Court File No.: 35945

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

BETWEEN:

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

Appellants (Respondents)

- and -

HER MAJESTY THE QUEEN as represented by THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT CANADA

Respondents (Respondents)

- and -

ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF ALBERTA, NATIVE COUNCIL OF NOVA SCOTIA, NEW BRUNSWICK ABORIGINAL PEOPLES COUNCIL AND NATIVE COUNCIL OF PRINCE EDWARD ISLAND, MÉTIS SETTLEMENTS GENERAL COUNCIL, TE'MEXW TREATY ASSOCIATION, MÉTIS FEDERATION OF CANADA, ASENIWUCHE WINEWAK NATION, CHIEFS OF ONTARIO, GIFT LAKE MÉTIS SETTLEMENT, NATIVE ALLIANCE OF QUEBEC, ASSEMBLY OF FIRST NATIONS, MÉTIS NATIONAL COUNCIL

(Interveners)

MEMORANDUM OF ARGUMENT OF THE INTERVENER, GIFT LAKE MÉTIS SETTLEMENT

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Gift Lake Métis Settlement ("Gift Lake") is one of eight land-based, self-governing Métis communities created by Alberta's *Métis Settlements Act* ("MSA").[1] It is situated some 400 km North of Edmonton.

2. The particular circumstances surrounding the the Métis of northern Alberta, as set out in the existing evidentiary record, are directly relevant to two key issues raised in this appeal: namely that Métis are "Indians" within the meaning of the phrase "Indians and lands reserved for Indians" found within s. 91(24) of the *Constitution Act, 1867* (the "First Declaration"), and that there is clear utility to issuing a declaration to this effect.

3. In this regard, it is noteworthy that Canada dealt with the Métis of Northern Alberta (where Gift Lake is situated) by way of a scrip commission in 1899 that operated in direct parallel to the treaty commission of that same year that was mandated by the Dominion to deal with the First Nation inhabitants of that same broad territory. This reality underscores the central fact that notwithstanding the clear distinctiveness of Métis people and culture, Métis communities were considered by Canada to have Aboriginal rights similar though not identical to those of First Nations, which rights needed to be addressed as part of the Canadian government's nation-building project.

4. It is also noteworthy that the history of the Alberta Métis is punctuated by Canada's selective exercise of its 91(24) jurisdiction. The genesis of the Alberta Métis settlements arises almost singularly from Canada's failure to fulfil its promise to provide the Alberta Métis with land under the scrip system initiated and administered by Canada in the late 19th and early 20th centuries. Over the ensuing decades, and in the absence of clarity as to whether Métis and non-status Indians are "Indians" for the purposes of 91(24), the Alberta Métis have been negatively impacted in real ways. Thus, clarification

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[1] R.S.A. 2000, c. M-14.

as to legislative authority in regard to Métis peoples is not only practical, but essential to the unfinished project of reconciliation with the Métis.

5. However, and contrary to the position taken by the Appellants and certain other interveners, there is a lack of utility in broadly re-asserting the existence of fiduciary and consultative duties by the Crown – whether federal or provincial – toward Métis peoples.

B. Facts relevant to this intervention

6. The Métis' history in northern Alberta and history of dealings with Canada provide an important context and perspective to the issue of Métis inclusion in 91(24). Canada operated its scrip system between 1870 and 1930 to provide Métis with allocations of land or money. The intent of this system was to extinguish any "Indian title or claim" of Métis. It was employed in Manitoba in 1870, throughout the northwest in the 1880s, and later on in the area of Treaty 8, in what is now northern Alberta.[2]

7. In Manitoba, Canada promised to distribute 1.4 million acres "towards the extinguishment of the Indian Title to the lands in the Province" while assuring the Manitoba Métis that it would "be of a nature to meet the wishes of the half-breed residents" and distributed "in the most effectual and equitable manner."[3] In *MMF*, this Court held that Canada failed to live up to that promise. Following this failure, the Métis were soon displaced by settlers and forced to move further west.[4]

8. In 1881, Métis located at the historic Métis community of Fort Edmonton petitioned Canada for scrip allocations in fulfilment of Canada's promise to them.[5] The scrip commission eventually arrived in Edmonton in 1885 and 1886 and provided scrip to eligible Métis. Most Métis did not take the land, but rather sold it for cash.[6]

9. In 1889, the Superintendent of Mines wrote the following regarding scrip:

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[2] Trial decision, ¶ 316.
[3] *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 ¶ 31, 38 ("*MMF*").
[4] *MMF* ¶ 39, 128, 150.

