Are the Métis in Section 91(24) of the *Constitution Act, 1867*? An Issue Caught in a Time-Warp

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A. INTRODUCTION

Addressing the question posed in the title of this paper has proven to be particularly difficult for me on a personal level. In some senses, I have been wrestling with the uncertainty implicit in the query for much of my professional life. I have authored and co-authored a variety of legal articles on varied aspects of this topic for many years;[1] I have prepared internal briefing notes and legal opinions for the Native Council of Canada (now known as the Congress of Aboriginal Peoples) and for other

1 See, for example, Bradford W. Morse, "Government Obligations, Aboriginal Peoples and Section 91(24)" in David C. Hawkes, ed., *Aboriginal Peoples, Government Responsibility: Exploring Federal and Provincial Roles* (Ottawa: Carleton University Press, 1989) at 59; also Bradford W. Morse & Robert K. Groves, "Canada's Forgotten Peoples: The Aboriginal Rights of Métis and Non-Status Indians" (1987) 2 Law & Anthropology 139; Bradford W. Morse, *Aboriginal Self-Government in Australia and Canada* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1984); Bradford W. Morse & John Giokas, "Do the Métis Fall within Section 91 (24) of the *Constitution Act, 1867*?" in Royal Commission on Aboriginal Peoples, *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: Supply and Services Canada, 1995) at 140; Bradford W. Morse & Robert K. Groves, "Constituting Aboriginal Collectivities: Avoiding New Peoples 'In Between'" (2004) 67 Sask. L. Rev. 257; Bradford W. Morse & Robert K. Groves, "Métis and Non-Status Indians and Section 91(24) of the *Constitution Act, 1867*" in Paul Chartrand, ed., *Who Are Canada's Aboriginal Peoples? Recognition, Definition and Jurisdiction* (Saskatoon: Purich Publications, 2002) at 191–229.

Indigenous peoples' organizations in Canada. For well over two decades, I have also advocated in favour of either a reference to our highest court or a constitutional amendment to resolve this debate. The governments of Canada and the Northwest Territories had each seriously contemplated making a reference for resolution of this constitutional issue in the mid-1980s, but never proceeded with the plan. Agreement was reached among all prime ministers, premiers, and leaders through the Charlottetown Accord[2] in 1992. That accord would have led to a constitutional overhaul. It would have decided this matter conclusively in favour of expressly including all Aboriginal peoples within a renewed section 91(24), along with a justiciable commitment to negotiate self-government agreements, entrenching the inherent right of self-government and other constitutional provisions. There was as well a complementary political commitment, called the Métis Nation Accord, by the federal government with the five western provinces, the Northwest Territories, and the Métis National Council, to develop a new relationship with the Métis Nation. That consensus, however, died with the rest of the accord's defeat in separate, but simultaneous national and Quebec referenda in October of 1992. As a result, the government of Canada continues to treat the Métis as outside its section 91(24) jurisdiction.

The jurisdictional question itself has not died. It continues to plague the very core of the political and legal position of the Métis people of Canada. Section 91(24), a provision dating back to Confederation in 1867, remains the single largest stumbling block to welcoming the Métis people, and especially those of the Métis homeland, into the circle of Confederation in the 21st century. Over the years, many federal ministers and senior officials have proposed putting the question aside and focusing on efforts to achieve practical measures to address socio-economic imbalances between the Métis and other Canadians. Although this approach has helped spur some tangible gains, creating federally funded

2 The accord was signed on 28 August 1992 by the first ministers and national Aboriginal leaders, with the draft legal text released on 9 October. It proposed to amend s. 91(24) to replace "Indians" with "Aboriginal Peoples of Canada." It also would have protected the long-standing unique relationships established for specified Métis settlements in Alberta by enacting s. 95E through which the province of Alberta would have received concurrent yet subordinate jurisdiction to the federal government concerning the Métis people within its borders.

employment training programs and other initiatives, the absence of a definitive resolution as to whether the Métis are, constitutionally speaking, "Indians" in the same sense as the Inuit has caused many practical difficulties in moving forward.

This situation remains unresolved due to the unwillingness of all provinces to agree with the federal interpretation of section 91(24). Instead, they unanimously agree with the political and legal positions taken by the Métis National Council and the Congress of Aboriginal Peoples, both of which assert that the Métis are within the parameters of section 91(24). Unfortunately for the Métis, this agreement has meant that provincial governments, with the notable exception of Alberta, have refused to respond to the real needs of the Métis for land, natural resources, economic opportunity, and self-determination. The provinces argue that the federal government is shirking its fiscal and legislative responsibilities by refusing to accept its jurisdiction for the Métis under section 91(24). The predominant provincial view is that the government of Canada should bear the cost for Métis programs, services, and the fulfillment of outstanding Aboriginal rights obligations, as it does with federally recognized First Nations and Inuit peoples.[3] It is the Métis who have suffered from the jurisdictional vacuum caused by the failure of either of the two orders of government to accept responsibility. In many ways, the worst aspect of this is that governments are fighting to avoid accepting constitutional jurisdiction for the Métis rather than trying to include them within their constitutional ambits.

