R. *v.* Blais, [2003] 2 S.C.R. 236, 2003 SCC 44

Ernest Lionel Joseph Blais *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Canada,
Attorney General for Saskatchewan,
Attorney General of Alberta,
Métis National Council
and Congress of Aboriginal Peoples *Interveners*

Indexed as: R. *v.* Blais

Neutral citation: 2003 SCC 44.

File No.: 28645.

2003: March 18; 2003: September 19.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

on appeal from the court of appeal for manitoba

Constitutional law — Manitoba Natural Resources Transfer Agreement — Hunting rights — Métis — Métis convicted of hunting contrary to provincial statute — Natural Resources Transfer Agreement providing that provincial laws respecting game apply to Indians subject to their continuing right to hunt, trap and fish for food on unoccupied Crown lands — Whether Métis are "Indians" under hunting rights provision of Natural Resources Transfer Agreement — Natural Resources Transfer Agreement (Manitoba), para. 13.

The appellant, a Manitoba Métis, was convicted of hunting deer out of season. He had been hunting for food on unoccupied Crown land. His appeals to the Manitoba Court of Queen's Bench and the Manitoba Court of Appeal were based solely on the defence that, as a Métis, he was immune from conviction under the *Wildlife Act* regulations in so far as they infringed on his right to hunt for food under para. 13 of the Manitoba *Natural Resources Transfer Agreement* (*NRTA*). This provision stipulates that the provincial laws respecting game apply to the Indians subject to the continuing right of the Indians to hunt, trap and fish for food on unoccupied Crown lands. Both appeals were unsuccessful. The issue in this appeal was whether the Métis are "Indians" under the hunting rights provision of the *NRTA*.

Held: The appeal should be dismissed.

The *NRTA* is a constitutional document which must be read generously within its contextual and historical confines and yet in such a way that its purpose is not overshot. Here, the appellant is not entitled to benefit from the protection accorded to "Indians" in the *NRTA*. First, the *NRTA*'s historical context suggested that the term "Indians" did not include the Métis. The historical documentation indicated that, in

Manitoba, the Métis had been treated as a different group from "Indians" for purposes of delineating rights and protections. Second, the common usage of the term "Indian" in 1930 did not encompass the Métis. The terms "Indian" and "half-breed" had been used to refer to separate and distinguishable groups of people in Manitoba from the mid-19th century through the period in which the *NRTA* was negotiated and enacted. The location of para. 13 in the *NRTA* under the heading "Indian Reserves" further supports this interpretation. Third, the purpose of para. 13 of the *NRTA* was to ensure respect for the Crown's obligations to "Indians" with respect to hunting rights, who were viewed as requiring special protection and assistance. This view did not extend to the Métis, who were considered more independent and less in need of Crown protection.

A requirement for "continuity of language" should not be imposed on the Constitution as a whole and, in any event, such an interpretation would not support the contention that the term "Indians" should include the Métis. The principle that ambiguities should be resolved in favour of Aboriginal peoples is inapplicable as the historical documentation was sufficient to support the view that the term "Indians" in para. 13 of the *NRTA* was not meant to encompass the Métis. Nor does the "living tree" doctrine expand the historical purpose of para. 13; while constitutional provisions are intended to provide "a continuing framework for the legitimate exercise of governmental power", the Court is not free to invent new obligations foreign to the original purpose of the provision at issue, but rather must anchor the analysis in the historical context of the provision.

Cases Cited

Applied: *R. v. Powley*, [2003] 2 S.C.R. 207, 2003 SCC 43; **referred to:** *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629; *Frank v. The Queen*, [1978] 1 S.C.R. 95; *Moosehunter v. The Queen*, [1981] 1 S.C.R. 282; *R. v. Horseman*, [1990] 1 S.C.R. 901; *R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Reference as to whether "Indians" in s. 91(24) of the B.N.A. Act includes Eskimo inhabitants of the Province of Quebec*, [1939] S.C.R. 104; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *R. v. Sutherland*, [1980] 2 S.C.R. 451; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Marshall*, [1999] 3 S.C.R. 456.