> I know of no single case where the original grantee obtained the land; he sells his scrip and locates it for the purchaser wherever the latter may desire it. In this way lands are acquired at a nominal rate, in some cases as low as 70 cents an acre.[7]

10. By 1895, the Métis were becoming destitute. In response to the need to provide the Métis with land, a Métis reserve and industrial school were established by Canada in the area that is now known as St. Paul, Alberta. It proved to be a failure and was closed.[8]

11. In 1899, the Minister of the Interior wrote to the Governor in Council requesting a scrip commission be appointed to address claims of those Métis who were not otherwise eligible under the *Manitoba Act, 1870*. The Minister recommended that Métis claims be addressed concurrently with Indian treaties as part of Order in Council 918:

> [...] 15th July, 1870, was selected as the date applicable to the Halfbreeds because it was the date of the transfer from the Hudson's Bay Company, But the Halfbreeds of the District of Athabasca and adjoining country were not affected by the transfer. Whatever rights they have, they have in virtue of their Indian blood; and the first interference with such rights will be when a surrender is effected of the territorial claims of the Indians. It is obvious that while differing in degree, Indian and Halfbreed rights in an unceded territory must be co-existent, and should properly be extinguished at the same time.[9]

12. This scrip was to be provided under the *Dominion Lands Act*. The Act provided that the grants would issue "on such terms and conditions, as may be deemed expedient." However, as was the case in Manitoba, no "terms and conditions" were spelled out by the Act, and the scrip was issued on an *ad hoc* basis, facilitating predatory land speculation.

13. In 1899, s. 90 of the *Dominion Lands Act* was amended to allow granting "lands in satisfaction of claims of half-breeds arising out of the extinguishment of Indian title."[10] Despite serious concerns raised in Parliament in relation to the risk of land

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[5] [Volume 37, Exhibit P346, p. 10297.]
[6] *R v. Hirsekorn*, 2010 ABPC 385 ¶ 103.
[7] [Volume 3, Exhibit P18, p. 555]
[8] Trial decision, ¶ 437-444.
[9] [Volume 38, Exhibit P372, p. 10628.] [emphasis added]
[10] [Volume 38, Exhibit P374, p. 10666].

speculators taking advantage of Métis, no effective protections were implemented.[11] Between 1899 and 1921, Canada abandoned any idea of protecting Métis from speculation, and began issuing cash compensation to Métis in parallel with treaty payments to members of First Nations and Métis who had taken treaty.[12]

14. Ultimately, the scrip system failed the Alberta Métis as it did the Manitoba Métis, and they were left destitute. As the trial judge observed, in 1930 a dialogue occurred between Alberta and Canada regarding responsibility for "indigent half-breeds."[13] In 1934, Alberta appointed a Royal Commission to investigate Métis problems, and subsequently accepted his recommendations. This led to the creation of 12 Métis "colonies" under the *Métis Population Betterment Act* in 1938, which evolved into the current MSA after a process of negotiation in the 1980s.[14]

15. Today, the Métis settlement lands are held and self-governed by Métis people. Protections on the lands are now entrenched in Alberta's constitution, in contemplation that they may one day be included in the constitution of Canada.[15] This Court has described the MSA as "the result of a negotiation process between the Métis of Alberta and the Province and the outcome of an ongoing struggle for self-preservation."[16]

PART II – POSITION ON QUESTIONS IN ISSUE

16. Gift Lake makes the following submissions:

(a) The history of the Métis of northern Alberta from whom the members of Gift Lake are descended supports the conclusion that the Métis are included in 91(24);