3 The provincial governments have also been criticizing the federal government actively over the past thirty-five years for failing to respect many of its financial obligations to Indian and Inuit peoples. The provinces complain that the federal interpretation of its mandate continues to shrink such that it denies any responsibility at all for non-status Indians (even though the *Indian Act* regulates the definitional dividing line), while seeking to limit its authority solely to those status Indians residing on a reserve. The federal government has also consistently sought to limit its responsibility solely to those Inuit living north of the 60th parallel except when it is directly negotiating land claims settlements. This pattern of federal reluctance to assume its constitutional obligations regarding Indians is outlined in greater detail in Morse, "Governmental Obligations, Aboriginal Peoples and Section 91(24) of the *Constitution Act, 1867*," above note 1 at 59–91.

The net result of this unresolved dimension to the *Constitution Act, 1867*,[4] is political and legal limbo for the Métis. They are largely unable to persuade either the federal or provincial governments to engage in meaningful negotiations on land claims, hunting or fishing rights, the development of Métis political institutions, or other section 35 collective Aboriginal or treaty rights issues arising from the *Constitution Act, 1982*.[5] The two levels of government will talk only when the other one is present, if at all. When governments do sit down to talk, their biggest precondition to reaching agreement is resolving who will pay for whatever might come out of the negotiations.

Equally frustrating, no government has been prepared to force a judicial determination through a reference to its appellate court. None of the jurisprudence that has dealt with Métis rights has yet been compelled to rule on this question. Even the latest efforts by Métis leaders and organizations to litigate this matter directly have yet to bear fruit. One federal court judge, in dealing with a federal motion to strike out litigation that would respond to this question, was moved to say:

> **24** Finally, there is the issue of whether there is some other reasonable and effective manner in which the Plaintiffs' issue may be brought before the Court. Clearly, neither the federal Crown nor the provincial Crown are the least bit interested in negotiating with the Métis and with non-status Indians who, as a result, are trapped in a jurisdictional vacuum between Canada and the Provinces. Therefore, even though ". . . the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith," as Chief Justice Lamer pointed out in *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010 at 1123, the issues in this proceeding are highly unlikely to come before the Court in the context of a suit over a specific right. Given the track record of the Crown in refusing to negotiate, it could well be generations before this issue could come before the Court in some other suitable fact situation. That is in no one's interest. To urge, at this point, that the litigation is premature, when there is no prospect of negotiation, is to throw unreasonable difficulty in the way of this proceeding, for there is a real point of difficulty

4 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

5 *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

which requires a timely judicial decision. Here I acknowledge that the *Dumont* case is perhaps headed for some sort of a determination under section 91(24) of the *Constitution Act of 1867*, however the parties have been litigating for over 20 years and perhaps will never reach a conclusion, let alone a timely conclusion. Thus the present proceeding is an appropriate vehicle.[6]

B. BACKGROUND

More than 140 years ago, the Fathers of Confederation actively negotiated among competing visions for a new country. Regional politics and interests were paramount. Clearly missing from these debates was any discussion of the legitimacy of the imperial Crown's claim to sovereignty over the original Indigenous nations and their territories, never surrendered to the Crown or seized through military victory. Moreover, affected Indigenous peoples were not invited to participate in or even comment on the proposed federation. There are no records of any serious consideration of the terms on which the Crown–Aboriginal relationship would be reaffirmed or recast. The apparent, almost complete silence on this matter is particularly ironic given that so many of the important discussions among colonial leaders occurred in the Maritime colonies that had a treaty history with the Mik'maq, Malecite, and Passamoquoddy Nations that extended over two centuries. The overwhelming majority of the people living in the four colonies that contained a land base larger than most of Europe were members of other nations and yet these peoples were never invited to take part in the negotiations.

This failure to consider the pre-existing claims of Indigenous peoples persisted when colonial powers fantasized about the riches that would accrue to the new state if Great Britain and the Hudson's Bay Company could be enticed to transfer Rupert's Land. Even when a clause was negotiated for inclusion in the proposed *British North America Act*[7] to facilitate this purchase and assignment, no thought seems to have been given

6 *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, [2002] 4 F.C. 550, 220 F.T.R. 41 (Fed. Ct.).

7 (U.K.), 30 & 31 Vict., c. 3. Also included in s. 146 were other imperial lands unilaterally claimed and relabelled as the "North-western Territory." This Act was renamed as the *Constitution Act, 1867*, by the Schedule to the 1982 reforms.

to the views of those most affected. In retrospect, it may seem surprising that political leaders could debate the shape of a new state to be founded on democratic principles while never considering that the majority population in British Columbia and the unorganized rest of Western Canada might have different perspectives or aspirations for the future.

