métis and therefore are unconstitutional.

118. This Court has used the language of "singling out" on several occasions. It appeared for the first time in 1980 in *Four B Manufacturing v. United Garment Workers.*[141] The issue in the case was the applicability of Ontario provincial labour laws to an enterprise on an Indian reserve. Beetz J. concluded that provincial laws apply to Indians provided the laws "do not single out Indians nor purport to regulate them *qua* Indians. . ."[142]

119. Since *Four B Manufacturing,* the language of "singling out" has most often been used to describe provincial legislation that impacted on aboriginal rights or identity. Justice LeBel summarized this Court's jurisprudence on "singling out" in *Kitkatla* as follows: [143]

> [I]t is clear that legislation which singles out aboriginal people for special treatment is *ultra vires* the province: see *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031. For example, a law which purported to affect the Indian status of adopted children was held to be *ultra vires* the province: see *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751. Similarly, laws which purported to define the extent of Indian access to land for the purpose of hunting were *ultra vires* the provinces because they singled out Indians: see *Sutherland*, *supra*; *Moosehunter v. The Queen*, [1981] 1 S.C.R. 282. Further, provincial laws must not impair the status or capacity of Indians: see *Kruger v. The Queen*, [1978] 1 S.C.R. 104, at p. 110; *Dick*, *supra*, at pp. 323-24.

120. In *Dick v. The Queen,*[144] the issue was whether the British Columbia *Wildlife Act* applied to non-treaty Indians who were charged with hunting out of season. Beetz J. considered whether a law that restricted hunting would nevertheless apply to Indians by virtue of being a law of

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[141] *Four B Manufacturing v. United Garment Workers*, [1980] 1 S.C.R. 1031 [*Four B Manufacturing*] [Manitoba's Authorities, Vol. I, Tab 15].
[142] *Ibid*. at 1048.
[143] *Kitkatla*, *supra* at para. 67 [Manitoba's Authorities, Vol. I, Tab 20].
[144] *Dick v. The Queen*, [1985] 2 S.C.R. 309 [Manitoba's Authorities, Vol. I, Tab 12].

general application within the meaning of s. 88 of the *Indian Act.* He held that laws would not qualify as laws of general application if they:[145]

> . . . either overtly or colourably, single out Indians for special treatment and impair their status as Indians. Effect and intent are both relevant. Effect can evidence intent. But in order to determine whether a law is not one of general application, the intent, purpose or policy of the legislation can certainly not be ignored: they form an essential ingredient of a law which discriminates between various classes of persons, as opposed to a law of general application.

121. The language of "singling out", therefore, has been used by this Court in two contexts: to describe provincial statutes that impair the core of s. 91(24) and to describe those statutes which could not be made applicable to Indians as laws of general application by virtue of s. 88 of the *Indian Act.*

122. None of the cases that have discussed the concept of "singling out" have suggested that it is a substitute for the pith and substance analysis. The fact that legislation is specific to Indians may be a factor in determining pith and substance but it is not determinative. If the legislation is in pith and substance within provincial jurisdiction then it is necessary to undertake an interjurisdictional immunity analysis and to determine whether it impacts the core of s. 91(24) jurisdiction. This Court followed such an approach in *Lovelace v. Ontario,*[146] in upholding the constitutionality of an Ontario program for the distribution of casino profits among Indians on reserve. Iacobucci J. concluded that the program fell within the provincial spending power and did "nothing to impair the status or capacity of the appellants as aboriginal peoples."[147] Thus, the mere fact that the program "singled out" Indians did not render it unconstitutional.

123. Manitoba's nineteenth century legislation covered private contracts, albeit with at least one party being Métis. However, the legislation did not deal with people *qua* Métis, but rather as vendors and purchasers of land. This is similar to the situation dealt with in *Four B*

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[145] *Ibid*. at 323, 324.
[146] *Lovelace v. Ontario*, [2000] 1 S.C.R. 950 [Manitoba's Authorities, Vol. I, Tab 22].
[147] *Ibid*. at para. 111.

