

Section 91(24) and Canada's Legislative Jurisdiction with Respect to the Métis

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Section 91 (24) of the Constitution Act of 1867 provides that the federal government has the legislative jurisdiction over "Indians and lands reserved for the Indians." However, the Federal government has consistently held that the Métis fall within the authority of Provincial governments. This has resulted in the anomaly of the Federal government presently claiming jurisdiction for two of the three Aboriginal peoples of Canada—the Indians and the Inuit—while there is a de facto jurisdictional vacuum in respect to the Métis. With the Federal government's assertion of jurisdiction over Indian and Inuit issues has come the Federal allocation of lands and services to persons of those groups. The Métis in the meantime are mostly left to fend for themselves. While the author is aware of the distinction between legislative jurisdiction and responsibility over Métis affairs, this paper focuses on the former in exploring

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the matter of Federal jurisdiction over the Métis under section 91(24) of the Constitution Act of 1867.

The starting point for this analysis is the Supreme Court decision in Re the term ‘Indians’ which held that examining documents contemporaneous to Confederation is central to a determination of the scope of the term. As such, much of this article focuses on examining contemporaneous material including the British Parliamentary Papers. It is argued that the reports examined show that the term “Indians” was often used in a generic sense including the Métis. This article also looks at pre and post Confederation legislation dealing with Aborigines and posits that such legislation generally defines “Indians” broadly enough to include most Métis. Additionally, Métis land grants and treaty entitlements are examined, and it is argued that at least some Métis were considered “Indians” for the purposes of accessing rights under a number of treaties.

The article reasons that the inclusion of Métis under section 91(24) of the Constitution Act of 1867 is consistent with the approach taken by the Supreme Court in Re the term ‘Indians’ and is consistent with a purposive approach to the constitutional interpretation of s. 91(24) which was to have one central authority responsible for the Aboriginal inhabitants of the Dominion. While the acceptance of Federal jurisdiction over issues pertaining to the Métis is expected to create some complications pertaining to the Métis in Alberta, this article forwards the position that these can and should be overcome in the interest of legal consistency and in the interest of furthering the equity of services and rights available to the Aboriginal peoples of Canada.

I INTRODUCTION

In Canada, there are few constitutional provisions fraught with the enormous social, economic and political difficulties and yet unresolved uncertainties as those dealing with Aboriginal¹ peoples and their rights. The ongoing controversies in New Brunswick and Nova Scotia regarding MicMac treaty rights to harvest seafood for a “moderate livelihood”, described as “food, clothing and housing supplemented by a few amenities”,² are a case in point. Similarly in British Columbia, the Supreme Court of Canada’s decision in *Delgamuukw v. British Columbia*³ has resulted in political and economic uncertainty and associated social tensions.⁴

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1. In Canada, because the term “[A]boriginal” is found in the Constitution, it is used more frequently than the term “Indigenous.” “Indigenous” is used more in international instruments. The terms are used interchangeably in this paper.
 2. *R. v. Marshall*, [1999] 3 S.C.R. 456.
 3. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*].
 4. More recently, there have been two cases from the British Columbia Court of Appeal that have altered the provincial Crown’s view on the need to consult with First Nations (see decision in *Taku River Tlingit v. Ringstad*, and see also *Haida Nation v. Ministry of Forests*). In addition,

There are, no doubt, numerous reasons for the tensions and behavior patterns which flow from these and similar Aboriginal and treaty rights decisions. Some of the reasons are related to ignorance and intolerance, while other reasons are directly related to the economic consequences that may result from a reallocation of natural resources. Intrinsic to the source of these tensions is the inherent lack of clarity around some of the most fundamental provisions of the Canadian constitutional framework, which provides for the recognition of the rights of Aboriginal peoples.

For example, section 91(24) of the *Constitution Act, 1867*⁵ provides that the federal government has the legislative jurisdiction for “Indians and lands reserved for the Indians.” On its face, it is a seemingly clear constitutional provision. Yet even today, we are unclear as to the scope of the term ‘Indians’ as used in the *Act* of 1867. We do know that the term ‘Indians’ is broader than the definition provided in the *Indian Act*⁶ and that it also includes the Inuit.⁷ But the matter of which level of government has the legislative jurisdiction over the Métis is as yet unresolved.⁸

The question of jurisdiction is important because it could well mean an associated assumption of responsibility for the delivery of social programs and services. And while there is a distinction between having legislative jurisdiction over a subject matter and having associated responsibilities, the fact is the federal government currently delivers billions of dollars of services to those persons deemed as Indians under the federal *Indian Act* and provides some services to the Inuit. In addition, there have been formal processes resulting in the setting aside of lands and resources for the Indians and the Inuit. And while the setting aside of lands and the services provided to the Indians, and to a lesser extent to the Inuit, may be wholly inadequate, the lands and services that have been provided are certainly of some value. For the most part, the Métis are left to fend for themselves or are considered a responsibility of the provincial governments. With the notable exception of

the Haida Nation has filed a writ seeking Aboriginal title over Haida Gwaii (Queen Charlotte Islands). These matters, along with the B.C. provincial government’s referendum on treaty issues, have contributed to continued tension around Aboriginal lands and resource issues in British Columbia.

5. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [hereinafter *Constitution Act, 1867*].
6. *Indian Act*, R.S.C. 1970, c. I-6, consolidated since 1876.
7. *Re the term “Indians”*, [1939] S.C.R. 104 determined that the Inuit are Indians for the purpose of the *Constitution Act, 1867*. I will use the term Inuit in place of the term Eskimo in this paper, except when citing directly from other sources.
8. Arguably the matter of legislative jurisdiction is less important than the matter of responsibility. There is Canadian jurisprudence that distinguishes between the two. At the same time, while jurisdiction in itself does not place an obligation on the legislature to act, there are matters related to Canada’s fiduciary obligation to Indigenous peoples and section 15 of the *Canadian Charter of Rights and Freedoms* which provide compelling arguments for the exercise of legislative jurisdiction in a manner that is fair and equitable to those Indigenous or Aboriginal peoples over whom the federal government has legislative jurisdiction. This is however, a separate topic.

Alberta, the provinces have generally been reluctant to address in a serious way the poverty and social and economic hardship of the Métis. For these and other reasons, Métis are often referred to as the ‘forgotten people’.

With the inclusion of sections 35(1) and 35(2) and 37.1 in the *Constitution Act 1982*,⁹ there was some hope that the jurisdictional issue would be resolved. The provisions of section 35(1) provide for the recognition of Aboriginal and treaty rights. More importantly for the Métis, section 35(2) includes the Métis as one of the Aboriginal peoples of Canada who would presumably be entitled to exercise the section 35(1) rights.¹⁰ And, while the provisions of section 35 recognize and affirm rights and provide general guidance around who would be entitled to exercise those rights, the provisions of section 35 lack clarity and precise definition.

Section 37.1 (formerly section 37) established a process to help clarify the rights of Aboriginal peoples. One of the items on the agenda for the section 37 process was the issue of jurisdiction over the Métis. However, Métis hopes that the jurisdiction question would be clarified were short lived.¹¹ The section 37 process failed, leaving it to the courts to consider and examine what the political process should have resolved.

This leaves the Canadian constitutional framework with the interesting anomaly of having the federal government clearly with the legislative jurisdiction for two of the three Aboriginal Peoples of Canada, the Indians and the Inuit, while there is a de facto jurisdictional vacuum respecting the Métis.¹² This paper will explore the matter of federal jurisdiction over the Métis.

9. *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution Act, 1982*].

10. The Métis are Aboriginal peoples with mixed Aboriginal and European ancestry. In Canada, the Métis constitute one of the three Aboriginal peoples of Canada. Until section 35 of the *Constitution Act, 1982* was introduced, there was some question as to whether the Métis would be considered Aboriginal peoples.

11. At the outset, not all Métis were convinced that an amendment to section 91(24) would be beneficial. The Alberta Métis were particularly concerned about the implications changes to section 91(24) would have respecting their relationship with the Province of Alberta and the Métis settlement legislation enacted by the Province.