As a result of what can only be labelled as blindness and prejudice, there is no record of any discussions about the views of these negotiators regarding the place of Indian, Inuit, and Métis peoples within — or outside of — the new Canada. Similarly, there is no transcript or *travaux préparatoire* that gives even a glimmer of the true intention of those negotiating the terms of the *British North America Act* when they agreed to include the following sections:

> **91.** It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, . . .
>
> **24.** Indians, and Lands reserved for the Indians.
>
> . . .
>
> And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.[8]

Section 91(24) has had a profound impact upon the evolution of the Crown–Aboriginal relationship since 1867. Its very existence generated the ready presumption that all of the major responsibilities that had been held exclusively by the Colonial Office, including obligations under pre-

8 Above note 7.

Confederation treaties and the power to negotiate new ones, were simply transferred to the government of Canada. As this passage is the only one expressly addressing legislative jurisdiction concerning "Indians," and thereby implicitly including executive authority, it was clear that imperial power was not being transferred to the provinces. The only remaining interpretation would have been that the United Kingdom retained responsibility under existing treaties and the power to negotiate new treaties with First Nations as it did for all international treaties on Canada's behalf until after the First World War. Although a possible legal interpretation, such a view was never advocated, and the federal government did begin negotiating the numbered treaties in Kenora in 1870. Despite its extraordinary influence in the westward and northward expansion of this fragile new country, little parliamentary guidance as to the scope of section 91(24) has been provided.

Similarly, the judiciary has had few occasions to determine the precise meaning of this constitutional language. Even then, as Prof. Peter Hogg has cautioned: "The main problem is that it is not possible to be confident as to the 'intention of the framers' or the 'original understanding' . . . who are to count as framers? Whose original understanding or intention is important?"[9] This is not to say that turning to legislative history is entirely inappropriate, as it can often provide guidance and some understanding of what has influenced lawmakers. This history can present an excellent point of departure in the search for legislative meaning. As Beetz J. put it, "legislative history provides a starting point," [10] but it cannot be conclusive in interpreting essential dynamic provisions. Other members of the Supreme Court, however, have suggested that legislative history is deserving of only little weight.[11] In either assessment, there is significant added concern when it comes to deducing the meaning of constitutional language due to its greater importance, difficulty in amending, and necessity to continually be speaking in the present so as to address the exigencies of an ever evolving world.

The ambiguity surrounding section 91(24) is compounded by the lack of any documentation or other evidence that illuminates what was in the

9 Peter W. Hogg, *Constitutional Law of Canada*, looseleaf, vol. 2 (Scarborough, ON: Carswell, 1992–) at 57-7.

10 *Martin Service Station v. M.N.R.*, [1977] 2 S.C.R. 996 at 1006.

11 *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, Lamer J.

minds of the drafters when they crafted "Indians, and Lands reserved for the Indians." If there is no definitive legislative history, then one must turn to the historical information available at the time, as well as the jurisprudence, for whatever guidance may be provided. The most useful guide is likely the Supreme Court of Canada's one opportunity to reflect upon the meaning of the term *Indians* in section 91(24).

C. *REFERENCE RE ESKIMOS*[12]

The only time the Supreme Court has been asked to deliberate on the scope of section 91(24) was in the context of another federal–provincial battle to avoid fiscal obligations. During the Depression, the Quebec government decided to provide emergency relief to help Inuit families on the brink of starvation. The province sought reimbursement for its expenditures from the federal government, which quickly declined. After lengthy, but ultimately futile, correspondence, it was agreed that the dispute would be remitted to the Supreme Court of Canada.[13] A formal reference was made by Order-in-Council P.C. 867, issued on 2 April 1935.

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12 *In the Matter of a Reference as to Whether the Term "Indians" in Head 24 of Section 91 of the* British North America Act, 1867*, includes Eskimo Inhabitants of the Province of Quebec*, [1939] S.C.R. 104, commonly referred to as *Reference re Eskimos*, although it is indexed by the S.C.C. as *Reference re British North America Act, 1867 (U.K.), s. 91.*

13 Wakeling J., in dissent in *R. v. Grumbo* (1998), 159 D.L R. (4th) 577 (Sask. C.A.), rev'g [1996] 3 C.N.L.R. 122 (Sask. Q.B.), had a particularly critical cast on the motives of the parties when he stated at para. 83:

> I view it as unfortunate that there appears to be a considerable amount of tactical manoeuvring involved in the positions taken by the federal and provincial authorities with respect to issues of this nature. This does not assist in reaching the appropriate judicial interpretation of the legislation and agreements which are before this court. For example, in the reference to the Supreme Court of Canada to determine whether Eskimos were included in the word Indian in s. 91(24) of the *Constitution Act, 1867*, the federal government took the position they were not included and the Province of Quebec took the position they were. I do not believe it had gone unnoticed that if the Eskimos were in fact included as Indians, a significant increase in the federal budget for the Department of Indian Affairs was inevitable. Nor was the Province of Quebec unaware that it was in their best interests to see that Eskimos were a Federal responsibility.