Manufacturing where Beetz J. discussed the business and labour arrangements relevant to a manufacturing business located on an Indian reserve. He stated:[148]

> I think it is an oversimplification to say that the matter which falls to be regulated in the case at bar is the civil rights of Indians. The matter is broader and more complex: **it involves the rights of Indians and non-Indians to associate with one another for labour relations purposes, purposes which are not related to "Indianness"**; it involves their relationship with the United Garment Workers of America or some other trade union about which there is nothing inherently Indian; it finally involves their collective bargaining with an employer who happens to be an Ontario corporation, privately owned by Indians, but about which there is nothing specifically Indian either, the operation of which the Band has expressly refused to assume and from which it has elected to withdraw its name.
>
> But even if the situation is considered from the sole point of view of Indian employees and as if the employer were an Indian, **neither Indian status is at stake nor rights so closely connected with Indian status that they should be regarded as necessary incidents of status such for instance as registrability, membership in a band, the right to participate in the election of Chiefs and Band Councils, reserve privileges, etc.** For this reason, I come to the conclusion that the power to regulate the labour relations in issue does not form an integral part of primary federal jurisdiction over Indians or Lands reserved for the Indians. Whether Parliament could regulate them in the exercise of its ancillary powers is a question we do not have to resolve any more than it is desirable to determine in the abstract the ultimate reach of potential federal paramountcy. (Emphasis added)

124. As in *Four B Manufacturing*, it is unnecessary in the case at bar to resolve the abstract question as to whether the federal Parliament could have regulated the contracts of Métis vendors. Given that the pith and substance of the impugned provincial legislation was to regulate private contractual arrangements, the legislation fell within provincial jurisdiction even though it was specific to sales of s. 31 interests by Métis vendors.

125. In the modern context, provinces regularly legislate to address aboriginal issues and concerns in a desire to meet the specific needs of those communities. For example, in Manitoba, *The Child and Family Services Authorities Act*, C.C.S.M. c. C90 provides for the establishment

[148] *Four B Manufacturing, supra* at 1047-1048 [Manitoba's Authorities, Vol. I, Tab 15].

of child welfare authorities to meet the needs of Indian and Métis children.[149] *The East Side Traditional Lands Planning and Special Protected Areas Act*, C.C.S.M., c. E3 enables First Nations to develop land use and resource management plans for designated areas of Crown land.[150] These are examples of co-operative federalism, an approach to constitutional jurisdiction that "accepts the inevitability of overlap between the exercise of federal and provincial competencies": *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*.[151] To the extent that it can be said these statutes "single out" Indians, the language is unhelpful in assessing constitutionality. Rather, the established tests of pith and substance, paramountcy and interjurisdictional immunity set the parameters for the proper constitutional analysis.

126. The reality faced by the Manitoba legislature during the last few decades of the nineteenth century was that Métis people had acres of surplus land that some wished to dispose of for a variety of personal and family reasons, and it fell to the province to regulate the contracts under which this could occur. The statutes were drafted to be "Métis specific" because that was the social reality. They very easily could have been drafted in general terms to be all encompassing so as to also cover the miniscule number of sales transactions that were occurring in the province for non-s. 31 lands. Presumably, they were not drafted in that fashion because the legislature identified no pressing need. Thus, eighteen to under twenty-one year olds, whether Métis or non-Métis, who owned non-s. 31 lands in Manitoba were free to sell that land without parental consent or judicial supervision, subject to the common law of rescission. Alternatively, the land could have been sold by their parents under *The Infants Estates Act.*

127. The appellants argue that the impugned statutes were unconstitutional merely because they were Métis specific. This is insufficient to establish that they were *ultra vires* the province. Even if the Métis recipients of the s. 31 grants were "Indians" within the meaning of s. 91(24) of

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[149] *The Child and Family Services Authorities Act*, C.C.S.M. c. C90 [Manitoba's Authorities, Vol. II, Tab 52].
[150] *The East Side Traditional Lands Planning and Special Protected Areas Act*, C.C.S.M., c. E3 [Manitoba's Authorities, Vol. II, Tab 53].
[151] *NIL/TU,O, supra* at para. 42 [Manitoba's Authorities, Vol. I, Tab 28].

the *Constitution Act, 1867*, it is still necessary to undertake a pith and substance analysis of the legislation. When that analysis is done, the legislation was clearly constitutional as falling within provincial power under ss. 92(13), (14) and (16).

Are the Manitoba Métis "Indians" within the meaning of s. 91(24) of the *Constitution Act, 1867*?

128. As set out in paragraph 238 of their factum, the appellants seek to establish that the Métis children and the lands reserved for them under s. 31 qualified under s. 91(24) of the *Constitution Act, 1867* as "Indians and Lands reserved for the Indians". They do not seek a general determination as to whether the Métis are "Indians" within the meaning of s. 91(24).