Statutes and Regulations Cited

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Constitution Act, 1982, s. 35.

Indian Act, R.S.C. 1985, c. I-5, s. 88.

Manitoba Act, 1870, S.C. 1870, c. 3 [reprinted in R.S.C. 1985, App. II, No. 8], s. 31.

Natural Resources Transfer Agreement (Manitoba), paras. 1, 10, 11, 12, 13.

Wildlife Act, R.S.M. 1987, c. W130, s. 26 [rep. & sub. 1989-90, c. 27, s. 13].

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APPEAL from a judgment of the Manitoba Court of Appeal (2001), 198 D.L.R. (4th) 220, [2001] 8 W.W.R. 231, 156 Man. R. (2d) 53, 246 W.A.C. 53, [2001] 3 C.N.L.R. 187, [2001] M.J. No. 168 (QL), 2001 MBCA 55, affirming a decision of the Court of Queen's Bench, [1998] 10 W.W.R. 442, 130 Man. R. (2d) 114, [1998] 4 C.N.L.R. 103, [1998] M.J. No. 395 (QL), upholding a judgment of the Provincial Court, [1997] 3 C.N.L.R. 109, [1996] M.J. No. 391 (QL). Appeal dismissed.

Lionel Chartrand, for the appellant.

Holly D. Penner and *Deborah L. Carlson*, for the respondent.

Ivan G. Whitehall, Q.C., *Barbara Ritzen* and *Michael H. Morris*, for the intervener the Attorney General of Canada.

Written submissions only by *P. Mitch McAdam*, for the intervener the Attorney General for Saskatchewan.

Kurt J. W. Sandstrom and *Margaret Unsworth*, for the intervener the Attorney General of Alberta.

Jean Teillet, *Clem Chartier*, *Arthur Pape* and *Jason Madden*, for the intervener the Métis National Council.

Joseph Eliot Magnet, for the intervener the Congress of Aboriginal Peoples.

The following is the judgment delivered by

THE COURT —

I. Introduction

1 This case raises the issue of whether the Métis are "Indians" under the hunting rights provisions of the Manitoba *Natural Resources Transfer Agreement* ("*NRTA*"), incorporated as Schedule (1) to the *Constitution Act, 1930*. We conclude that they are not.

2 On February 10, 1994, Ernest Blais and two other men went hunting for deer in the District of Piney, in the Province of Manitoba. At that time, deer hunting was prohibited in that area by the terms of the wildlife regulations passed pursuant to *The Wildlife Act* of Manitoba, R.S.M. 1987, c. W130, s. 26, as amended by S.M. 1989-90, c. 27, s. 13. Mr. Blais was charged with unlawfully hunting deer out of season.

3 The requisite elements of the offence were conceded at trial. However, the appellant asserted two defences that would have entitled him to acquittal. Both defences were based on his identity as a Métis. First, the appellant argued that, as a Métis, he had an aboriginal right to hunt for food under s. 35 of the *Constitution Act, 1982*. Second, he claimed a constitutional right to hunt for food on unoccupied Crown lands by virtue of para. 13 of the *NRTA*.

4 The parties agreed at trial, and continue to agree, that the appellant was hunting for food for himself and for the members of his immediate family, and that he was hunting on unoccupied Crown land. They further agree that the appellant is Métis.

5 The trial judge rejected both of the appellant's defences and entered a conviction on August 22, 1996 ([1997] 3 C.N.L.R. 109). The appellant appealed the conviction to the Manitoba Court of Queen's Bench ([1998] 4 C.N.L.R. 103) and to the Manitoba Court of Appeal ([2001] 3 C.N.L.R. 187, 2001 MBCA 55). His appeals were based solely on the defence that, as a Métis, he is immune from conviction under the *Wildlife Act* regulations in so far as they infringe on his right to hunt for food under para. 13 of the *NRTA*. Both courts rejected this defence and upheld the appellant's conviction.