(b) There is utility and indeed necessity in determining whether Parliament has legislative jurisdiction over Métis in order to advance the unfinished project of reconciliation with Métis;

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[11] [Volume 38, Exhibit P374].
[12] [Volume 3, Exhibit P18, p. 572, 580-581].
[13] Trial decision, ¶ 56.
[14] See also *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] 2 S.C.R. 670, 2011 SCC 37 ¶ 5-19 where this Court provided a factual summary of the contemporary history of the MSA.
[15] *Cunningham* ¶ 5-19.
[16] *Cunningham* ¶ 63-64, 66.

(c) It is not necessary to attempt to exhaustively define 'who' the Métis are to decide that they are included in 91(24); and

(d) It is not necessary to consider the issues raised by the Second and Third Declarations in relation to Crown consultative or fiduciary duties, and this Court should not do so in a factual vacuum.

PART III – STATEMENT OF ARGUMENT

B. The lower Courts' conclusions on 91(24) were correct and factually supported

17. The trial judge's key legal conclusion was premised on the purpose of 91(24), holding that it encompassed at least three objectives: (i) the intent to control all people of aboriginal heritage, (ii) to honour Crown obligations inherited from Britain to extinguish aboriginal interests in land, and (iii) to "civilize and assimilate" Aboriginal peoples.[17]

18. Canada's creation of the scrip system was a key consideration in the trial judge's conclusion in that regard. He acknowledged that even with Métis, who were of varying degrees of mixed Aboriginal ancestry, "the federal government accepted the existence of a title or interest on the part of Indians that had to be addressed in some way."[18]

19. Indeed, Canada chose to exercise the 91(24) power within the scrip system in attempting to extinguish Métis "Indian title." The creation of a system that purported to address the "Indian title" held by the Métis is persuasive evidence that the government counted the Métis as being part of the "people sharing a native hereditary base" that the 91(24) power was designed to address in order to facilitate the objects of confederation.[19]

20. The scrip process commenced shortly after Confederation. It was inextricably linked to the federal government's efforts to treat with the prior Aboriginal occupants of the land, in order to quiet title, with a view to settling, developing and uniting the new nation by transcontinental railway. The relevant statutes and instruments

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[17] Trial decision, ¶ 352-354, 566.

[18] Trial decision, ¶ 411. Laws to control and "civilize and assimilate" Métis were also enacted: ¶ 443-452

consistently reference the purpose of scrip as being "in extinguishment of Indian title."[20] In northern Alberta, the scrip process was intimately connected to the negotiation of Treaty 8, and operated in parallel to the Treaty 8 treaty commission, in clear exercise of the federal 91(24) power.[21]

21. While the scrip process began prior to the establishment of Alberta as a province in 1905, it did so as part of the effort to quiet Aboriginal title and rights, and continued well after the creation of the province. There was no transfer of responsibility from the federal government to the province for the issuance of scrip.

22. In Gift Lake's submission, the trial judge was correct in holding that the inclusion of the Métis in 91(24) accords with its historical purpose.[22] The primary purpose of 91(24) is today as it was in 1867: a responsibility to deal honourably with Aboriginal peoples before settlement may occur, in a manner consonant with the *Royal Proclamation, 1867* and the the honour of the Crown.[23] In 1867, the dominant object of so doing was to build a nation; today, it is to achieve reconciliation within that nation.

23. Contrary to Canada's submission,[24] s. 91(24)'s historic roots in the *Royal Proclamation, 1763* does not speak to that power being one of paternalism or to a need to deal with Aboriginal people as "wards." As this Court has found, the *Royal Proclamation* was a recognition of Aboriginal "strength, not weakness and need of protection". [25]

B. The First Declaration's practical utility

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[19] Trial decision, ¶ 412.

[20] Trial decision, ¶ 411.

[21] Trial decision, ¶ 418, 454. See also [Volume 38, Exhibit P372, p. 10628.]

[22] Appeal decision ¶ 130-144.