129. The Attorney General of Manitoba submits that it is neither necessary nor desirable in the present case for this Court to rule on the scope of s. 91(24). This head of power is only relevant to the case at bar if the pith and substance of the provincial legislation is determined to be in respect of Métis and Métis lands. If so, then it is necessary to determine whether and to what extent the Parliament of Canada can legislate in respect of Métis and Métis lands pursuant to s. 91(24). As set out above, the Attorney General of Manitoba submits that the pith and substance of the provincial legislation was the regulation of contract, the validity of Queen's Bench orders, the payment of mortgages that were in default and the registration of lands in the Torrens system, matters squarely falling within provincial jurisdiction. Thus, the s. 91(24) analysis is unnecessary.

130. In the alternative, to the extent that the Court finds it necessary to address the issue, Manitoba submits that the mere fact that both s. 31 of the *Manitoba Act, 1870* and s. 91(24) of the *Constitution Act, 1867* contain the word "Indian" is insufficient to determine the scope of s. 91(24). Rather, as this Court indicated in *R. v. Big M Drug Mart Ltd.*[152] and *R. v. Blais*,[153] determining the scope of a constitutional provision requires placing the section within its proper linguistic, philosophic and historical contexts, something the appellants have chosen not to do (appellants' factum paragraph 242). When this analysis is done, the Attorney General of

[152] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 344 [Manitoba's Authorities, Vol. II, Tab 33].
[153] *R. v. Blais*, [2003] 2 S.C.R. 236 at para. 17 [*Blais*] [Manitoba's Authorities, Vol. II, Tab 34].

Manitoba submits that it becomes clear that the Manitoba Métis were never understood to be Indians within the meaning of s. 91(24).

131. The determination in 1867 to carve out to the federal Parliament exclusive jurisdiction over "Indians and lands reserved for the Indians" recognized the obligation on Canada to both address the issue of Indian title and to protect the Indians from the effects of European settlement. Section 91(24) continued the policy set out in the *Royal Proclamation, 1763* that treaty-making with the Indians was the sole responsibility of the British Crown. The natural successor to this responsibility was the federal government.

132. In *Re Eskimo,*[154] Duff C.J. noted that when the *British North America Act* was passed it contemplated the eventual admission into Canada of Rupert's Land and the Northwestern Territory. It was understood at the time that there was a large Indian population in this region. The evidence reviewed in *Re Eskimo* established that the word "Indian" was used to encompass the Inuit. One particular document that was relied on in *Re Eskimo* was the *Report of the Select Committee of the House of Commons, 1857.* It listed the Indian population in the region as numbering 147,000 and the "Whites and half-breeds" as numbering 11,000.[155] This latter group would largely have encompassed the Red River population.

133. The *Report of the Select Committee*, according to the decision in *Blais,* "illustrates that the 'Whites and half-breeds' were viewed as an identifiable group, separate and distinct from the Indians".[156] It is one of many documents in the record of this case that exemplifies this distinction.[157] This Court concluded in *Blais* that "[g]overnment actors and the Métis themselves

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[154] *Re Eskimo,* [1939] S.C.R. 104 at 105 [Manitoba's Authorities, Vol. II, Tab 38].
[155] *Ibid*. at 107.
[156] *Blais, supra* at para. 27 [Manitoba's Authorities, Vol. II, Tab 34].
[157] For example, the Council of Assiniboia had special laws concerning the sale of alcohol to Indians from 1836 onwards: Exhibit 1-2005, Appellants' Record, Vol. XXIII, pp. 81, 122, 123, 160, 161. The Laws of Assiniboia also contained such provisions: Exhibit 1-0434, Respondent's Record, pp. 88-92. The third and fourth Lists of Rights sought treaties with the Indians and sought to deprive them of the right to vote: Exhibits 1-0422, 1-0431, Appellants' Record, Vol. IX, pp. 112, 151, 152. In the Declaration of the People of Rupert's Land and the North West, the Métis describe themselves as "British subjects" and the Indians as "hordes of barbarians": Exhibit 1-0348, Appellants' Record, Vol. VII, pp. 109, 110.

viewed the Indians as a separate group with different historical entitlements . . ."[158] This Court re-emphasized the distinction in *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham,*[159] commenting that "[s]ince their emergence as a distinct people on the Canadian prairies in the 1700s, the Métis have claimed an identity based on non-Indianness."

134. The Fathers of Confederation would have been aware in 1867 that a sizeable Métis population lived in the North-West. Yet they chose to limit the scope of s. 91(24) to the Indians. This was the group of people with whom the federal government intended to develop long term relations in the form of treaties and to create reserves that would need to be managed in perpetuity. Section 91(24) was needed to allow the federal Crown to administer the treaties and reserves. It was not needed for Canada to settle any Métis-exclusive claims.