Despite the opinion of the lawyers for the federal Crown that the Inuit (then referred to as "Eskimos") were indeed Indians for the purposes of section 91(24), the government persisted in opposing Quebec's argument until it was confirmed by the Supreme Court of Canada after several years of preparation.[14]

The Order-in-Council transmitting the reference is worthy of quoting in detail for its discrete treatment of the cause of the reference:

> The Committee of the Privy Council have had before them a report, dated April 1, 1935, from the Minister of Justice, representing that under the terms of the *British North America Act, 1867*, section 91 "the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated," and that among these subjects is number "24. Indians, and Lands reserved for the Indians."
>
> The Minister states that in parts of the province of Quebec there are Eskimo inhabitants, and
>
> That a controversy has arisen between the Dominion Government and the Government of the province of Quebec in relation to the question whether the legislative and executive power of the Dominion Government under the above provision of the *British North America Act, 1867*, extends to the Eskimo inhabitants of the province of Quebec.
>
> The Committee, on the recommendation of the Minister of Justice, advise that Your Excellency may be pleased, in the exercise of the powers conferred by section 55 of the *Supreme Court Act*, to refer to the Supreme Court of Canada for hearing and consideration the following question:
>
> Does the term "Indians," as used in head 24 of section 91 of the *British North America Act, 1867*, include Eskimo inhabitants of the Province of Quebec?[15]

The case was heard over two days in June of 1938, some thirty-eight months after the Order-in-Council was issued. The only participant

14 The case is discussed in Richard Diubaldo, "The Absurd Little Mouse: When Eskimos Became Indians" (1981) 16 J. Can. Studies 34. The author informs us (at 36) that the Justice Department, and especially its external counsel, was of the opinion that the federal case was weak enough that it seemed unwise to incur the expense of arguing it before the Supreme Court and favoured a settlement.

15 *Reference re Eskimos*, above note 12 at 104–5.

other than the federal government was the province of Quebec.[16] The Inuit were not involved in any way and appear never to have been asked to comment. As there was no regional Inuit political representative or other organization at that time, it would have been exceedingly difficult for an Inuit perspective to have been presented to the Court.

The Court was unanimous in answering the question in the affirmative, almost ten months later. The majority judgment was written by Duff C.J. (with Hudson, Davis, and Crocket JJ. concurring), who described the task before the Court in these terms:

> The *British North America Act* is a statute dealing with British North America and, in determining the meaning of the words "Indians" in the statute, we have to consider the meaning of that term as applied to the inhabitants of British North America. In 1867 more than half of the Indian population of British North America were within the boundaries of Rupert's Land and the North-Western Territory; and of the Eskimo population nearly ninety per cent were within those boundaries. It is, therefore, important to consult the reliable sources of information as to the use of the term "Indian" in relation to the Eskimo in those territories. Fortunately, there is evidence of the most authoritative character furnished by the Hudson's Bay Company itself.[17]

As Duff C.J. makes clear through this passage, the Court was required to assess what was encompassed within the term *Indians*, not just through pre-Confederation experience within the three colonies, as the Inuit presence in the limited territorial extent of these colonies at that time was minimal. Rather, the Court had to be cognizant of the fact that the *British North America Act*, through its preamble and section 146, expressly envisaged territorial expansion. Furthermore, the Quebec that argued this Reference in 1938 was dramatically different in size than it was in 1867, when most of its current territory was still part of Rupert's Land.

Chief Justice Duff reviewed the historical record, such as it was, that had been presented to the Court by both participants. In addition to the

16 The province of Newfoundland and Labrador did not yet exist, such that the colonial government in St. John's would have had no interest in an interpretation of a matter internal to Canada's division of powers.

17 *Reference re Eskimos*, *ibid*. at 124–25.

reports provided by the Hudson's Bay Company to the British Parliamentary Committee that investigated Aboriginal affairs in 1856–57, the record consisted of reports from colonial governments and missionaries, as well as proclamations and descriptions of the process of acquiring the new western and northern lands in 1870. The Chief Justice was quite prepared to be persuaded by the documentary record of how the Inuit of Labrador were viewed prior to 1867, even though Labrador was not part of Canada when this Reference was determined. Chief Justice Duff was particularly struck by the repeated usage of "savages" as a synonym for "Indians" in many of the documents and how both words seemed to include the "Esquimaux." Occasionally, the expression was the "Esquimaux Indians."