12. Just as curious is the lack of clarity around the second part of section 91(24), the meaning of the words “lands reserved for the Indians”. While it is self-evident that this term includes Indian reserves established under the *Indian Act*, the scope of all the lands that were reserved to the Indians is not clear. Arguably, the expression “lands reserved for the Indians” includes not only the *Indian Act* reserves, but also all those unceded lands reserved to the Indians under the Royal Proclamation and those lands where Aboriginal rights and title continue to flourish.

II THE MÉTIS

A Who are the Métis?

On a number of occasions the courts have explored questions surrounding the jurisdiction over the Métis, but the decisions have been inconclusive.¹³ Recently, the Appeal Courts of both Manitoba¹⁴ and Ontario¹⁵ have had the opportunity to explore the knotty questions associated with Métis Aboriginal rights. However, neither of these courts deliberated directly on the question of which level of government has the legislative jurisdiction for Métis. And, while it is clear from these decisions and the language of section 35 that the Métis are an Aboriginal people, with Aboriginal rights,¹⁶ it is not clear who the Métis are. There is no constitutional definition of the Métis, and there are at least two valid views.

The Congress of Aboriginal Peoples¹⁷ was originally incorporated to represent the Métis and Non-Status¹⁸ Indians at the national level. The Congress and some of its affiliates have expressed the view that the term Métis refers to a broad category of persons with mixed Aboriginal and European ancestry. This would include all people of ‘mixed blood’ who identify themselves as Métis.¹⁹ It is important to note that it was the Native Council of Canada, the predecessor of the current Congress of Aboriginal Peoples, that negotiated the inclusion of the term ‘Métis’ as one of the Aboriginal peoples of Canada referred to in section 35 of the *Constitution Act 1982*.

The Métis National Council representing the Métis people from primarily the three prairie provinces maintains the view that the Métis are a unique people, emerging out of special historical and political circumstances. In the view of the Métis National Council, the Métis people emerged as a distinct socio-cultural entity, primarily in the valleys of the

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13. See for example *R. v. Laprise*, [1977] 3 W.W.R. 379; *R. v. Grumbo*, [1998] 3 C.N.L.R. 172 (C.A.); and *R. v. Blais*, [1998] 4 C.N.L.R. 103. Each of these cases addresses the term “Indian” in the *Natural Resource Transfer Agreements* directly, and indirectly with the term “Indians” and the *Constitution Act, 1867*.
 14. *R. v. Blais*, [2001] 3 C.N.L.R. 187 [hereinafter *Blais*].
 15. *R. v. Powley*, [2001] 2 C.N.L.R. 291.
 16. While the leading Métis cases differ on whether Métis Aboriginal rights have been extinguished, all leading cases recognize that the Métis would have had Aboriginal rights at some point. *R. v. Powley, ibid.* is particularly instructive on this point.
 17. Formerly known as the Native Council of Canada.
 18. The term “non-status Indian” has a number of meanings. Prior to the 1985 amendments to the *Indian Act*, it was often used to refer to women and their offspring who lost their status under the *Indian Act* because of the former section 12(1)(b) and other provisions. More generally, it refers to those Indians who are not registered under the *Indian Act*. It may or may not be used to refer to the Métis.
 19. Canada, *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol. 4 (Ottawa: Supply and Services Canada, 1966) at 264-265 [hereinafter *RCAP Report*].

Saskatchewan, the Red and the Assiniboine Rivers, uniting to oppose Canadian expansion into the Northwest.²⁰ This distinct socio-cultural entity culminated in the birth of the Métis nation under the political and spiritual leadership of Louis Riel.²¹ These Métis were eventually allotted parcels of land under the *Manitoba Act*²² and the *Dominion Lands Acts*²³ “towards the extinguishment of the Indian title.” Accordingly, the Métis National Council is of the view that most Métis today are the descendants of those persons who were legally recognized as Métis (half-breeds) under the provisions of these two acts.

During the negotiations around the failed Charlottetown Accord, the Métis National Council, Canada and several provinces developed a *Métis Nation Accord* to address specific Métis issues. The Accord was an appendix to the Charlottetown Accord. The *Métis Nation Accord* defines Métis as follows:

(a) Métis means an Aboriginal person who self-identifies as Métis, who is distinct from Indian and Inuit and is a descendant of those Métis who received or were entitled to receive land grants and/or Scrip under the provisions of the *Manitoba Act 1870* or *Dominion Lands Act* as enacted from time to time.²⁴

The different views of who the Métis are has been the subject of much debate between the Métis National Council and the Congress of Aboriginal Peoples, and will likely not be resolved until the matter is before the Supreme Court of Canada. Having said this, Catherine Bell provides an interesting view on the Métis definition question.²⁵ Bell indicates that while there are three distinct groups of Aboriginal peoples, the Indians, the Inuit and the Métis, there are numerous distinct collectivities within these groups and each of these distinct collectivities is a people. Each of these sub-groups of the broader categories of Aboriginal peoples might, in Bell’s view, have the same qualities as a ‘people’ in international law, as proposed by the International Commission of Jurists. The International Commission of Jurists proposed the use of the following criteria for the purposes of identifying a ‘People’ in International Law: a common history; racial or ethnic ties; cultural or linguistic ties; religious or ideological ties; a common territory or geographical location; a common economic base; and a sufficient

20. Catherine Bell, “Who are the Métis People in Section 35(2)?” (1991) 29 Alta. L. Rev. 351 at 359 [hereinafter *Who are the Métis*].

21. *RCAP Report*, supra note 19 at 220-223. See also generally D. Bruce Sealey & A. Lussier, *The Métis: Canada’s Forgotten People* (Winnipeg: Manitoba Métis Federation Press, 1975).

22. *Manitoba Act*, S.C. 1870, c. 3.

23. *Dominion Lands Acts, 1879* (U.K.), 42 Vict., c. 31; 1883 (U.K.), 46 Vict., c. 17.

24. See *Métis Nation Accord*, s.1(a). The *Métis Nation Accord* was agreed to by the Métis National Council, the four western provinces (and later the Northwest Territories) and Canada during the round of negotiations leading to the Charlottetown Accord.

25. *Who are the Métis*, supra note 20.

number of people.²⁶ Bell postulates that the Métis might be better served by focusing their attention more to the international arena as opposed to resting their aspirations with the federal government in the hopes Canada will accept that it has jurisdiction for the Métis under section 91(24).

However, notwithstanding the views of the International Commission of Jurists and the comments of Bell, the question of the definition of a 'people' in international law is not at all clear. In Patrick Thornberry's view, peoples are simply "the Non Self Governing Territories" referred to in Chapter XI of the UN Charter.²⁷ In this view, a people for the purposes of international law would be those people that have emerged out of the decolonization process, primarily since the second world war, and who have now emerged or are emerging as Nation States.

The issue of Métis definition is important and it is interwoven with the issue of jurisdiction and responsibility.²⁸ Clearly, at a minimum the term Métis would include those western Métis represented by the Métis Nation, and descendants of the Métis who have taken scrip under the *Manitoba Act* and the *Dominion Lands Acts*.

B Federal Perspective Regarding Legislative Jurisdiction

The issue of legislative jurisdiction respecting the Métis has been debated on several occasions during the various constitutional conferences dealing with Aboriginal matters. The federal government has consistently stated that the Métis fall within the authority of the provincial governments, notwithstanding the federal government's jurisdiction for Indians and Indian lands. This view was clearly stated by former Prime Minister Pierre Elliot Trudeau in his opening statement at the 1983 First Ministers Conference on Aboriginal Constitutional Matters. In outlining the federal view, Trudeau stated:

The provincial governments are mainly responsible for the Métis. While in the view of the federal government they do not fall within the definition of the

26. International Commission of Jurists Secretariat, "The Events in East Pakistan: 1971" (1972) 8 Int'l Comm. Jur. Rev. 23. See also *RCAP Report*, *supra* note 19 at 298. See also Michael Jackson, "Aboriginal Rights Litigation and International Law: The Gitksan and Wet'suwet'en Case" (Canadian Bar Association Conference on Aboriginal Peoples in the Canadian Constitutional Context, Montreal, Quebec, 29-30 April 1995) [unpublished]. In this article, Jackson notes that the Commission is careful to point out that no single criteria, if unmet, would be fatal to peoplehood.