135. Manitoba takes no exception to the appellants' assertion that the extinguishment of Indian title falls within the core of s. 91(24). Parliament, however, is not limited to extinguishing Indian title solely through the vehicle of s. 91(24). The *Constitution Act, 1867* is much broader than s. 91(24). Section 31 of the *Manitoba Act*, which by its terms extinguished "Indian title", was passed pursuant to Canada's power under s. 146 of the *Constitution Act, 1867* and perhaps its residual power over Peace Order and Good Government. Section 31 of the *Manitoba Act* is not connected to s. 91(24). Rather, it is a self-contained constitutional provision that recognized a potential Métis interest in land and extinguished that interest. The use of the word "Indian" in s. 31 reflected an imperfect understanding of the potential Métis interest and, as noted in *Blais,*[160] was acknowledged at the time as being an "inaccurate description."

136. By the mid-nineteenth century, the Métis at Red River had established an entirely independent identity from their Indian neighbours. As the majority population, they were fully integrated into the life at Red River and demanded through the Red River resistance a right to be consulted as to their fate. The Lists of Rights that the delegates carried with them to Ottawa

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[158] *Blais, supra* at para. 21 [Manitoba's Authorities, Vol. II, Tab 34].
[159] *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37 at para. 75 [*Cunningham*] [Appellants' Authorities, Vol. I, Tab 5].
[160] *Blais, supra* at para. 22 [Manitoba's Authorities, Vol. II, Tab 34].

reflected their concerns. They sought to protect French-Métis culture through the recognition of religious and linguistic rights. Further, they specifically indicated a desire to enter Canada as a province so as to ensure local control over decisions. In other words, they sought to reduce the control that the federal Parliament would have over their lives, not to increase it. In contrast, the Lists of Rights sought treaties for the Indians and sought to deny them the franchise, describing the Indians as "neither civilized nor settled" and thus not entitled to vote.[161]

137. The people of Red River understood that the Indians had a particular legal relationship with Canada. Father Ritchot's diary reflects a conversation he had with federal ministers on April 27, 1870. In discussing whether the Métis should receive benefits afforded the Indians, he informed the ministers "[t]hey do not claim them, they wish to be treated like the settlers of other provinces, and it is reasonable."[162] Moreover, when Father Ritchot reported on the *Manitoba Act* to the Legislative Assembly of Assiniboia, the following exchange occurred as reported in *The New Nation* newspaper:[163]

> Rev. Mr. Ritchot - The Half-breed title, on the score of Indian blood, is not quite certain. But, in order to make a final and satisfactory arrangement, it was deemed best to regard it as certain, and to extinguish the right of the minority as Indians; and for that reason 1,400,000 acres were set aside by the Canadian Government for the Half-breed children of the country to extinguish their admitted right as Half-breeds. This reservation does not in the least conflict with the 91st section of the general Act, where it is provided that certain tracts of land are to be reserved for, and owned by Indians.
>
> Hon. Mr. O'Donoghue – An hon. Member near me puts the question, as to whether Half-breeds taking these reserves are to be held as minors, as under the Confederation Act!
>
> Rev. Mr. Ritchot – No.

138. The implication of this exchange is clear. There was no desire on the part of the Métis leadership to become wards of the federal Crown. They were totally integrated into the culture at Red River and wished to stand on equal footing with their European neighbours. They spoke

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[161] Exhibit 1-0422, Appellants' Record, Vol. IX, p. 112, ss. VIII and XIII; Exhibit 1-0431, Appellants' Record, Vol. IX, pp. 151, 152, ss. 9 and 13.
[162] Exhibit 1-0005, Appellants' Record, Vol. VI, p. 33.
[163] Exhibit 1-0512, Appellants' Record, Vol. XII, p. 28.

the same languages as the Europeans, practiced the same religions and engaged equally in commerce, government and law with their European neighbours. They were quite prepared to assume the responsibility of running a province and retain local control over their own affairs.

139. One of the early actions of the Métis-dominated first legislature of Manitoba was to remove the right to vote from the Indian population. Section 8 of *An Act to amend the Act for the Registration of Voters*, S.M. 1874, c. 9 provided that "[a]ny Indian . . . receiving an annuity from the Dominion Government shall not be entitled to have his name registered on the Electoral lists so long as he receives such annuity."[164]

140. This *Act* was passed in anticipation of the second provincial election and following the completion of Treaties 1 and 2, which blanketed the original province. Canada was flexible in who could choose treaty. As Lieutenant Governor Morris explained in his book, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories,*[165] the Métis of Red River were given the option of choosing to take treaty as Indians or land grants as Métis. Those who chose treaty status and the annuity payments associated with that status lost the right to vote under the provincial legislation.