Chief Justice Duff had little difficulty in coming to this conclusion:

> Nor do I think that the fact that British policy in relation to the Indians, as evidenced in the Instructions to Sir Guy Carleton and the Royal Proclamation of 1763, did not contemplate the Eskimo (along with many other tribes and nations of British North American aborigines) as within the scope of that policy is either conclusive or very useful in determining the question before us. For that purpose, for construing the term "Indians" in the *British North America Act* in order to ascertain the scope of the provisions of that Act defining the powers of the Parliament of Canada, the Report of the Select Committee of the House of Commons in 1857 and the documents relating to the Labrador Eskimo are, in my opinion, far more trustworthy guides.
>
> Nor can I agree that the context (in head no. 24) has the effect of restricting the term "Indians." If "Indians" standing alone in its application to British North America denotes the aborigines, then the fact that there were aborigines for whom lands had not been reserved seems to afford no good reason for limiting the scope of the term "Indians" itself.
>
> For these reasons I think the question referred to us should be answered in the affirmative.[18]

Justice Kerwin wrote a further judgment (to which Cannon and Crocket JJ. concurred) agreeing in the result. While he placed far greater weight on dictionary definitions and correspondence after 1867 than his

18 *Ibid*. at 134–35.

peers, his view was nonetheless clear when he said in his opening lines, "In my opinion, when the Imperial Parliament enacted that there should be confided to the Dominion Parliament power to deal with 'Indians and Lands reserved for the Indians,' the intention was to allocate to it authority over all the aborigines within the territory to be included in the confederation."[19]

Justice Cannon wrote a short judgment in which he indicated he agreed with Kerwin J. Justice Cannon felt, however, that there was little need to go beyond noting that the official French translation of the original proposed wording for what would become section 91(24) used the phrase "Les Sauvages et les terres réservées pour les Sauvages." In his view, this signified the following understanding:

> The Upper and Lower Houses of Upper and Lower Canada petitioners to the Queen, understood that the English word "Indians" was equivalent to or equated the French word "Sauvages" and included all the present and future aborigines native subjects of the proposed Confederation of British North America, which at the time was intended to include Newfoundland.[20]

It is noteworthy that in Duff C.J.'s review of these many documents, he frequently quoted passages that spoke of "Half-breeds," "half Indians," intermarriage with non-Aboriginal men, and the inclusion of the children within the Indigenous community. At the same time, the judgments of both Duff C.J. and Kerwin J. placed great weight on the information derived from the report of the Select Committee on the Hudson's Bay Company to the Houses of Parliament of Great Britain and Ireland, presented in 1857. The population estimates generated by the many company managers and local factors of the individual Hudson's Bay trading posts resulted in a listing of "Indian Races," after which was included the following:

Total Indians	147,000
Whites and half-breeds in Hudson's Bay Territory	11,000
Souls	158,000

19 *Ibid*. at 137.

20 *Ibid*. at 136.

The identification of "Half-breeds" in the same population pool as "whites" in this report has been relied upon heavily by some commentators as evidence that the Métis were not seen in the same way as First Nations and the Inuit. Therefore, it is argued, the Métis were never meant to be included within section 91(24).[21] This view is not shared by the majority of scholars, including Métis scholars, who have come to a different conclusion.[22]

Something that is often overlooked when considering the statistics set out above is the nature, composition, and precise location of many families resident in Rupert's Land in the 1850s. There were virtually no European women anywhere in the north or west. Thus, the men of the Hudson's Bay Company would marry women from local Indian Nations or Métis women. Their children would be "Half-breeds" or Métis who stayed with their family and the Company. Other Métis families also gathered near the trading posts as they subsisted by trapping, interpreting, and participating in other aspects of the trading economy.

How would the male employees of the Company — those who developed these local estimates — likely perceive their situation so as to define themselves, their wives, their children, and their grandchildren? Would it be logical for them to divide up their families into different categories? Or, would they more likely lump their family members in with themselves under the vaguer, yet more comprehensive, category of "Whites and Half-breeds in Hudson's Bay Territory"? Little attention seems to have been given to this very human element in the scholarly

21 See, for example, Thomas Flanagan, "The Case against Métis Aboriginal Rights" (1983) 9 Can. Pub. Pol'y 314; Thomas Flanagan, "The History of Métis Aboriginal Rights: Politics, Principle, and Policy" (1990) 5 C.J.L.S. 71; Bryan Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: The Institute for Research on Public Policy, 1986).

22 For the earliest study of this topic by a Métis expert, see Clem Chartier, "'Indian': An Analysis of the Term as Used in Section 91(24) of the *British North America Act, 1867*" (1978–79) 43 Sask. L. Rev. 37. For another excellent and thorough study, see Mark Stevenson, "Section 91(24) and Canada's Legislative Jurisdiction with Respect to the Métis" (2002) 1 Indigenous L.J. 237; see also Mark Stevenson, "Métis Aboriginal Rights and the 'Core of Indianness'" (2004) 67 Sask. L. Rev. 301; Lionel Chartrand, "Are Métis Persons 'Indians'? Challenging Manitoba's Natural Resources Transfer Agreement" (2004) 67 Sask. L. Rev. 235; and for the most recent critique of the views of Thomas Flanagan, see Darren O'Toole, "La revendication du titre 'indien' par les Métis" (2006) 39 Canadian Journal of Political Science 529.

debate over what interpretation should be assigned to this demographic data description.