[23] *MMF* ¶ 66. See also Hogg, Peter W. Constitutional Law of Canada, 5th ed. Supp., vol. 1. Toronto: Carswell, 2007 at 28-2: "[t]he Royal Proclamation of 1763 had established that treaty-making with the Indians was the sole responsibility of the (imperial) Crown in right of the United Kingdom. After confederation, the federal government was the natural successor to that responsibility."

[24] Canada's factum on cross-appeal at paras. 194-202.

[25] *MMF* ¶ 66.

24. In Gift Lake's respectful submission, it does not lie in Canada's mouth to argue that the First Declaration lacks "practical utilty". Canada's longstanding refusal to acknowledge underlying legislative authority in relation to Métis people is at the heart of prolonged federal indifference toward Métis. As stated by this Court in *Cunningham*: :

> [...] The MSA, as discussed earlier, is the result of a negotiation process between the Métis of Alberta and the Province and the outcome of an ongoing struggle for self-preservation. The Métis considered themselves as one of three Aboriginal groups in Canada, but this was not recognized until the *Constitution Act, 1982*. Unlike Indians, however, they enjoyed no land base from which to strengthen their identity and culture or govern themselves. Nor did they enjoy the protection of an equivalent to the *Indian Act*. Their aboriginality, in a word, was not legally acknowledged or protected. Viewed in this perspective, the ameliorative program embodied in the MSA emerges as an attempt to provide to Alberta's Métis settlements similar protections to those which various Indian bands have enjoyed since early times.[26] [emphasis added]

25. This issue has manifested itself as a serious issue of disparity in relation to programs, services, and other benefits available to Alberta Métis. In *Cunningham*, the litigants were Métis persons who were eligible to register as status Indians, and had of necessity done so to obtain federal medical benefits available to status Indians and Inuit but not Métis, and thereby terminated their Métis Settlement memberships.[27]

26. In this regard, this Court commented that preserving an impetus for Métis persons to pursue such important issues of parity with the federal government was supportive of the MSA's ameliorative objects, and drawing bright lines as between status Indians and Métis settlement members under its provisions.[28]

27. Second, the Court of Appeal held that the First Declaration had utility in assisting "in extra-judicial negotiations with the Crown in pursuit of the overarching constitutional goal of reconciliation reflected in section 35 of the *Constitution Act, 1982*"[29] and in clarifying the jurisdictional lines where claims may be at issue, such as treaties or land claims agreements relating to unextinguished Métis Aboriginal rights.[30]

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[26] *Cunningham* ¶ 66.
[27] *Cunningham* ¶ 25.
[28] *Cunningham* ¶ 78.
[29] Appeal decision ¶ 68.
[30] Appeal decision ¶ 72.

28. Indeed, since the adoption of s. 35, this Court has laid an important foundation, and constructed large portions of the architecture, of Aboriginal rights in relation to First Nation peoples. Most recently, it confirmed the landmark Aboriginal title claim of the Tsilhqot'in,[31] and clarified provincial-federal responsibilities under First Nation treaties.[32]

29. The same project in relation to Métis is however in its infancy. In *R. v. Powley*, this Court adjusted the *Van der Peet* test to recognize the Métis' inclusion as one of the Aboriginal peoples of Canada, and in particular "the important differences between Indian and Métis claims" and "the unique post-contact emergence of Métis communities, and the post-contact foundation of their aboriginal rights."[33] More recent decisions by this Court in the *MMF* and *Cunningham* cases have further developed this jurisprudence. While its is clear that the provincial Crowns bear certain responsibilities toward Métis (just as they do toward First Nations), the limits of that provincial jurisdiction, and the scope of federal authority, if any, require delineation in order to foster the ongoing project of reconciliation.

30. In this regard, reconciliation may include the obligation to exercise the 91(24) power honourably, in appropriate circumstances.[34] This Court has recently emphasized that both levels of government are responsible for keeping treaty promises.[35] While this case is not about treaty promises *per se*, it is clear that matters have arisen of unique and central concern to Métis, and jurisdictional uncertainty or unwillingness to act have frustrated the resolution of these issues.[36]

C. It is not necessary or appropriate to attempt to exhaustively define who the Métis are in order to find that they are 'Indians' under 91(24)

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[31] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.