27. Patrick Thornberry, *Minorities and Human Rights* (Minority Rights Group, 1991) at 9.

28. Although clarification of who the Métis are is not essential to the jurisdictional debate, arguably, if the term "Métis" simply means "mixed blood" then these people may well come under the *Indian Act* and section 91(24). It may be more difficult to argue that the historic Métis ought to be included under the *Indian Act*, though as a matter of fact, many of the historic Métis are both self-identifying Métis and status Indians.

word 'Indian' in section 91(24) of the *Constitution Act, 1867*, the federal government accepts a measure of responsibility to them as disadvantaged peoples.²⁹

The federal view was subsequently elaborated at a later meeting of Justice Ministers by then federal Minister of Justice, John Crosbie. At that meeting, Mr. Crosbie stated:

The federal Department of Justice has concluded...has reached a legal opinion that Parliament cannot legislate for Métis as a distinct people. That is a legal opinion. We cannot legislate for Métis as a distinct people. On the other hand, Parliament can legislate for Indians irrespective of whether they are registered or not because of section 91(24).³⁰

And while these views were articulated several decades ago, they continue to be some of the most authoritative statements by the federal government with respect to the issue of which level of government has jurisdiction over the Métis.

The federal view seems to be based on the fact that the Métis identify themselves as a people, distinct from Indians, as do the Inuit. The view, as presented by Mr. Crosbie represents an interesting theory but the legal basis is somewhat dubious. One can illustrate the point by extending, by analogy, the federal reasoning to section 91(25) of the *Constitution Act, 1987*. Pursuant to that section, the federal government has legislative jurisdiction over "naturalization and aliens." The federal government would not be relieved of its legislative jurisdiction and any associated responsibilities if a specific group of aliens identified themselves as other than aliens. Such persons would remain under Canada's legislative jurisdiction notwithstanding the manner in which they chose to identify themselves. If the Métis fall within the jurisdiction of the federal government, the federal government may only divest itself of jurisdiction for the Métis by way of a constitutional amendment. There are no provisions for amendments through self-identification. And, as already noted, the Inuit identify themselves as distinct from the Indians, and this does not alter their inclusion under section 91(24).

29. Opening statement of Prime Minister Trudeau at the First Ministers Conference on Aboriginal Constitutional Matters (Ottawa, 8-9 March 1983).

30. Comments by then Minister of Justice, John Crosbie at the Inter-governmental Meeting of Ministers on Aboriginal Constitutional Matters, December 1984, in response to then Vice-President of the Native Council of Canada, Harry Daniels.

C Re the Term 'Indians'

An examination of the scope of the federal governments legislative jurisdiction respecting section 91(24) and the meaning of the term 'Indian' must begin with a discussion of the Supreme Court of Canada's decision in *Re the term 'Indians'*,³¹ which involved a dispute between the province of Quebec and Canada over the legislative jurisdiction for the Inuit. The question was referred by way of a reference to the Supreme Court of Canada. The Supreme Court of Canada was asked to determine whether the Inuit inhabitants of Quebec were Indians for the purposes of section 91(24) of the *Constitution Act, 1867*. In determining the meaning of the word 'Indians', the court looked at documents relating to the Aboriginal inhabitants of North America around the time of confederation. In its decision, the Court stated that in the interpretation of constitutional provisions related to the 1867 Act, it was necessary to rely on documents contemporaneous to confederation. Accordingly, the Court relied heavily on documents relating to the treatment of Indians in Rupert's land just prior to confederation. The principle source examined by the court was the *Report from the Select Committee on the Hudson's Bay Company*.³² In its report the Select Committee was considering the desires of Canada to assume possession of the British territories in North America, administered by the Hudson's Bay Company. In commenting on the Report from the Select Committee, Chief Justice Duff noted that, "[i]t is quite clear from the materials before us that this Report was the principle source of information as regards the [A]borigines in those territories until some years after Confederation."³³ After studying the Report, including the map and the census found in the appendix, the Chief Justice concluded that these documents use the term 'Indian' in a generic sense, interchangeable with the term 'Aborigine'. The Chief Justice stated, "[i]t is indisputable that in the census and in the map the 'esquimaux' fall under the general designation 'Indians' and that, indeed, in these documents, 'Indians' is used as synonymous with 'Aborigines'."³⁴

Justice Kerwin also felt that the term 'Indians' was used in its generic sense in 1867 and that it included all the Aborigines of the territory subsequently included in the Dominion of Canada. He states that:

There are also a few other publications to which our attention has been called where 'Indians' and 'Esquimaux' are differentiated but the majority of authoritative publications, and particularly those that one would expect to be in

31. *Supra* note 7.

32. U.K., "Report from the Select Committee on the Hudson's Bay Company" in *British Parliamentary Papers*, vol. 3 (1857) Session 2 (Irish University Press, 1969).

33. *Re the term "Indians"*, *supra* note 7 at 109.

34. *Ibid.* at 106-107.

common use in 1867, adopt the interpretation that the term ‘Indians’ includes all the [A]borigines of the territory subsequently included in the Dominion.³⁵

From a discussion of *Re the term ‘Indian’*, it is apparent that the Supreme Court has given some guidance for the interpretation of section 91(24). The Court indicated that in looking at section 91(24) to understand how the term ‘Indians’ is used in that section, it is necessary to look at reliable sources of information contemporaneous to Confederation. The Court determined that the term ‘Indians’ was used in section 91(24) in its generic sense and was synonymous with the term ‘Aborigines’. Among the documents examined, the court felt that the Report from the Select Committee was the principle source of information regarding the Aboriginal peoples in the territories administered by the Hudson’s Bay Company.

D British Parliamentary Papers

The Report from the Select Committee on the Hudson’s Bay Company is from the series of British Parliamentary Papers and Reports dealing with numerous issues referred to in the British Parliament. Several volumes of these Parliamentary Papers deal with issues related to Indians and ‘Aborigines’.

The *Report from the Select Committee on the Hudson’s Bay Company* was submitted as a study of the desirability of transferring the territories under the Hudson’s Bay Company to Canada. It was also an investigation of the manner in which the company was treating the Indian inhabitants. In referring to the Report from the Select Committee, it should be remembered that the Hudson’s Bay Company acted as the government of the day in Rupert’s Land, a vast territory covering the Hudson’s Bay drainage system, including most of western Canada and parts of the Territories.³⁶ The Chief Administrator of the Hudson’s Bay Company was also the Governor of those territories.

The *Report from the Select Committee on the Hudson’s Bay Company* deals with all manner of relationships between the Hudson’s Bay Company and the original inhabitants of Rupert’s land. It addresses issues related to the treatment of the Indians, the Inuit and the Métis, including their industriousness, levels of poverty, education, religious study and general

35. *Ibid.* at 121.

36. For a discussion of the boundaries of Rupert’s land see Kent McNeil, *Native Rights and the Boundaries of Rupert’s Land and the North Western Territories* (Saskatoon: University of Saskatchewan Native Law Centre, 1982) and Kent McNeil, *Native Claims in Rupert’s Land and the North Western Territory: Canada’s Constitutional Obligations* (Saskatoon: University of Saskatchewan Native Law Centre, 1982).

well being.³⁷ The Report also looks into the relationships within the Métis and Indian communities. With regard to the language used to describe the Métis, settler expressions such as ‘half-breed’, or ‘half-caste’ or ‘half-Indian’ are used interchangeably.³⁸ The way in which the Métis are treated is consistent with the treatment of the Indians. At times, they are referred to as Indians and treated the same as their Indian relatives. In some cases, they are treated as a unique class of Aboriginal inhabitants of the territories. In almost all cases, they are treated as Aborigines.³⁹ Like the Indians, the company did not administer justice among the Métis, unless a crime was committed against a non-Indian.⁴⁰ Administration and control of the internal affairs of the Métis, like the Indians, was considered to be generally outside the Hudson’s Bay Company.⁴¹

The following dialogue between members of the Select Committee and Sir George Simpson, Chief Administrator of the Hudson’s Bay Company is telling.