6 Because we agree that para. 13 of the *NRTA* cannot be read to include the Métis, we would dismiss this appeal. We make no findings with respect to the existence of a Métis right to hunt for food in Manitoba under s. 35 of the *Constitution Act, 1982*, since the appellant chose not to pursue this defence.

II. Analysis

7 Mr. Blais is a "Métis", a member of a distinctive community descended from unions between Europeans and Indians or Inuit. This is agreed by the parties and was confirmed by the trial judge. There is no basis for disturbing this finding, particularly as the appellant satisfies the criteria of self-identification, ancestral connection, and community acceptance set out in *R. v. Powley*, [2003] 2 S.C.R. 207, 2003 SCC 43. The question is whether, as a Métis, he is entitled to benefit from this hunting provision for "Indians".

8 Paragraph 13 of the *NRTA* reads:

> 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 lands to which the said Indians may have a right of access.

This provision consists of a stipulation and an exception. The stipulation is that "the laws respecting game in force in the Province from time to time shall apply to the Indians" (emphasis added). The exception is the continuing right of the Indians to hunt, trap and fish for food on unoccupied Crown lands "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 lands to which the said Indians may have a right of access" (emphasis added).

9 The issue, as stated, is whether the exception addressed to "Indians" applies to the Métis. As we explain in *Powley*, *supra*, at para. 10, the term "Métis" does not designate all individuals with mixed heritage; "rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears". Members of Métis communities in the prairie provinces collectively refer to themselves as the "Métis Nation", and trace their roots to the western fur trade: *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities* (1996), vol. 4, at p. 203 ("*RCAP Report*"). Other Métis communities emerged in eastern Canada: *RCAP Report*; see *Powley*, at para. 10. The sole question before us is whether the appellant, being a Métis, is entitled to benefit from the protection accorded to "Indians" in the *NRTA*. He can claim this benefit only if the term "Indians" in para. 13 encompasses the Métis.

A. *An Overview of the NRTA*

10 Before embarking on our analysis of the meaning of "Indians" in para. 13, it may be useful to set out the history of the *NRTA* in general and para. 13 in particular. The three *NRTA*s arose as part of an effort to put the provinces of Alberta, Manitoba and Saskatchewan on an equal footing with the other Canadian provinces by giving them jurisdiction over and ownership of their natural resources. Paragraph 1 of each of these Agreements reads in part:

> In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of section one hundred and nine of the Constitution Act, 1867, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province, and all sums due or payable for such lands, mines, minerals or royalties, shall . . . belong to the Province, subject to any trusts existing

> in respect thereof, and to any interest other than that of the Crown in the same, and the said lands, mines, minerals and royalties shall be administered by the Province for the purposes thereof . . .; any payment received by Canada in respect of any such lands, mines, minerals or royalties before the coming into force of this agreement shall continue to belong to Canada . . . it being the intention that . . . Canada shall not be liable to account to the Province for any payment made in respect of any of the said lands, mines, minerals or royalties before the coming into force of this agreement, and that the Province shall not be liable to account to Canada for any such payment made thereafter. [Emphasis added.]

In other words, the Agreements were largely concerned with the transfer of contractual and related liabilities from Canada to the provinces. Indeed, early litigation relating to the *NRTA*s involved precisely this: see, e.g., *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629.

11 In the midst of these transfer provisions, three out of 25 paragraphs in the Manitoba *NRTA* come under the separate heading "Indian Reserves". Paragraph 13 is one of them. These paragraphs are identical to paras. 10-12 of the Alberta and Saskatchewan *NRTA*s. The three provisions indicate that, notwithstanding the transfer of control over land to Manitoba, responsibility for administering Indian reserves will remain with the federal Crown (para. 11); that the rules set out in the March 24, 1924 agreement between Canada and Ontario will apply to these Indian reserves and to any others subsequently created in the Province (para. 12); and that provincial hunting and fishing laws will apply to Indians except that these laws shall not prevent Indians from hunting and fishing for food on unoccupied Crown lands (para. 13).

12 The broad purpose of the *NRTA* was to transfer control over land and natural resources to the three western provinces. The first two of the three provisions on "Indian Reserves" were included to specify that the administration of these reserves would remain with the federal government notwithstanding the general transfer.