141. The decision that people made to enter or withdraw from treaty had implications beyond receipt of annuities, land or scrip. The decision carried on-going legal and constitutional implications. Choosing the legal status of Indian meant falling under s. 91(24) and becoming a ward of the federal Crown. To the Métis who drafted the Lists of Rights and who went on to govern Manitoba, the people who chose Indian legal status became a federal responsibility and thus were disentitled to vote on matters of provincial concern.

142. The legal implications of choosing a particular aboriginal identity are not confined to the nineteenth century, as the facts of *Cunningham*[166] illustrate. This case considered whether Alberta could exclude people with Indian status from its Métis settlements. This Court ruled that

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[164] *An Act to amend the Act for the Registration of Voters*, S.M. 1874, c. 9 [Manitoba's Authorities, Vol. II, Tab 62].
[165] Alexander Morris, *The Treaties of Canada with The Indians of Manitoba and The North-West Territories (Toronto: Belfords,* Clarke & Clarke & Co., 1880) at 69 [Manitoba's Authorities, Vol. II, Tab 65]; also cited in *Blais, supra* at para. 23 [Manitoba's Authorities, Vol. II, Tab 34].
[166] *Cunningham*, *supra* [Appellants' Authorities, Vol. I, Tab 5].

the Alberta legislation was constitutional. The judgment recognized that individuals may have multiple aboriginal identities and thus the ability to choose which legal regime to adopt. The legal implication of choosing Indian status meant acceptance of federal jurisdiction under the *Indian Act.* Conversely, the legal implication of choosing Métis status meant acceptance of provincial jurisdiction under the Alberta *Métis Settlements Act.*

143. Manitoba's first conservation legislation, *An Act for the protection of game in the Province of Manitoba*, S.M. 1876 (39 Vict.), c. 24[167], passed by the second provincial legislature in 1876, is an example of the Métis-dominated legislature acting to protect Métis identity and culture. Section 5 of the *Act* carved out an exception to the ban on hunting and made it lawful "for any traveller, family or other person in a state of actual want to kill any bird or animal mentioned in this *Act*, and to take any egg or eggs hereinbefore referred to, for the purpose of satisfying his immediate wants, but not otherwise." It is inconceivable that the Métis of Red River would have voluntarily sought entry into Confederation if such important issues fell exclusively within the jurisdiction of Canada. Canada could pass legislation to protect its wards. The Manitoba legislature would pass legislation to protect the interests of the Métis.

144. Similarly, the Métis legislators managed the contractual requirements for the sale of the s. 31 grants. The first legislature passed the *HBLGPA, 1873*, which made contracts of sale voidable. The second legislature passed the *HBLGA, 1877,* which permitted binding contracts by deed. The remaining impugned statutes were passed under the direction of a Métis premier. It is antithetical to the entire events surrounding Manitoba's entry into Confederation that the Métis would have knowingly surrendered to the federal Crown the ability to legislate in respect of such core issues as hunting rights and land rights.

145. Of course, over time, the Métis lost their dominant political clout, though even today they continue to make up a significant portion of Manitoba's population. The evidence at trial was that there are estimated to be 100,000 to 130,000 Métis in the province.[168] While their political power decreased, the Métis never lost their right to vote, to sit in the legislature or to lobby a

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[167] *An Act for the protection of game in the Province of Manitoba,* S.M. 1876 (39 Vict.), c. 24 [Manitoba's Authorities, Vol. II, Tab 61].
[168] Evidence of D. Chartrand, April 5, 2006, Respondent's Record, p. 19.

government that was closer to them and more familiar with their issues. This was precisely what the *Manitoba Act* promised and Manitoba's entry into Confederation achieved.