1747. [*Mr. Grogan*] What privileges or rights do the native Indians possess strictly applicable to themselves? - They are perfectly at liberty to do what they please; we never restrain Indians.

1748. Is there any difference between their position and that of the half-breeds? – None at all. They hunt and fish, and live as they please. They look to us for their supplies, and we study their comfort and convenience as much as possible; we assist each other.

1749. [*Lord Stanley*] You exercise no authority whatever over the Indian tribes? – None at all.

1750. If any tribe now were pleased now to live as the tribes did live before the country was opened up to Europeans; that is to say, not using any article of European manufacture or trade, it would be in their power to do so? – Perfectly so; we exercise no control over them.

1751. [*Mr. Bell*] Do you mean that, possessing the right of soil over the whole of Rupert’s Land, you do not consider that you possess any jurisdiction over the inhabitants of that soil? – No, I am not aware that we do. We exercise none, whatever right we possess under our charter.

1752. Then is it the case that you do not consider that the Indians are under your jurisdiction when any crimes are committed by the Indians upon the Whites? – They are under our jurisdiction when crimes are committed upon the Whites, but not when committed upon each other; we do not meddle with their wars.

1753. What laws do you consider in force in the case of Indians committing crimes upon the Whites; do you consider that the clause in your license to

37. *Supra* note 32. See generally the statements by Sir George Simpson, Chief Administrator of the Hudson’s Bay Company in response beginning at para. 1448 at 78.

38. *Ibid.* paras. 1748-1751 at 91-92.

39. *Ibid.*

40. *Ibid.* para. 1752 at 92.

41. *Ibid.* See particularly paras. 1747-1756 at 91-92. See also the testimony of the Right Reverend David Anderson, Bishop of Rupert’s Land paras. 4387-4395 at 244, where he notes there is a total Indian population of 2600 in the Red River Settlement, including the half-breeds.

trade, by which you are bound to transport criminals to Canada for trial refers to the Indians, or solely to the Whites? – To the Whites, we conceive.

1754. [Mr. Grogan] Are the native Indians permitted to barter skins *inter se* from one tribe to another? – Yes.

1755. There is no restriction at all in that respect? – None at all.

1756. Is there any restrictions with regard to the half-breeds in that respect?
- None, as regard dealings amongst themselves.⁴²

In *Re the term 'Indians'*, much emphasis was placed on the census submitted by the Hudson's Bay Company. For that census (see page 367 of the Report from the Select Committee on the Hudson's Bay Company and page 107 of *Re the term 'Indians'*), the Eskimo were treated as a tribe of Indians. The Métis were put in the same class as the whites. It is worth noting that in the Report from the Select Committee, the census is the only occasion where the 'half-breeds' are categorized as non-Indians. Throughout most of the oral reports, Métis are treated as a class of 'Aborigines'. This becomes apparent when Sir George Simpson, Governor and Chief Administrator of the Hudson's Bay Company is directly questioned on the treatment of the Métis and on the census itself. In response to questions from the Select Committee member Mr. Roebuck, Governor Simpson contradicts the evidence on the census by categorizing the half-breed population with the Indians:

1681. In that census which you have given in, is there an account of the number of the half-breeds in the Red River Settlement? – Yes; 8000 is the whole population of the Red River; that is the Indian and half-breed population.

1682. Can you give any notion of how many of those are half-breeds? – About 4,000 I think.⁴³

Of equal interest is an earlier Select Committee Report considering what measures should be adopted with regard to the Aboriginal inhabitants in the countries where there are British Settlements. *The Report from the Select Committee on the Aborigines*⁴⁴ includes testimony concerning the Aborigines throughout the British Empire. In this Report, dealing exclusively with the 'Aborigines', there is a specific section dealing with the Red River Settlement, a majority of whom were Métis. When asked what measures had been taken to civilize the 'Native' population, then Chairman of the Hudson's Bay Company, John Henry Pelly Esquire, noted that a school had been established. When asked how many 'Native' children are being taught, he said there were from 200-300, and this number included half-breeds.⁴⁵ In

42. *Ibid.* paras. 1747-1756 at 91-92.

43. Interchange between Simpson (answerer) and Roebuck (questioner), *Ibid.* paras. 1681-1682 at 89.

44. U.K., "Report from the Select Committee on the Aborigines (British Settlements)" in *British Parliamentary Papers, Anthropology Aborigines*, vol. 2, Session 1837 (Irish University Press, 1968) [hereinafter *Select Committee on the Aborigines*].

45. *Ibid.* para. 375 (22 March 1837).

response to questions about the 'Native' population, he indicated that the Red River Settlement had about "5000 souls"⁴⁶ which included both the Indians and the Métis.

In addition to the Select Committee Reports, there are other British Parliamentary Papers dealing with the Métis and the Red River Settlement that give further insight into the treatment of the Métis. The *Report Correspondence and Other Papers Relating to the Red River Settlement, the Hudson's Bay Company and other Affairs in Canada*⁴⁷ examines the treatment by the Hudson's Bay Company of the Indians and Métis in the Red River Settlement as a result of complaints from the inhabitants. The complaint or "Memorial and Petition" was filed by the "Deputies from the Natives of Rupert's Land, North America."⁴⁸ In that Report there is a discussion around the census, and the Report notes "...The heads of families are 870; of whom 571 are Indians, or half-breeds, natives of the territory."⁴⁹

The three British Parliamentary Papers, that is the two Select Committee Reports and the *Report on the Red River Settlement*, are no doubt the most authoritative documents dealing with the manner in which the Métis were treated by the British Government and the Hudson's Bay Company. In all of these reports, the Métis were considered as and treated as natives of the land, or 'Aborigines', like the Indians and the Inuit. In many cases, particularly in the *Report from the Select Committee on the Hudson's Bay Company*, the manner in which the Métis were treated was indistinguishable from the way in which the Indians were treated.

The Report of the Select Committee on the Aborigines deals with communities of 'Aborigines' in the British Settlements. At that time, the Red River Settlement was predominantly Métis, and the community was clearly considered to be an 'Aborigine' settlement by the authors of the Report. Combined with the statement from *Re the term Indian* that the term 'Indians' includes all the 'Aborigines' in the territories that were to become Canada, it would appear, at a minimum, this would include the Métis in the Red River Settlement.

46. *Ibid.* para. 351 at 70 (22 March 1837).

47. U.K., "Reports Correspondence and Other Papers Relating to the Red River Settlement the Hudson's Bay Company and Other Affairs in Canada" in *British Parliamentary Papers, Colonies Canada*, vol. 18, Session 1849 (Irish University Press, 1969) [hereinafter *Red River Settlement Papers*].

48. *Ibid.* at 297.

49. *Ibid.* at 339. The testimony in this report is quoting Alexander Simpson from an earlier publication entitled, "The Life and Travels of Thomas Simpson, by his Brother Alexander". Alexander was a former employee of the Hudson's Bay Company. The view that the Métis and the Indians are Natives of the land with rights that flow from being natives was expressed in the "Memorial and Petition" that had been filed against the Hudson's Bay Company. The Hudson's Bay Company seemed to think that the petitioners were troublemakers trying to stir up the Indians and tried to make a distinction between the Métis and the Indians, adding that the use of the term "[N]atives" is "an ambiguity calculated to mislead." See page 354.