However, the provincial government would have the right and the responsibility to legislate with respect to certain natural resource matters affecting Indians, including hunting. Section 88 of the *Indian Act*, R.S.C. 1985, c. I-5, introduced in 1951 (S.C. 1951, c. 29, s. 87), makes general provincial laws applicable to Indians in the absence of conflicting treaties or Acts of Parliament. By enacting para. 13, the federal government specified that hunting and fishing by Indians could be the subject of provincial regulation, while seeking to ensure that its pre-existing obligations towards the Indians with respect to hunting rights would be fulfilled.

13 Paragraph 13 both affirmed and limited the Province's regulatory power: *Frank v. The Queen*, [1978] 1 S.C.R. 95, at p. 100; *Moosehunter v. The Queen*, [1981] 1 S.C.R. 282, at p. 285; *R. v. Horseman*, [1990] 1 S.C.R. 901, at pp. 931-32; *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 45. It affirmed the Province's power to regulate hunting for conservation purposes (see *Badger*, *supra*, at para. 71) but it carved out a protected space for hunting by Indians on unoccupied Crown lands and on lands to which the Indians have a right of access. Other potential sources of aboriginal hunting rights exist outside of the para. 13 framework, such as time-honoured practices recognized by the common law and protected by s. 35 of the *Constitution Act, 1982*. However, because Mr. Blais grounds his claim exclusively in para. 13 of the *NRTA*, we must confine our reasoning to this provision.

B. *The Regulatory Context*

14 The Province of Manitoba has used its regulatory power to enact laws designed to protect its wildlife population: *The Wildlife Act*. The regulations prescribe when, where, how and what species people can hunt. Where there is not an absolute

prohibition on hunting a particular species, Manitoba has instituted seasonal restrictions and a system of licensing to keep track of the date, location, kind and number of animals killed.

15 Seasonal restrictions and licensing requirements for deer hunting under the Manitoba *Wildlife Act* currently do not apply to members of Indian bands. Mr. Blais was arrested and charged with unlawfully hunting deer out of season because he is not a member of an Indian band, but a member of the Manitoba Métis community. The position of the Manitoba government is that para. 13 of the *NRTA* does not exempt the Métis from the obligation to comply with the deer-hunting regulations. Mr. Blais says that it does.

C. *Guiding Principles and Application*

16 Against this background, we turn to the issue before us: whether "Indians" in para. 13 of the *NRTA* include the Métis. The starting point in this endeavour is that a statute — and this includes statutes of constitutional force — must be interpreted in accordance with the meaning of its words, considered in context and with a view to the purpose they were intended to serve: see E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. As P.-A. Côté stated in the third edition of his treatise, "Any interpretation that divorces legal expression from the context of its enactment may produce absurd results" (*The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 290).

17 The *NRTA* is a constitutional document. It must therefore be read generously within these contextual and historical confines. A court interpreting a

constitutionally guaranteed right must apply an interpretation that will fulfill the broad purpose of the guarantee and thus secure "for individuals the full benefit of the [constitutional] protection": *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344. "At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the [constitutional provision] was not enacted in a vacuum, and must therefore . . . be placed in its proper linguistic, philosophic and historical contexts": *Big M Drug Mart*, *supra*, at p. 344. This is essentially the approach the Court used in 1939 when the Court examined the historical record to determine whether the term "Indians" in s. 91(24) of the *British North America Act, 1867* includes the Inuit (*Reference as to whether "Indians" in s. 91(24) of the B.N.A. Act includes Eskimo inhabitants of the Province of Quebec*, [1939] S.C.R. 104).

18 Applied to this case, this means that we must fulfill — but not "overshoot" — the purpose of para. 13 of the *NRTA*. We must approach the task of determining whether Métis are included in "Indians" under para. 13 by looking at the historical context, the ordinary meaning of the language used, and the philosophy or objectives lying behind it.