[32] *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48.

[33] *Powley* ¶ 18.

[34] Resort may be had to the unwritten principles in triggering a requirement to act in relation to Métis interests or concernts. This Court has previously held that the unwritten principles may give rise to "very abstract and general obligations, or they may be more specific and precise in nature.": *Secession Reference* ¶ 54.

[35] *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48 ¶ 35.

[36] Appeal decision, ¶ 70-71.

31. Gift Lake submits that this case is not the proper vehicle for determining who is and who is not Métis; rather, that determination must be made in cases that engage that issue expressly, and based on a detailed factual record directed to that issue.

32. The issue in this case is which order of government has legislative authority over Métis, however defined. This Court has held that in constititutional cases it is improper to attempt to answer unnecessary questions, or precisely define a head of power.[37]

33. Although Métis were first textually acknowledged in s. 35(2), so too were Inuit, who are included as 'Indians' in 91(24).[38] Accordingly, the distinctiveness of Métis vis-à-vis Indians or Inuit is not a bar to inclusion as 'Indians' in 91(24). Nor does it give rise to a need to define who is or is not Métis. Such definitional issues may arise in subsequent cases, informed though not constrained by the limited guidance provided by this Court in *Powley*.[39]

D. It is not necessary for this Court to address the issues related to the Second and Third Declarations in relation to Crown consultative or fiduciary duties

34. In *MMF* and *Grassy Narrows*, this Court confirmed that the Crown's relationship with the Métis "viewed generally, is fiduciary in nature" but its content may vary with the circumstances[40] and that either level of Crown contemplating conduct that may affect Aboriginal rights may give rise to a duty of consultation.[41]

35. Accordingly, the requested Second and Third declarations would merely repeat the existing state of the law. Fiduciary and consultative duties toward Métis peoples are that of the Crown. Depending on the circumstances, such duties as toward Métis may fall to either level of Crown.[42] A finding of federal jurisdiction over Métis

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[37] *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 ¶ 7. *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401 ¶ 27.

[38] *Reference whether "Indians" includes "Eskimo"*, [1939] S.C.R. 104.

[39] *Powley* ¶ 18, 30.

[40] *MMF* ¶ 48-49.

[41] [2014] 2 SCR 447, 2014 SCC 48 ("*Grassy Narrows*") ¶ 33-37.

[42] *Grassy Narrows* ¶ 33-37, affirming *Keewatin v. Ontario (Minister of Natural Resources)*, 2013 ONCA 158 ("*Keewatin*") ¶ 139-140. See also *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 ("*Haida*") ¶ 57-59.

peoples should not be taken to detract from the existence and exercise, in appropriate circumstances, of a provincial fiduciary or consultative duty toward Métis.

E. Conclusion

36. The lower Courts' decision to issue the First Declaration is well-supported in fact and law, and had practical utility. This is not the proper case to define 'Métis'.

37. The honour of the Crown and its consultative and fiduciary duties apply broadly to the Métis as one of the Aboriginal peoples of Canada, and both the content and the bearer of those duties may vary with different factual circumstances. The requested Second and Third Declarations would merely repeat the existing state of the law.

PART IV – SUBMISSION ON COSTS

38. Gift Lake does not seek costs and asks that no costs be ordered against it.

PART V – ORDER SOUGHT

39. Gift Lake submits that this case should be decided in line with the above principles, and requests permission to address the Court orally at the hearing of this appeal.

ALL OF WHICH IS RESPECTULLY SUBMITTED

Dated at Ottawa, Ontario this 27th day of July, 2015.

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PART V – TABLE OF AUTHORITIES

Case Law	Paragraph(s)
Alberta (Aboriginal Affairs and Northern Development) v. Cunningham, 2011 SCC 37, [2011] 2 S.C.R. 670.	14-15, 24-26
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