Simply by using the guidelines established by the Supreme Court, along with the testimony provided by the British Parliamentary Papers, there is sufficient evidence to draw the conclusion that Métis were considered Indians for the purpose of the *Constitution Act, 1867*. However, the evidence and testimony in the Parliamentary Papers must be balanced with the weight the Court gave to the census. A brief discussion of legislation contemporaneous to confederation, Métis land grants, Scrip, the inclusion of Métis in treaties and recent case law, including case law dealing with the Natural Resource Transfer Agreements (“NRTA”) will provide a more complete picture.

E Legislation

In his seminal article entitled ‘*Indians*’: *An Analysis Of The Term As Used In Section 91(24) Of The British North America Act, 1867*,⁵⁰ Clem Chartier undertakes a detailed discussion of the various pieces of legislation contemporaneous with confederation in an attempt to determine what the understanding of the term ‘Indian’ was at the time. Though Chartier’s work includes a complete review of the pre-confederation and post-confederation legislation and need not be repeated, a brief look at some of the statutes of the day will be helpful. Of interest is *An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada*.⁵¹ The 1850 Act of the Legislature of Lower Canada includes a definition of the term ‘Indians’ which provides that the following shall be considered Indians:

First – All persons of Indian blood, reputed to belong to a particular Body or Tribe of Indians interested in such lands, and their descendents.

Secondly – All persons intermarried with any such Indians and residing amongst them, and the descendants of all such persons

Thirdly – All person residing among such Indians, whose parents on either side were or are Indians of such Body or Tribe, or entitled to be so considered as such:

And Fourthly – All person adopted in infancy by any such Indians, and residing in the Village or upon the lands of such tribe or body of Indians, and their descendants.⁵²

50. Clem Chartier, “‘Indian’: An Analysis of the Term as used in Section 91(24) of the British North American Act, 1867” 43 Sask. L. Rev. 37.

51. *Act for the Better Protection of the Lands and Property of the Indians in Lower Canada*, 1850 (U.K.), 13 & 14 Vict., Cap. 42.

52. *Ibid.* s. 5.

As well, *An Act Respecting Indians and Indian Lands*,⁵³ passed in 1860, also includes a definition of the term ‘Indian’ similar to the 1850 definition. In 1868, the Dominion of Canada passed *An Act Providing for the Organization of the Department of the Secretary of State of Canada, and for the Management of Indian and Ordinance Lands*,⁵⁴ which was the first piece legislation enacted pursuant to section 91(24) of the Act of 1867. The 1868 Act provides that for the purposes of determining who is entitled to enjoy Indian lands and immovable property, the following shall be considered as Indians:

Firstly - All persons of Indian Blood, reputed to belong to the particular tribe, band or body of Indians interested in such lands or immovable property, and their descendants;

Secondly – All persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians or an Indian reputed to belong to the particular tribe, band or body of Indians interested in such lands or immovable property, and the descendants of all such persons; and

Thirdly – All women lawfully married to any of the persons included in the several classes hereinbefore designated; the children issue of such marriages, and their descendants.⁵⁵

Both of these statutes provide a fairly flexible definition of the term Indian. The earlier statute is particularly interesting. The second paragraph of the 1850 Act would allow status to those intermarried with Indians and living among them, as well as all their descendants. Clearly this category is broad enough to include many Métis. The 1850 Act also contemplates adopted infants, whether Indian or not. The 1868 legislation, while still fairly broad, excludes infant adoptions and tries to connect the definition of Indians more directly to those having an interest in Indian immovable property. Yet the definition is still broad because it includes all the descendants of the three classes or categories of persons defined as Indians: those belonging to a band or tribe with an interest in certain lands, and their descendants; those residing amongst them and their descendants, and those women *lawfully* married to members of the preceding categories, and their descendants.

The difficulty with the legislation defining the term ‘Indians’ examined by Chartier is that while the language is broad, and includes women married to Indians and their descendants, the legislation also ties recognition as an

53. *An Act Respecting Indians and Indian Lands*, 1860 (U.K.), 31 Vict., Cap. 14.

54. *An Act Providing for the Organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordinance Lands*, 1868 (U.K.), 31 Vict., Cap. 42.

55. *Ibid.* s. 15.

Indian to membership to a “particular band, body or tribe of Indians” with an interest in immovable Indian property. And while it is true that all Métis, at some point, would have in their lineage membership to a particular band, body or tribe of Indians with an interest in certain immovable property, the genealogical link is often difficult if not impossible to prove. At the same time, it is simply illogical to conclude that most if not all Métis are not descendants from the above categories. This point did not escape the Dominion government.

In 1876, the federal government enacted the first *Indian Act*,⁵⁶ which was a consolidation of the various laws dealing with Indians. The 1876 Act specifically excludes Métis from the definition of term ‘Indians’. Section 3(3)(e) states:

(e) Provided also that no half-breed in Manitoba who has shared in the distribution of half-breed lands shall be accounted an Indian; and that no half-breed head of family (except the widow of an Indian, or a half-breed who has already been admitted into treaty), shall, unless under very special circumstances, to be determined by the Superintendent-General or his agent, be accounted an Indian, or entitled to be admitted into any Indian Treaty.⁵⁷

Presumably the Act of 1876 included the definition in 3(3)(e) because the earlier definitions of ‘Indian’ would have been broad enough to include the Métis and the issues of Indian title of the Métis and any responsibilities that may be associated with that title had been addressed pursuant to the *Manitoba Act*.

Catherine Bell argues that the Chartier approach is a double-edged sword because the various statutes, which Chartier relied upon, can be used to either argue for or against the Métis being considered Indians at the time of confederation. Bell goes on to say that the strongest argument in favor of the Métis being considered Indians at or about the time of confederation is found in Section 31 of the *Manitoba Act* which on its face recognizes Métis Aboriginal rights to “Indian title.”⁵⁸

In 1869, the Hudson’s Bay Company relinquished its Charter and transferred Rupert’s Land to the Dominion of Canada. By this time, a large settlement of Métis had settled in the lands being transferred to Canada. Fearing a loss of their proprietary rights, the Métis, under Louis Riel established a provisional government in what is now the province of Manitoba.⁵⁹ Under the auspices of the provisional government, the Métis negotiated the entry of Manitoba into the Confederation. In order to

56. *An Act to Amend and Consolidate the Laws Respecting Indians*, 1876 (U.K.), 39 Vict., Cap. 18.

57. *Ibid.* at s. 3.3(e).

58. C. Bell, *Métis Aboriginal Title* (LL.M. Thesis, University of British Columbia 1989) at 66 [unpublished] [hereinafter *Métis Aboriginal Title*]. See also *RCAP Report*, *supra* note 19 at 298.

59. *RCAP Report*, *ibid.* at 285.

accommodate concerns of the Métis over their land rights, section 31 set aside lands for the half-breed families. Section 31 provides as follows:

31. And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the province, to appropriate a portion of such un-granted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, it is hereby enacted, that, under regulations to be from time to time made by the Governor General in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the province at the time of the said transfer to Canada.⁶⁰

It is of course interesting to note that section 31 provides the half-breed families lands “towards the extinguishment of the Indian title.” On its face, section 31 recognizes Indian or Aboriginal title for the Métis and provides force to the view that during the confederation era, the Métis were considered as Indians. The paradox is that Métis are recognized as ‘Indians’ for the purposes of section 91(24) because of the interpretation of provisions of the *Manitoba Act*, but as a result of the same act, their Indian title was extinguished. Could this have been the intention of the fathers of confederation?

Bell makes a distinction between whether the Métis are Indians and subject to federal jurisdiction and whether the Métis are an Aboriginal people with rights that flow from being one of the Aboriginal peoples of Canada. Bell argues that at the time of confederation, there were at least four distinct types of Métis, “those who lived with the Indians; those who had permanent homes close to the trading post and adopted the way of life of the white settlers; those who were semi-settled and lived by the buffalo hunt and freighting; and those who were semi-settled and lived by hunting, trapping and by the buffalo hunt.”⁶¹ Bell argues that the latter two groups formed the Métis Nation, which negotiated a land grant to the Métis population in Manitoba. Similar provisions to those of section 31 were included in the *Dominion Lands Acts*⁶² of 1879 and 1883 for the Northwest Territories. These provisions, combined with the fact that Métis who were living a lifestyle like the Indians were granted the option of taking treaty, are “consistent with the view that they were considered an Aboriginal people by the government at the time of confederation”⁶³ and considered to be Indians.