(1) Historical Context

19 The *NRTA* was not a grant of title, but an administrative transfer of the responsibilities that the Crown acknowledged at the time towards "the Indians within the boundaries" of the Province — a transfer with constitutional force. In ascertaining which group or groups the parties to the *NRTA* intended to designate by the term "Indians", we must look at the prevailing understandings of Crown obligations and the administrative regimes that applied to the different Aboriginal groups in Manitoba.

The record suggests that the Métis were treated as a different group from "Indians" for purposes of delineating rights and protections.

20 The courts below found, and the record confirms, that the Manitoba Métis were not considered wards of the Crown. This was true both from the perspective of the Crown, and from the perspective of the Métis. Wright J. summarized his findings on this point as follows, at paras. 18-19:

> The nature of the negotiations in the 1920's, as reflected in correspondence and other evidence introduced at the trial of the appellant, shows that protection was the fundamental concern of the federal authorities, being consistent with the Crown's obligations to those who automatically or voluntarily became subject to, or beneficiaries of, the *Indian Act*.
>
> Nowhere is there any suggestion [that] the Metis, as a people, sought or were regarded as being in need of this kind of protection. On the contrary, the evidence demonstrates the Metis to be independent and proud of their identity separate and apart from the Indians.

21 The difference between Indians and Métis appears to have been widely recognized and understood by the mid-19th century. In 1870, Manitoba had a settled population of 12,228 inhabitants, almost 10,000 of whom were either English Métis or French Métis. Government actors and the Métis themselves viewed the Indians as a separate group with different historical entitlements; in fact, many if not most of the members of the Manitoba government at the time of its entry into Confederation were themselves Métis.

22 The *Manitoba Act, 1870* used the term "half-breed" to refer to the Métis, and set aside land specifically for their use: *Manitoba Act, 1870*, S.C. 1870, c. 3, s. 31 (reprinted in R.S.C. 1985, App. II, No. 8). While s. 31 states that this land is being set

aside "towards the extinguishment of the Indian Title to the lands in the Province", this was expressly recognized at the time as being an inaccurate description. Sir John A. Macdonald explained in 1885:

> Whether they [the Métis] 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 that Province . . . 1,400,000 acres would be quite sufficient for the purpose of compensating these men for what was called the extinguishment of the Indian title. That phrase was an incorrect one, the half-breeds did not allow themselves to be Indians.
>
> (*House of Commons Debates*, July 6, 1885, at p. 3113, cited in T. E. Flanagan, "The History of Metis Aboriginal Rights: Politics, Principle, and Policy" (1990), 5 *C.J.L.S.* 71, at p. 74)

23 Other evidence in the record corroborates this view. For example, at trial, the expert witness Dr. G. Ens attached to his report a book written by Lieutenant-Governor A. Morris entitled *The Treaties of Canada with the Indians of Manitoba and the North-West Territories*, published in 1880. The book includes an account of negotiations between the Governor and an Indian Chief who expresses the concern that his mixed-blood offspring might not benefit from the proposed treaty. The Governor explains, at p. 69: "I am sent here to treat with the Indians. In Red River, where I came from, and where there is a great body of Half-breeds, they must be either white or Indian. If Indians, they get treaty money; if the Half-breeds call themselves white, they get land". This statement supports the view that Indians and Métis were widely understood as distinct groups for the purpose of determining their entitlements *vis-à-vis* the colonial administration.

24 It could be argued that the ability of individual Métis to identify themselves with Indian bands and to claim treaty rights on this basis weighs against a view of the two groups as entirely distinct. However, the very fact that a Métis

person could "choose" either an Indian or a white identity supports the view that a Métis person was not considered Indian in the absence of an individual act of voluntary association.