From a legal perspective, what matters is whether by 1867 the constitutional language and structure of federalism would have intended to include Métis within "Indians" as the Supreme Court concluded it did regarding the Inuit. Were the Métis, as Duff C.J. and Kerwin J. asked in *Reference re Eskimos*, considered within the common meaning of "aborigines" or were they seen as "whites," at least for constitutional purposes?

D. SUBSEQUENT JURISPRUDENCE

In recent years, much jurisprudence dealing with the Métis has arisen in the context of hunting and fishing cases in which a Métis accused has mounted a defence to a regulatory charge by asserting an Aboriginal right, a treaty right, or a right confirmed by one of the *Natural Resources Transfer Agreements*.[23] While those who practise a "traditional" Aboriginal lifestyle, in the courts' view, and those with a clear tie to the Métis Nation have had growing success in recent years, none of these cases has directly answered whether the Métis are included within section 91(24). The Supreme Court has definitively declared in *R. v. Powley*[24] that the Métis possess Aboriginal rights and that the inclusion of the Métis in section 35(1) of the *Constitution Act, 1982*, was not a hollow promise.

In *R. v. Blais*,[25] released concurrently with *Powley*, the Court determined that the Métis were not constitutional Indians in the context of the *Manitoba Natural Resources Transfer Agreement* (NRTA) and the *Constitution Act, 1930*.[26] The Court explicitly avoided the section 91(24) jurisdictional question when it rejected a continuity of language argu-

23 See, for example, *R. v. McPherson*, [1992] 4 C.N.L.R. 144 (Man. Prov. Ct.), rev'd [1994] 2 C.N.L.R. 137 (Man. Q.B.); *R. v. Morin*, [1996] 3 C.N.L.R. 157, [1996] S.J. No. 262 (Prov. Ct.), aff'd [1998] 1 C.N.L.R. 182 (Sask. Q.B.); *R. v. Maurice*, [2002] 2 C.N.L.R. 244 (Sask. Prov. Ct.), aff'd [2002] 2 C.N.L.R. 273 (Sask. Q.B.); *R. v. Grumbo*, above note 13; *R. v. Castonguay*, [2003] 1 C.N.L.R. 177 (N.B. Prov. Ct.); and *R. v. Blais*, [1997] 3 C.N.L.R. 109 (Man. Prov. Ct.), aff'd [1998] 4 C.N.L.R. 103 (Man. Q.B.), aff'd [2001] M.J. No. 168 (C.A.), aff'd 2003 SCC 44.

24 [2003] 2 S.C.R. 207.

25 Above note 23.

26 *Constitution Act, 1930*, 20-21 Geo. V, c. 26 (U.K.), formerly called the *British North America Act, 1930*.

ment submitted by the Crown. This argument had suggested that the term *Indians* should be interpreted in all constitutional enactments in the same manner as referenced most recently in the *Constitution Act, 1982*. In other words, the Crown suggested that the term *Indians* as being just one of three groups within the overall definition of "aboriginal peoples" in section 35(2) should acquire the same meaning when used in the NRTA. The Court stated:

> [w]e do not find this approach persuasive. To the contrary, imposing a continuity requirement would lead us to conclude that "Indians" and "Métis" are different, since they are separately enumerated in s. 35(2) of the Constitution Act, 1982. *We emphasize that we leave open for another day the question of whether the term "Indians" in s. 91(24) of the Constitution Act, 1867 includes the Métis* — an issue not before us on this appeal.[27]

This argument would also have indirectly required an overruling of the *Reference re Eskimos* decision as the Inuit are also distinctly identified within section 35(2) yet included within section 91(24). In avoiding this question, the Court must have been aware that it had done the same thing three years earlier in *Lovelace v. Ontario* [28] when it advised:

> **4** At the outset, I wish to note that this appeal has raised collateral issues which are of great importance; among them are the constitutionality of the Indian Act and the scope of the federal jurisdiction with respect to Métis and non-registered First Nation peoples pursuant to s. 91(24) of the *Constitution Act, 1867*. Although the substantive equality analysis obliges the Court to consider the circumstances of these appellant aboriginal communities, including the social realities relating to their exclusion from, or non-participation in, the *Indian Act* regime, these important collateral issues are not properly raised in this appeal and, therefore, cannot be decided herein. Similarly, it is neither necessary nor appropriate for this Court to decide or comment upon the responsibilities of provincial governments with respect to these matters.

27 *Blais,* above note 23 at para. 36 [emphasis added].

28 *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 188 D.L.R. (4th) 193, 2000 SCC 37.