60. *Manitoba Act*, *supra* note 22 at s. 31.

61. *Métis Aboriginal Title*, *supra* note 58 at 65. See also Sealey & Lussier, *supra* note 21 at 13-73; A Morris, *The Treaties of Canada with the Indians of Manitoba and the Northwest Territories* (Toronto: Bedford, Clarke and Co., 1880) at 294-295; and D.B. Sealey, *Statutory Land Rights of the Manitoba Métis* (Winnipeg: Manitoba Métis Federation Press, 1975) at 4-50.

62. *Dominion Lands Act*, *supra* note 23.

63. *Métis Aboriginal Title*, *supra* note 58 at 66.

Thomas Flanagan and Bryan Swartz⁶⁴ do not share this view. The view of Flanagan and Swartz is supported by an after the fact comment made by Sir John A. MacDonald in the House of Commons. MacDonald states:

In that Act [the Manitoba Act], it is provided that in order to secure the extinguishment of Indian title 1,400,000 acres land should be settled upon the families of the half-breeds living within the limits of the then province. Whether they had any right to those lands or not was not so much the question as it was a question of policy to make an arrangement with the inhabitants of the province ... 1,400,000 acre would be quite sufficient for the purpose of compensating these men for what was called the extinguishment of Indian title. That phrase was an incorrect one, for the half-breeds did not allow themselves to be Indians.⁶⁵

Curiously, MacDonald uses a similar rationale as does the federal government today. As mentioned earlier, the federal position is based on the desire by the Métis to define themselves as distinct from the Indians. With respect to Sir John A. MacDonald, whether or not the Métis allowed themselves to be Indians is not the point. The point is, they were treated as Indians by the Government of the day (Hudson's Bay Company) just prior to confederation, the early *Indian Act* legislation did not exclude Métis from the definition of those entitled to be Indians, and the *Manitoba Act* was enacted towards the extinguishment of their Indian title. Self-definition, or the Métis not allowing themselves to be Indians, does not alter the constitutional jurisdiction of a government.

F Métis Land Grants and Treaty Entitlement

Much work has been undertaken on the Métis land grants, scrip and Métis participation in treaties. It is not the intention of this paper to undertake a comprehensive assessment of the work that has been done. At the same time, it is necessary to reference some of the work in order to provide some background and context.

Scrip was the way the way the government of Canada distributed land to various groups of people, including members of the army, settlers and Métis.⁶⁶ Scrip was issued in different monetary and money values. The land

64. See Thomas E. Flanagan, "The History of Métis Aboriginal Rights: Politics, Principles and Policy" (1990) Can. L.J. & Soc. 71 and Bryan Swartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: Institute for Research on Public Policy, 1986) at 245.

65. *House of Commons Debates* (6 July 1985) at 3113.

66. See Paul L.A.H. Chartrand, *Manitoba's Métis Settlement Scheme of 1870* (Saskatoon: Native Law Centre, University of Saskatchewan, 1991); "Aboriginal Rights: The Dispossession of the Métis" (1991) 29 Osgoode Hall L.J. 457; *The Obligation to Set Aside and Secure Lands for the "Half-breed" Population Pursuant to section 31 of the Manitoba Act, 1870* (LL.M. Thesis, University of Saskatchewan, 1988); D.N. Sprague, *Canada and the Métis: 1869-1885*

scrip and money scrip were originally interchangeable. When Manitoba entered into confederation, residents were granted lands pursuant to sections 31 and 32 of the *Manitoba Act*. Section 31 deals with the 'half-breed' land grants. Section 32 was to provide all residents, regardless of their ancestry, protection for the lots they had settled upon. The *Manitoba Act* made no specific mention of scrip. It merely stated the amount of land to be awarded and that such land was for the benefit of "children of half-breed heads of families." In 1879, the half-breed grants were extended throughout the Northwest Territories, Alberta and Saskatchewan by way of amendments to the *Dominions Lands Act*.⁶⁷

The apparent purpose of the Métis land grants, based upon section 31 of the *Manitoba Act*, was to extinguish Indian title. However, a number of scholars have argued that while the purpose may have been to put in place a system of land distribution which was intended to contribute "towards the extinguishment of Indian title", the system was so fraught with mismanagement and allegations of fraud that the actual purpose was never achieved.⁶⁸ In addition, it has been strongly argued that the 'exchange' contemplated under section 31 was to include benefits other than land that had been agreed to. These additional benefits were referred to in a letter from Sir George-Étienne Cartier on behalf of Canada, to Abbe Ritchot, who headed the Métis negotiation team around the provisions of section 31.⁶⁹ Accordingly, even if section 31 was intended to extinguish the Indian title of the Métis, the system that was put in place to do so was not implemented as intended and the 'exchange' was never perfected.

While scrip and land grants were being distributed to the Métis in the West and Northwest, the Dominion of Canada continued its policy of attempting to extinguish Indian or Aboriginal title through the treaty process. In implementing the policy, it was often difficult to distinguish whether the beneficiary was an Indian or Métis. This was especially true in the Northwest where there was apparently almost no ability to discern between the two. In the Treaty 8 area, both the treaty commission and the scrip system were implemented in tandem. The individuals were left to identify themselves as either Indians or Métis. The Indians received treaty benefits; the Métis received scrip,⁷⁰ which could be immediately converted to cash. The apparent intent behind both the scrip and the treaty process, from a

(Waterloo, Ontario: Wilfrid Laurier University Press, 1988) and "Government Lawlessness in the Administration of Manitoba Land Claims, 1870-1887" (1980) 10 Man. L.J. 415.

67. *Supra* note 23.

68. *RCAP Report*, *supra* note 19 at 324-329. See also Chartrand and Sprague, *supra* note 66.

69. *RCAP Report*, *supra* note 19 at 288, 326-327.

70. An additional piece of this fluidity between categories occurred when the *Indian Act* was amended to allow status Indians to enfranchise (sign off treaty and get half-breed scrip). This was apparently done to undercut the status population and was the main device used to disestablish the Paspaschase reserve.

government point of view, was to provide certainty with respect to title. To the commissioners it hardly mattered how the individual identified himself.⁷¹ It also hardly seemed to matter whether there was a meeting of minds with respect to the intent of either the scrip system or the treaty process.

In Ontario there was no system specifically designed for allotting land to the Métis, but they were included in a number of the Ontario Treaties. In addition to the Ontario treaties, some of the Manitoba treaties also included references to half-breed beneficiaries. In particular, in the report of W.M. Simpson, concerning Treaty 1, Simpson noted that a number of the Indians, particularly in the Broken Head River Band, were Métis entitled to share in the land grants provided under the *Manitoba Act*. Simpson explained to these Métis that they had an option of either Métis land grants, or taking treaty entitlement. Simpson explains:

I was most particular, therefore, in causing it to be explained generally and to individuals, that any person now electing to be classed with Indians, would I believe, therefore forfeit his or her right to another grant as a half-breed; and in all cases where it was known that a man was a half-breed, the matter as it affected himself and his children was explained to him, and the choice given to him to characterize himself. A very few only decided upon taking their grants as half-breeds.⁷²

Alexander Morris had also given the matter a great deal of consideration, though he did not appear to make a conclusive determination on how the Métis as a distinct people ought to be dealt with. Morris considered that there were three categories of Métis in the North West. Those who were married to and living among the Indians, those had taken up homes and farms and were living as whites, and those who lived a life similar to the Indians and who depended upon the buffalo for survival.⁷³ For this class, Morris had the following to report:

I refer to the wandering Half-breeds of the plains, who are chiefly of French descent and live the life of the Indians. There are a few who are identified with the Indians, but there is a large class of Métis who live by the hunt of the buffalo, and have no settled homes. I think that a census of the numbers of these should be procured, and while I would not be disposed to recommend their being brought under the treaties, I would suggest that land should be assigned to them, and that on their settling down, if after an examination into their circumstances, it should be found necessary and expedient some

71. For details of Alberta Métis participation in both the Treaty Process and the Scrip System see Métis Association of Alberta, Joe Sawchuck, Patricia Sawchuck & Theresa Ferguson, *Métis Land Rights in Alberta: A Political History* (Edmonton: Métis Association of Alberta, 1981). For more information on the scrip system, see Chartrand and Sprague, *supra* note 66.