25 The Canadian government's response to an 1877 petition from a group of Métis further illustrates the perceived difference between the Indians and the Métis, and the exclusion of the Métis from the purview of Indian treaties. The Métis petitioners requested a grant of farming implements and seeds, and the relaxed enforcement of game laws to enable them to recover economically from the small-pox epidemic of 1870. David Laird, the Lieutenant-Governor of the North-West Territories, responded to the petition. He concluded by declaring:

> I can assure you that the Government feel[s] a kindly interest in your welfare, and it is because they desire to see you enjoying the full franchise and property rights of British subjects, and not laboring under the Indian state of pupilage, that they have deemed it for the advantage of half-breeds themselves that they should not be admitted to the Indian treaties.
>
> (W. L. Morton, ed., *Manitoba: The Birth of a Province* (1984), vol. I, at p. 23)

Without commenting on the motivations underlying the government's policy or on its ultimate wisdom, we take note of the clear distinction made between Indians and "half-breeds", and the fundamentally different perception of the government's relationship with and obligations towards these two groups. We also note that counsel for the intervener, the Métis National Council, told the Court of Appeal: "the Métis want to be 'Indian' under the *NRTA*, but for no other purpose" (para. 75).

26 Placing para. 13 in its proper historical context does not involve negating the rights of the Métis. Paragraph 13 is not the only source of the Crown's or the

Province's obligations towards Aboriginal peoples. Other constitutional and statutory provisions are better suited, and were actually intended, to fulfill this more wide-ranging purpose. The sole issue before us is whether the term "Indians" in the *NRTA* includes the Métis. The historical context of the *NRTA* suggests that it does not.

(2) Language

27 The common usage of the term "Indian" in 1930 also argues against a view of this term as encompassing the Métis. Both the terms "Indian" and "half-breed" were used in the mid-19th century. Swail Prov. Ct. J. cites a North American census prepared by the Hudson's Bay Company in 1856-57 (pp. 146-47). The census records 147,000 "Indians", and breaks this down into various groups, including "The Plain Tribes", "The Esquimaux", "Indians settled in Canada", and so forth. A separate line indicates the number of "Whites and half-breeds in Hudson's Bay Territory", which is estimated at 11,000, for a total of 158,000 "souls". This document illustrates that the "Whites and half-breeds" were viewed as an identifiable group, separate and distinct from the Indians.

28 The Red River Métis distinguished themselves from the Indians. For example, the successive Lists of Rights prepared by Métis leaders at the time of the creation of the Province of Manitoba excluded "the Indians" from voting. This provision could not plausibly have been intended to disenfranchise the Métis, who were the authors of the Lists and the majority of the population. The Third and Fourth Lists of Rights emphasized the importance of concluding treaties "between Canada and the different Indian tribes of the Province", with the "cooperation of the Local Legislature" (Morton, *supra*, at pp. 246 and 249). The Local Legislature was, at that

time, a Métis-dominated body, underscoring the Métis' own view of themselves and the Indians as fundamentally distinct.

29 There might not have been absolute consistency in the use of the terms "Indian" and "half-breed", and there appears to have been some mobility between the two groups. However, as evidenced by the historical documents statement cited above, the prevailing trend was to identify two distinct groups and to differentiate between their respective entitlements. Dr. Ens indicated in his report: "By 1850 'Half-Breed' was the most frequently used term among English-speaking residents of the North West to refer to all persons of mixed ancestry. It was a term that clearly differentiated between Indian and Metis populations" (respondent's record, at p. 176). At trial, the appellant's expert, Dr. Shore, could not cite any source in which the Canadian government used the term "Indian" to refer to all Aboriginal peoples, including the Métis.

30 This interpretation is supported by the location of para. 13 in the *NRTA* itself. Quite apart from formal rules of statutory construction, common sense dictates that the content of a provision will in some way be related to its heading. Paragraph 13 falls under the heading "Indian Reserves". Indian reserves were set aside for the use and benefit of Status Indians, not for the Métis. The placement of para. 13 in the part of the *NRTA* entitled "Indian Reserves", along with two other provisions that clearly do not apply to the Métis, supports the view that the term "Indian" as used throughout this part was not seen as including the Métis. This placement weighs against the argument that we should construe the term "Indians" more broadly than otherwise suggested by the historical context of the *NRTA* and the common usage of the term at the time of the *NRTA*'s enactment.

31 We find no basis in the record for overturning the lower courts' findings that, as a general matter, the terms "Indian" and "half-breed" were used to refer to separate and distinguishable groups of people in Manitoba from the mid-19th century through the period in which the *NRTA* was negotiated and enacted.