146. Canada also accepted Manitoba's authority to pass legislation that was Métis-specific. It did not disallow the impugned statutes during an era when the power of disallowance was regularly exercised. In a similar fashion, Canada has since 1938 accepted Alberta's constitutional authority to develop and maintain its Métis settlements: *The Métis Population Betterment Act*, S.A. 1938, c. 6 and amendments thereto. While it is true that a federal-provincial agreement on the scope of constitutional jurisdiction is not conclusive, it is deserving of careful consideration: *Siemens v. Manitoba (Attorney General),*[169] *Kitkatla,*[170] *OPSEU v. Ontario (Attorney General),*[171] *Rothmans, Benson, & Hedges Inc. v. Saskatchewan.*[172] In the present context, Canada supported the constitutionality of Manitoba's legislation in the nineteenth century and continues to support it today. The creation of Manitoba was premised on the legal position that Canada would manage the relationship with the Indians but the Métis would be instrumental in forming the government that would manage their own affairs. This example of co-operative federalism and nation-building ought not to be dismantled at this late date, particularly when the only concern relates to repealed legislation.

147. It is unnecessary in deciding this case to determine the scope of s. 91(24). If this issue is considered at all, the analysis should be confined to the Métis at Red River. In this regard, it is best to define the scope of s. 91(24) by what it does not include rather than by what it does. Given the unique history of the Red River Métis, including their direct involvement in negotiating their entry into Confederation on the basis that they would have the authority to manage their affairs in accordance with s. 92 of the *Constitution Act, 1867*, this is not a group that falls within the scope of s. 91(24). This Court stated in *Blais*, that "the Manitoba Métis were

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[169] *Siemens v. Manitoba (Attorney General)*, [2003] 1 S.C.R. 6 at para. 34 [Manitoba's Authorities, Vol. II, Tab 45].
[170] *Kitkatla*, *supra* at para. 73 [Manitoba's Authorities, Vol. I, Tab 20].
[171] *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2 at 19, 20 [Manitoba's Authorities, Vol. I, Tab 29].
[172] *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188 at para. 26 [Manitoba's Authorities, Vol. II, Tab 44].

not considered wards of the Crown."[173] If they were not wards of the Crown, they cannot be covered by s. 91(24) of the *Constitution Act, 1867*.

3.3 Conclusion in Respect of Constitutionality

148. In summary, the Attorney General of Manitoba submits that the eight impugned statutes fell squarely within provincial jurisdiction over property and civil rights, matters of a local nature and the administration of justice. They do not deal in any manner with the federal Crown's interest in land and thus do not conflict with s. 91(1A) of the *Constitution Act, 1867*. Given the pith and substance of the provincial legislation, it is unnecessary to explore the scope of s. 91(24) of the *Constitution Act, 1867*. However, even if this analysis is undertaken, the particular history of the Manitoba Métis leads to the conclusion that this group defined itself as "non-Indian" and "non-wards" in its dealings with Canada and thus fell outside Canada's jurisdiction under s. 91(24).

C. The Doctrine of Federal Paramountcy

149. The appellants also argue that the Manitoba legislation conflicted with paramount federal legislation and was therefore inoperative. Manitoba submits that this Court ought to decline to rule on this issue because it is moot. The purported application of the doctrine of paramountcy where the legislation of both levels of government is repealed or spent is an academic exercise in the extreme.

150. At paragraph 248 of their factum, the appellants state that the purpose of s. 31 was to grant land to the children, to be held by them to the age of majority and not to be sold for the benefit of speculators. They argue that the impugned provincial enactments frustrated this federal purpose.

151. This alleged purpose, however, is not apparent from the text of s. 31. The concluding phrase of the section is that the grants shall be "in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine."

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[173] *Blais, supra* at para. 20 [Manitoba's Authorities, Vol. II, Tab 34].

The section itself contains no limits on the grants or the ability to alienate. On the contrary, the wording clearly indicates that any limitations will be set out by the Governor General in Council.

152. The starting point for the interpretation of any statute, including one of constitutional force, is to place the words in context, being careful, according to *R. v. Big M Drug Mart Ltd.* "not to overshoot the actual purpose."[174] The Attorney General of Manitoba submits that the interpretation placed on the section by the appellants does overshoot the mark because it ignores the concluding words of the provision.

153. In placing s. 31 into its historical context, it is important to recognize that it was enacted at a point in history when the governing constitutional principle was parliamentary and legislative sovereignty. Even today, unless specifically limited by the Constitution, the Parliament of Canada and the legislatures have authority that is "plenary and as ample" as that of the United Kingdom Parliament.[175] In exercising this ample authority, the Parliament of Canada conferred on the Governor General in Council unfettered discretion to pass regulations concerning the selection of lots or tracts, the method of division among the children, the mode of the grant, and the placing of conditions as to settlement or otherwise. If it had been the intention of Parliament to limit the discretion, one would have expected clear words to that effect.