No other case dealing with Métis issues that has touched on this matter can be viewed as decisive in this regard. Efforts have been made to set the question squarely before Canadian courts, but the task has proven to be surprisingly difficult. Most recently, Métis leader Harry Daniels filed a statement of claim in the Federal Court to force a resolution to this issue, but the matter has yet to go to trial due at least in part to procedural challenges brought by the federal Justice Department. In *Daniels v. Canada* the Crown unsuccessfully challenged the appropriateness of the action.[29] After the tragic death of Harry Daniels, the federal government challenged the addition of Daniel's son Gabriel as a plaintiff, a move necessary to maintain the cause of action. The government was unsuccessful before the case management judge and then again on appeal.[30] These procedural obstacles are hardly a vigorous display of adherence to the "honour of the Crown" standard that has been declared by our highest court as "always at stake in its dealings with Aboriginal peoples."[31]

At present, the best prospect of obtaining judicial direction on the scope of section 91(24) lies in the *Dumont* case,[32] which was originally launched solely to pursue Métis land rights. The intention was to challenge the constitutionality of legislation enacted after 1870 that is alleged to have been intended to undermine the implementation of the scrip entitlements set out in the *Manitoba Act*. The litigation had languished for many years following its filing in 1980 due to budgetary problems. These problems stemmed, in part, from the numerous federal motions that led the case all the way to the Supreme Court of Canada on preliminary matters in 1990,[33] then back to the Court of Appeal.[34] Since then, the case has become re-energized and has begun to move forward to trial. On 15 March 2000,

29 *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, [2002] 4 F.C. 550 (T.D.).

30 *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, 2005 FC 1109, [2005] 4 C.N.L.R. 156.

31 *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at para. 16.

32 *Dumont v. Canada (Attorney General)*, [1990] 2 C.N.L.R. 19 (S.C.C.), rev'g (*sub nom. Manitoba Metis Federation Inc. v. Canada (Attorney General)*), [1988] 3 C.N.L.R. 39 (Man. C.A.), rev'g [1987] 2 C.N.L.R. 85 (Man. Q.B.). See also *Dumont v. Canada (Attorney General)* (1991), [1992] 2 C.N.L.R. 34 (Man. C.A.), rev'g [1991] 3 C.N.L.R. 22 (Man. Q.B.).

33 *Ibid*.

34 *Dumont v. Canada (Attorney General)* (1991), 91 D.L.R. (4th) 654 (Man. C.A.).

the plaintiffs filed an amended statement of claim in which they asserted for the first time that the Métis are Indians within the meaning of section 91(24). Efforts by the Attorneys General of Manitoba and Canada to have these amendments struck out were rejected.[35] After a lengthy trial in 2006, a decision by the Manitoba Court of Queen's Bench is eagerly awaited.

In *R. v. Laviolette*,[36] a Métis accused raised the jurisdictional question as part of a defence to a fishing charge in Saskatchewan. The Crown prosecutor conceded the section 91(24) issue and the argument then became that this concession had rendered the matter moot. Although agreeing with the Crown in this regard, the judge stated:

> While the Crown argues that this is an attempt to turn this case into a private reference case and that this ruling is sought for larger political purposes, the same argument of "playing politics" could be levelled against the Crown for continuing to make this admission, as it appears to have done consistently beginning with the decision of our Court of Appeal in *Grumbo* [1998] 3 C.N.L.R. 172, thereby avoiding a judicial determination of this issue. Where there [is] no other way of making this judicial determination, I would agree that it was appropriate that the Accused be permitted to call evidence on this issue, and have the Court rule on it, despite the Crown's concession.[37]

While there is still hope that either the *Dumont* case (renamed *Manitoba Metis Federation Inc.*) or the *Daniels* case will ultimately lead to a judicial resolution of this issue, neither of these cases promises attractive resolution. Any decision by the trial judge will clearly need to be appealed to serve as an authoritative answer to the question. The willingness of the Saskatchewan government to concede the section 91(24) jurisdictional debate in *Laviolette* and similar cases so as never to appeal its defeats

35 *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2002 MBQB 52. See a discussion of this case in the Introduction to this book.

36 *R. v. Laviolette*, 2004 SKPC 102.

37 *Ibid*. at para 4. The accused appealed this ruling unsuccessfully: *R. v. Laviolette*, [2005] SKQB 61, 260 Sask. R. 121. The trial court later held that the accused possessed Aboriginal rights and acquitted him; however, it was unnecessary to address the s. 91(24) issue as well as a variety of other legal arguments to reach the conclusion regarding the presence of s. 35(1) rights in this case, 2005 SKPC 70. This latter decision has recently been followed and applied to a different region of Saskatchewan in *R. v. Belhumeur*, 2007 SKPC 114.

demonstrates only too vividly that appellate decisions are essential. However, pursuing an appeal can be as much as a six- to ten-year process after a trial decision and is hardly a speedy or inexpensive resolution.