72. Morris, *supra* note 61 at 41. For more details of the Métis participation in the treaties see also *RCAP Report*, *supra* note 19, particularly 278-279.

73. Morris, *ibid.* at 294-295.

assistance should be given them to enable them to enter upon agricultural operations.⁷⁴

With the foregoing references in mind respecting both the treaty process in parts of Ontario and Western Canada, as well as the Métis land grants or scrip under the *Manitoba Act* and the *Dominion Lands Act*, it is possible to make a number of observations. It would appear that for both the land grants or scrip and the treaty process, as these applied to the Métis and the Indians, the underlying policy was to extinguish Indian or Aboriginal title in order to open the frontier for settlement. It goes without saying that this was not necessarily the policy intent of the Indians and the Métis.

For the most part, the western Métis either received land grants or scrip or at least were entitled to receive such, and the Indians in a majority of cases received treaty entitlement. In a number of instances, where it was difficult to distinguish the Métis from the Indians, the Métis were allowed to come under treaty. When this occurred, the Métis were to forfeit benefits to which they were entitled under either the *Manitoba Act* or the *Dominions Lands Act*. The purpose of the Métis entitlement and the treaty system was to ensure there was a comprehensive policy of extinguishment to allow settlement to proceed, uninterrupted by competing claims to the land. That the Métis were entitled to benefits under the *Manitoba Act* or the *Dominions Land Act* and the Indians to treaty benefits was more a question of administrative and political expediency as opposed to an attempt to deny claims by the Métis to “Indian title” based upon Indianness.

G Natural Resource Transfer Agreements

Métis issues under the Natural Resource Transfer Agreements are tied to the issues of both Métis Aboriginal rights and the intent of the NRTAs. This is a matter that requires a separate study. However a discussion of the jurisdiction over the Métis would be incomplete without a reference to some of the Métis issues that have emerged under the NRTAs. Unlike the four original provinces that entered confederation, the three prairie provinces did not at the outset have jurisdiction for the lands and resources within their boundaries. In 1929 and 1930, agreements were entered into between Canada and each of the three prairie provinces. These agreements, referred to as the Natural Resource Transfer Agreements, transferred to each of the three prairie provinces the ownership of the lands and resources within their respective boundaries. The NRTAs were each confirmed by an Act of the

74. *Ibid.* at 295.

provincial legislatures and the Parliament of Canada⁷⁵ and by an Act of the British Parliament.⁷⁶ In addition to providing for the lands and resource transfer, the NRTAs also have identical provisions dealing with the continued exercise of hunting and fishing rights of the Aboriginal peoples. Section 12 of the Saskatchewan NRTA provides as follows:

In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other land to which the said Indians may have a right of access.⁷⁷

Section 12 of the NRTAs has been subject to a considerable amount of litigation. A portion of the litigation has dealt with the meaning of the term 'Indians' for the purposes of the NRTAs and whether that term includes either Métis or non-status Indians. Some of the issues raised by the litigation respecting the NRTAs are useful and help to inform the debate around whether Métis are section 91(24) Indians.

In *R. v. Laprise*⁷⁸ the Saskatchewan Court of Appeal had to consider whether Mr. Laprise would be protected by the provisions of section 12 of the Saskatchewan NRTA. Laprise was a Chipewyan but not registered as an Indian under the *Indian Act* and was charged under provisions of the Saskatchewan *Game Act*⁷⁹ for being in possession of game, contrary to the *Act*. The Court of Appeal determined that as Laprise was not a status Indian under the provisions of the *Indian Act* he could not avail himself of the provisions of the NRTA. The decision has since been criticized for wrongfully applying statutory rules of interpretation to the NRTA because the NRTA is a constitutional document and not a federal statute. The case has also been criticized for implying that provinces may define the term 'Indian' in provincial gaming legislation.⁸⁰

Twenty years later, Laprise was revisited by the Saskatchewan Court of Appeal in *R. v. Grumbo*.⁸¹ Mr. Grumbo was a Métis from Saskatchewan who had been charged pursuant to section 32(1) of the *Wildlife Act*,⁸² which

75. Thomas Isaac, *Aboriginal Law* (Saskatoon: Purich Publishing, 1999) at 280.

76. *Constitution Act, 1930* (formerly the *British North America Act, 1930*) (U.K.), 20-21 Geo. V, c. 26, R.S.C. 1985 Appendix II, No. 26.

77. Section 12, NRTA, a schedule to the *Constitution Act, 1930, ibid.* and enacted in the Province of Saskatchewan by S.S. 1930, c. 87.

78. *R. v. Laprise*, [1978] 6 W.W.R. 85 (Sask. C.A.).

79. *Game Act, 1967* (Sask.) c. 78.

80. In particular, see A.J. Jordan, "Who is an Indian?" [1977] 1 C.N.L.B. 22.

81. *R. v. Grumbo*, *supra* note 13.

82. *Wildlife Act*, S. S. 1979, c. W-13.1, as amended.

prohibits persons other than Indians for being in possession of wildlife, which has been taken by an Indian for food. The main question before the Court was the same as in *R. v. Laprise*, that is, whether the accused was an Indian for the purposes of section 12 of the NRTA. The accused had been acquitted by the Queens Bench⁸³ and the crown appealed. Grumbo invoked the doctrine of *per incuriam*, asking the court to declare that *R. v. Laprise* had been wrongly decided and that the court was not bound by that decision.

The Court of Appeal reviewed both the Queen's Bench and Court of Appeal decisions in *R. v Laprise* and noted that:

[T]he judges showed no consciousness that the confirmatory legislation made it [NRTA] a part of the constitution of Canada, and that when they were dealing with the defense of Mr. Laprise, they were dealing with a claim to a constitutional right to hunt and to possess game, beyond the jurisdiction of the province to limit.

The failure to take into account that the issue was one of interpretation of the constitution is sufficient, by itself, to require that the decision in *Laprise* be declared to have been made *per incuriam*.⁸⁴

After deciding that *R. v. Laprise* should no longer be followed, the Court then looked at the Court of Queens Bench decision in *Grumbo* to determine whether that decision should be upheld or whether a new trial should be ordered.

Rather than deal with the question of whether the Métis are Indians for the purposes of the NRTA, the Court decided that in order to determine if Mr. Grumbo could take advantage of the provisions of section 12 of the NRTA, Grumbo must show that he has Aboriginal rights. And, while there was much evidence provided on the use of the term 'Indians' and 'Métis' and whether the Métis are Indians in order to establish the intention of the drafters of the Saskatchewan NRTA, there was no evidence put forward on whether the Métis of Saskatchewan have or had Aboriginal rights or if they had, if these rights were extinguished. The court stated at page 182 that: "It is difficult see how one could decide the question of whether the word Indian in the Natural Resources Transfer Agreement included Métis without considering those matters."⁸⁵ A new trial was ordered. One of the reasons given for the new trial was that the parties to the litigation and the public in Saskatchewan had expected the Court to deal definitively with the question of whether the Métis were Indians for the purposes of the NRTA in Saskatchewan. If the Court was to deal with both the legal and the public policy issues, it felt that the foundation of evidence for it to do so must be

83. *R. v. Grumbo*, [1996] 3 C.N.L.R. 122.