154. Further, s. 31 must be read in conjunction with s. 33 of the *Manitoba Act.* This provision states that the Governor General in Council "shall from time to time settle and appoint the mode and form of Grants of Land . . . and any Order in Council for that purpose . . . shall have the same force and effect as if a portion of this Act." This section reinforces that the discretion found within s. 31 is to be exercised freely and is to be given full legal effect.

155. The interpretation placed on s. 31 by the appellants does not come from the words of the provision itself but rather from external sources such as the debates in the House of Commons and common law principles of fiduciary duty. In effect, the appellants seek to amend the

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[174] *R. v. Big M Drug Mart Ltd.*, *supra* at 344 [Manitoba's Authorities, Vol. II, Tab 33].
[175] *Hodge v. The Queen* (1883), 9 A.C. 117 (P.C.) at 132 [Manitoba's Authorities, Vol. I, Tab 17]. See also P.W. Hogg, *Constitutional Law of Canada*, 5th ed. (looseleaf) (Toronto: Carswell, 2007) at 12-3 to 12-5 [Manitoba's Authorities, Vol. II, Tab 68].

Constitution through these external sources. But this approach is untenable in a federation where each legislative body must rely on the written text of the Constitution to ascertain its power. As this Court recognized in *Reference re Succession of Quebec*:[176]

> [T]here are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review.

156. The appellants' attempt to elevate unwritten external considerations into the Constitution itself is analogous to the efforts by British Columbia to supplement its Terms of Union with external arrangements as discussed in *British Columbia (Attorney General) v. Canada (Attorney General); An Act Respecting the Vancouver Island Railway (Re).*[177] In rejecting this argument, Iacobucci J. commented:[178]

> I see no value in a constitutional argument which is not grounded in the language of the Constitution itself. . .
>
> Since there is no suggestion in the language of the Terms of Union that Canada has a continuing constitutional obligation to operate the Island rail line, British Columbia cannot assert that such an obligation, located in another instrument which is not itself constitutional, somehow attained constitutional status.

157. Therefore, in exercising its constitutional jurisdiction, Manitoba was entitled to rely on the words of s. 31, properly interpreted, not amended or altered in the manner suggested by the appellants. The words of s. 31 clearly indicate that any conditions on the grants would be set out in a federal *OIC*. Absent such an *OIC*, there were no limits on the right to alienate.

158. The *OIC* of April 25, 1871 set out the basic scheme for the distribution of the s. 31 grants. It read in part:

> No conditions of settlement shall be imposed in grants made to half-breeds in pursuance of the provisions of the Act referred to, and there shall be no

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[176] *Reference re Succession of Quebec*, [1998] 2 S.C.R. 217 at para. 53 [Manitoba's Authorities, Vol. II, Tab 42].
[177] *British Columbia (Attorney General) v. Canada (Attorney General); An Act Respecting the Vancouver Island Railway (Re),* [1994] 2 S.C.R. 41 [Manitoba's Authorities, Vol. I, Tab 4].
[178] *Ibid*. at 93-94.

> other restrictions as to their power of dealing with their lands when granted than those which the laws of Manitoba may prescribe.

159. The purpose of this *OIC* is clear. Canada chose as a matter of policy to put no limits on the grants but left to Manitoba the authority to do so. The *OIC* recognized Manitoba's constitutional jurisdiction to legislate in respect of property owned by its residents and respected the right of the Métis-dominated legislature to decide what course of action was best to follow. If the Manitoba legislature had desired to prevent sales it had the constitutional jurisdiction to do so. However, this was not the policy option that was adopted. Rather, the legislature chose the "rights assured by common law to the owners of individual property"[179] with certain statutory modifications as to the technical requirements to create a binding contract. The legislature imposed no restrictions, however, on the right to transact in s. 31 lands, whether by age, timing of patent or otherwise.

160. It is noteworthy that where Canada wished to prevent transfers before patent it did so using the clear language of "null and void", the phrase found in the *OIC* of April 25, 1871 in the provisions dealing with pre-emptions and homesteads.[180] No such language was employed in respect of the s. 31 grants. To the contrary, no restrictions of any sort were imposed. Canada deferred to Manitoba's jurisdiction.

161. Similarly, the *OIC* of March 23, 1876 did not place any restrictions on the alienability of the land grants. Through this *OIC*, Canada sought to "discourage", not prevent, the operation of speculators. To this end, Canada chose not to recognize assignments but issued the patents in the name of the child to whom the land was allotted. It then fell to the provincial law, both statutory and common law, to determine the validity of any contracts of sale or assignments.