One could also readily argue that litigation is the absolutely worst way to proceed and that negotiation should be the preferable strategy to resolve this matter. Indeed, our highest court has frequently encouraged negotiation as the preferred approach to settle major Aboriginal legal disputes. Resorting to litigation is a last resort that reflects the complete unwillingness on the part of the federal government to concede the point and accept that its interpretation is contrary to that of every provincial and territorial government in Canada as well as the Aboriginal associations involved. Alternatively, if it is so confident in the strength of its legal arguments, the government of Canada could expedite obtaining judicial direction by pressing ahead to a determination through a reference to the Supreme Court. Instead, the message conveyed by trying to avoid the issue, or even settling the matter in Court, is similar to that sent in 1936. At that time, the government's legal advice was that winning the *Reference re Eskimos* matter seemed unlikely so it was wiser not to proceed; this led the government to slow the preparation of the submission down without seeking a negotiated resolution. However, in 1936, the Quebec government was insistent upon proceeding and had the benefit of the 1935 federal Order-in-Council directing the Reference. These factors made it too politically embarrassing for the federal government to retreat. When delay was no longer sustainable, the government had to go through with its legal arguments. Clearly, a negotiated solution today would be a preferable way to build a country, while also respecting the unique political and legal history of the Métis Nation within Canada.

E. ROYAL COMMISSION ON ABORIGINAL PEOPLES

The Royal Commission on Aboriginal Peoples declared its conclusion on the section 91(24) interpretation question after carefully considering its own research, holding community hearings, listening to presentations from Métis organizations, and contracting research[38] in these terms:

38 I wish to advise readers that I co-authored a research paper with John Giokas for the Commission on this precise topic, which was subsequently published by the

1.5 Coverage under Section 91(24)

> We are convinced that all Métis people, whether or not they are members of full-fledged Aboriginal nations, are covered by section 91(24). There are several reasons for that conclusion. The first is that at the time of Confederation, use of the term "Indian" extended to the Métis (or "halfbreeds" as they were called then). This can be seen, for example, in section 31 of the *Manitoba Act, 1870* and in section 125(e) of the *Dominion Lands Act 1879*, both of which made provision for land grants to "halfbreed" persons ("Métis" in the French versions) or in connection with the "extinguishment of *Indian* title." The Supreme Court of Canada held as early as 1939 that Inuit ("Eskimos") are included within the scope of section 91(24) because the section was intended to refer to "all the aborigines of the territory subsequently included in the Dominion" and there is every reason to apply the same reasoning to Métis people. Most academic opinion supports the view that Métis are Indians under section 91(24), and a recent commission of inquiry [referencing the Aboriginal Justice Inquiry] in Manitoba reached the same conclusion. We support this view.[39]

In light of this assessment, the Royal Commission then proceeded to recommend the following action to the federal government:

> 4.5.3 The government of Canada either
> (a) acknowledge that section 91(24) of the *Constitution Act, 1867* applies to 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.

Commission: "Do the Métis Fall within Section 91(24) of the *Constitution Act, 1867*?" in Royal Commission on Aboriginal Peoples, *Aboriginal Self-Government: Legal and Constitutional Issues*, above note 1 at 140–276; also published in French as "Les Métis sont-ils visés par le paragraphe 91(24) de la *Loi Constitutionnelle de 1867*?" in *L'autonomie Gouvernemental des Autochtones: Questions juridiques et constitutionnelles* (Ottawa: Supply and Services Canada, 1995) at 159–313.

39 Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol. 4 (Ottawa: Supply and Services Canada, 1996) c. 5 at 209 [emphasis in original; footnotes omitted].

> If it is unwilling to take either of these steps, the government of Canada make a constitutional reference to the Supreme Court of Canada, asking that court to decide whether section 91(24) of the *Constitution Act, 1867* applies to Métis people.
>
> Of the many measures needed to ensure that Métis people receive fair treatment in the future, one of the most fundamental is the elimination of discrimination in all forms. The refusal by the government of Canada to treat Métis as full-fledged Aboriginal people covered by section 91(24) of the constitution is the most basic current form of governmental discrimination. Until that discriminatory practice has been changed, no other remedial measures can be as effective as they should be.[40]

F. CONCLUSION

We have passed the eleventh anniversary of the Final Report of the Royal Commission on Aboriginal Peoples without any action on either of the two main recommendations or any willingness shown to accept the fallback choice of a reference. One wonders if the jurisdictional question will remain unanswered at the twentieth anniversary of the Royal Commission's groundbreaking work. One can only hope that this will not be the case. While the matter seems anachronistic, given the developments through section 35 and land claims settlements in the North, its lack of resolution prevents significant progress in addressing the real needs and aspirations of the Métis people. As long as federal and provincial governments in Canada focus so heavily on who pays before being willing to move forward and continue to abdicate responsibility in the interim, one cannot expect a decision as to whether the Métis are inside or outside of section 91(24) of the *Constitution Act, 1867*.[41] This jurisdictional ambiguity will continue to retard the legitimate progress of the Métis people in achieving their goals well into the 21st century.

40 *Ibid*. at 210.

41 Above note 4.