84. *R. v Grumbo*, *supra* note 13 at 180.

85. *Ibid.* at 182.

sufficient. The Court also noted that the questions before the court were live questions having recently been examined by the *Report of the Royal Commission on Aboriginal Peoples*.⁸⁶

Both the courts in Alberta and Manitoba have looked at the same questions, as did the Saskatchewan Court of Appeal in Grumbo. In Alberta, the Provincial Court declined to follow the decision in *R v. Laprise*. A decision in the lower Court⁸⁷ found that the term 'Indian' as used in the Alberta NRTA did include 'non-treaty Indians', and the accused, who was a Métis, was acquitted. An appeal to the Queen's Bench was dismissed.⁸⁸ In Manitoba, the Court of Queens Bench in *R. v. Blais*⁸⁹ rejected the view that Métis are Indians for the purposes of section 13 of the Manitoba NRTA, which is identical to the section 12 of the Saskatchewan and Alberta NRTAs. Blais also held that section 13 of the NRTA was intended to protect existing rights and Métis Aboriginal rights were long extinct⁹⁰ through a combination of the *Manitoba Act*, the *Dominion Lands Act* and related legislation including *An Act Respecting the Appropriation of Certain Dominion Lands in Manitoba*.⁹¹ While the Queens Bench decision in Blais was a bit of an anomaly in its reasoning, the Court of Appeal of appeal agreed with the finding that the term Indian for the purposes of the NRTA does not include the Métis.⁹²

III ARE MÉTIS S. 91(24) INDIANS?

To briefly recap: in trying to determine if Métis are s 91(24) Indians, the starting point is *Re the term 'Indians'*. In that decision the Supreme Court of Canada has said that to determine the meaning of the term 'Indians' for the purposes of the 1867 Act, one should have regard to documents contemporaneous to confederation. The court also found that the most reliable sources were the British Parliamentary Papers, particularly the *Report from the Select Committee on the Hudson's Bay Company*. These reports used the term 'Indians' in a generic sense that included the Inuit. The Court also found that the word 'Indians' was synonymous with the word 'Aborigines'. The Select Committee reports generally considered the Métis as Indians or 'Aborigines' or 'natives'. It is important to note that the *Report on the Aborigines in the British Commonwealth* is a report on the

86. *Ibid.* at 184.

87. *R. v. Ferguson*, [1993] 2 C.N.L.R. 148.

88. *R. v. Ferguson*, [1994] 2 C.N.L.R. 117.

89. *R. v. Blais*, [1998] 4 C.N.L.R. 103 [hereinafter *Blais*].

90. *Ibid.* at 107.

91. This latter *Act* was intended to satisfy a perceived shortfall in s. 31 of the *Manitoba Act* whereby children of Métis families were given grants of land but heads of families were not.

92. *Blais*, *supra* note 14.

“Aborigine” settlements and specifically reports on the Red River Settlement, which was a Métis settlement.

Both the pre and post-confederation legislation dealing with Indians and Indian lands define Indians broadly enough to include most Métis, though there is a requirement for a genealogical link between the categories of those defined Indians, to specific tribes or bands with a proprietary interest in specific lands, and their descendents.

While both the Métis land grants or scrip and the treaty process require separate studies, from a brief review, there is sufficient evidence to conclude that the Métis land grants, scrip and the numbered treaties were introduced by the dominion government for reasons that include the extinguishment of Indian title. There is evidence that shows that at least some Métis were considered as Indians for the purposes of accessing rights under a number of the treaties. More importantly, section 31 of the *Manitoba Act* provided for lands for the Métis towards the extinguishment of their Indian title which seems to contemplate that the Métis are Indians, or at least that they were understood to have Indian or Aboriginal title at the time the *Manitoba Act* came into force.

One of the most compelling arguments in favour of federal jurisdiction for Métis is perhaps the least complex. The Métis are an Aboriginal people of Canada, along with the Inuit and the Indians. It would be an absurd result to have two of the three Aboriginal peoples under section 91(24) with the jurisdiction for the Métis resting with the Provinces. That would defeat the purposes of establishing a central authority to deal with Indians, Indian lands and the associated treaties, treaty rights and Aboriginal rights. The notion of one central authority to deal with these matters was addressed by Justice Kerwin (Canon and Crocket JJ. concurring) in *Re the term Indians*:

In my opinion, when the Imperial Parliament enacted that they should be confined in the Dominion Parliament power to deal with “Indians and lands reserved for the Indians” the intention was to allocate to its authority over all the [A]borigines within the territory to be included within the confederation.⁹³

In order to have a consistent and logical approach to section 91(24) and using the canons of interpretation required when dealing with constitutional documents, there is compelling logic to conclude the Métis must therefore fall within the scope of section 91(24).

IV CONCLUSION

The conclusion that Métis are Indians for the purposes of section 91(24) of the *Constitution Act, 1867* is consistent with the recommendations of the

93. *Supra* note 7 at 119.

Royal Commission on Aboriginal Peoples,⁹⁴ the proposed amendments in the Charlottetown Accord,⁹⁵ and the recommendations from the Aboriginal Justice Inquiry of Manitoba.⁹⁶ It is also consistent with the approach taken by the Supreme Court of Canada in *Re the term 'Indians'* and, it is consistent with a purposive approach to the constitutional interpretation of section 91(24), which was to have one central authority responsible for the Aboriginal inhabitants of the Dominion. With the inclusion of the Métis as an Aboriginal people in section 35 of the *Constitution Act, 1982*, and the recognition of their existing rights, the conclusion that Métis are Indians for the purposes of section 91(24) is even more persuasive.

At the same time, it is not without its problems. In Alberta, there is a system of land holding and special rights for the Métis that has been developed on the assumption that the Alberta government has jurisdiction for the Métis.⁹⁷ As long as the matter is left unresolved, the constitutional uncertainty allows for the provincial regime to stand. Clarification of section 91(24) may cause the Alberta legislation to be challenged. Alberta could argue that its legislation is simply an extension of provincial spending powers to assist a certain class of Albertans. For greater clarity, there ought to be amendments to the Constitution that would save the Alberta legislation. This was recommended in the Charlottetown Accord.⁹⁸ And, if Alberta legislation respecting the Métis is threatened by clarity around section 91(24), there are technical solutions to resolve the problems, including the use of the amending formula.

However, the Alberta dilemma should not stand in the way of the federal government doing what is right and clearly accepting its legislative jurisdiction and associated responsibilities for the Métis.

94. *RCAP Report*, *supra* note 19, recommendation 453 at 210:

The government of Canada must either:

- (a) acknowledge that section 91(24) of the *Constitution Act, 1867* applies to the Métis people and base its legislation, policies and programs on that recognition: or
- (b) collaborate with appropriate provincial governments and with Métis representatives in the formulation and enactment of a constitutional amendment specifying that section 91(24) applies to Métis people.

If it is unwilling to take either of these steps, the government of Canada must make a constitutional reference to the Supreme Court of Canada, asking the court to decide whether section 91(24) of the *Constitution Act, 1867* applies to the Métis people.

95. See "Consensus Report on the Constitution," Final Text, (Charlottetown: 28 August 1992) at 25.

96. See "The Justice System and Aboriginal People" in *Report of the Aboriginal Peoples Justice Inquiry of Manitoba*, vol. 1 (Winnipeg: Queens Printer, 1991).

97. For more information on the Métis Settlements in Alberta see Catherine Bell, *Alberta Métis Settlement Legislation: An Overview of Ownership and Management of Settlement Lands* (Regina: Canadian Plains Research Centre, University of Regina, 1994).

98. The proposed *Charlottetown Accord* (Draft Legal Text, 9 October 1992) would have created a new section 95E in the *Constitution Act, 1867*, which would have allowed Alberta to make laws for the Métis. This was to compliment the clarification of section 91(24). The proposed amendments are included in the *RCAP Report*, *supra* note 19 at 383.