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[179] Exhibit 1-0687, Appellants' Record, Vol. XIV, p. 191. See paragraphs 20 and 64 above.

[180] However, even very clear language purporting to prohibit alienation before patent may have been unsuccessful in stopping sales. In *Meek v. Parsons* (1900), 31 O.R. 529 (Div. Ct.) [Manitoba's Authorities, Vol. I, Tab 24] the court considered the meaning of Ontario legislation that provided that there was no power to alienate before patent. The court interpreted the legislation narrowly to mean that only actual conveyance of legal title could not be alienated before patent. The parties could still validly contract to transfer the equitable interest in the land before patent. This case reflects the tenor of the times, which strongly favoured individual property rights and freedom of contract.

162. Manitoba's statutes did not frustrate the federal purpose. The appellants' interpretation of s. 31 and the federal *OICs* is a twenty-first century construct that does not reflect the reality of the nineteenth century. The Métis of the 1870s did not consider their land grants to be inalienable and did not go to court to argue paramountcy. Nor did the Catholic clergy take any such action. The Canadian government of the time neither disallowed the provincial legislation nor sought to have the statues declared inoperative. Canada does not today argue that Parliament's intent was frustrated.

163. While frustration of a federal purpose is an aspect of paramountcy, there is a presumption against incompatibility as explained in *Canadian Western Bank v. Alberta:*[181]

> An incompatible federal legislative intent must be established by the party relying on it, and the courts must never lose sight of the fundamental rule of constitutional interpretation that, "[w]hen a federal statute can be properly interpreted so as to not interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about conflict between the two statutes" (*Attorney General of Canada v. Law Society of British Columbia*, at p. 356*)*

164. Had Canada considered that its purpose was frustrated by the Manitoba legislation, it would have passed clear and unambiguous legislation so the doctrine of paramountcy could easily have been applied. As Justices Binnie and LeBel stated in *Canadian Western Bank v. Alberta:*[182]

> Finally, the doctrine would seem as a general rule to be superfluous in that Parliament can always, if it sees fit to do so, make its legislation sufficiently precise to leave those subject to it with no doubt as to the residual or incidental application of provincial legislation.

165. The Attorney General of Manitoba therefore submits that this Court ought to decline to consider the issue of paramountcy on the basis that the matter is moot. In the alternative, Manitoba submits that the conclusion of the trial Judge that there was no federal paramount

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[181] *Canadian Western Bank v. Alberta, supra* at para. 75 [Manitoba's Authorities, Vol. I, Tab 9].
[182] *Ibid.* at para. 46.

legislation ought to be affirmed.[183]

D. Conclusion

166. This case has shed light on very important events in Canadian history and the roles of Canada and Manitoba in dealing with the Métis land grants. The appellants are critical of the role each government played in the process. However, the Attorney General of Manitoba submits that in deciding this case, this Court must be cognizant of its role in our constitutional framework. It is the role of historians, not courts, to question past events, to criticize decisions and to ponder what might have been if different policy choices had been made. It is the role of the courts to apply legal doctrines to established facts for the purpose of resolving live disputes that have a real impact on legal rights. Courts should not involve themselves in furnishing bare legal opinions about historical events for the sole purpose of influencing political and policy outcomes.

167. In the alternative, Manitoba submits that the impugned statutes were constitutional as falling within its jurisdiction over property and civil rights, matters of a local nature and the administration of justice. Moreover, those statutes were operative throughout their currency as there was no paramount federal legislation.

168. In the end, the impugned statutes brought some order, safeguards and direction to sales between willing sellers and willing buyers. Without the statutes, the common law rules of contract would have governed these voluntary sales. But with the statutes or without them, the sales would have taken place. Accordingly it is futile to consider the constitutionality of the impugned statutes at this late date.

169. In conclusion, therefore, Manitoba submits that the appeal should be dismissed.

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[183] Reasons of the Trial Judge, Appellants' Record, Vol. II, p. 111, paras. 904-906.

PART IV

ORDER SOUGHT CONCERNING COSTS

170. There is no claim for costs.

PART V

ORDER SOUGHT

171. The appeal should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of September 2011.

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PART VI

TABLE OF AUTHORITIES

Cases

Cited at Paragraph Nos.

Cases (con't) **Cited at Paragraph Nos.**

Cases (con't) **Cited at Paragraph Nos.**

Statutes **Cited at Paragraph Nos.**

Other Authorities

Cited at Paragraph Nos.

PART VII

STATUTES, REGULATIONS, RULES, BY-LAWS

Cited at
Paragraph Nos.