(3) The *NRTA*'s Objectives

32 The purpose of para. 13 of the *NRTA* is to ensure respect for the Crown's obligations to "Indians" with respect to hunting rights. It was enacted to protect the hunting rights of the beneficiaries of Indian treaties and the *Indian Act* in the context of the transfer of Crown land to the provinces. It took away the right to hunt commercially while protecting the right to hunt for food and expanding the territory upon which this could take place: see *Frank*, *supra*, at p. 100; *Moosehunter*, *supra*, at p. 285; *Horseman*, *supra*, at pp. 931-32; and *Badger*, *supra*, at para. 45. Wright J. put it thus, at para. 8:

> The NRTA was entered into between the federal government and each of the Provinces of Manitoba, Saskatchewan and Alberta. . . . [Its] primary purpose was to transfer Crown lands, with the resources associated, from Canada to the Provinces concerned. Section 13 in the Manitoba agreement . . . was included to enable Manitoba to pass laws respecting game and fish which would apply to Indians. . . . The exclusion in s. 13 was aimed to protect existing Indian rights to hunt, trap and fish on unoccupied Crown lands or any other lands to which the Indians had a right of access. Any such rights arose as a result of an Aboriginal historic base or because they were established or confirmed by treaty.

Manitoba would have the authority to pass laws respecting game and fish that would apply to all hunting and fishing activities in the province, including the activities of Indians. The exception was that Indians, a subset of the population with a particular

historical relationship to the Crown, would not thereby be deprived of certain specified hunting and fishing rights.

33 The protection accorded by para. 13 was based on the special relationship between Indians and the Crown. Underlying this was the view that Indians required special protection and assistance. Rightly or wrongly, this view did not extend to the Métis. The Métis were considered more independent and less in need of Crown protection than their Indian neighbours, as Wright J. confirmed. Shared ancestry between the Métis and the colonizing population, and the Métis' own claims to a different political status than the Indians in their Lists of Rights, contributed to this perception. The stark historic fact is that the Crown viewed its obligations to Indians, whom it considered its wards, as different from its obligations to the Métis, who were its negotiating partners in the entry of Manitoba into Confederation.

34 This perceived difference between the Crown's obligations to Indians and its relationship with the Métis was reflected in separate arrangements for the distribution of land. Different legal and political regimes governed the conclusion of Indian treaties and the allocation of Métis scrip. Indian treaties were concluded on a collective basis and entailed collective rights, whereas scrip entitled recipients to individual grants of land. While the history of scrip speculation and devaluation is a sorry chapter in our nation's history, this does not change the fact that scrip was based on fundamentally different assumptions about the nature and origins of the government's relationship with scrip recipients than the assumptions underlying treaties with Indians.

35 The historical context of the *NRTA*, the language of the section, and the purpose that led to its inclusion in the *Constitution Act, 1930* support the lower courts' conclusion that para. 13 does not encompass the Métis.

D. *Appellant's Counter-Arguments*

(1) Continuity of Language

36 The appellant asks us to impose a "continuity of language" requirement on the Constitution as a whole in order to support his argument that the term "Indians" in the *NRTA* includes the Métis. We 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 in this appeal.

(2) The Ambiguity Principle

37 In the absence of compelling evidence that the term "Indians" in para. 13 includes the Métis, the appellant invokes the principle that ambiguities should be resolved in favour of Aboriginal peoples: see *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36; *R. v. Sutherland*, [1980] 2 S.C.R. 451, at p. 464; see also *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, *per* La Forest J., at pp. 142-43 (suggesting refinements to this principle). This principle is triggered when there are doubts about the most fitting interpretation of the provision in question. In such cases, a generous

and liberal interpretation is to be preferred over a narrow and technical one: *Nowegijick*, *supra*.

38 The ambiguity principle does not assist the appellant in this case. The historical documentation is sufficient to support the view that the term "Indians" in para. 13 of the *NRTA* was not meant to encompass the Métis. Nor do we find relevant the respondent's counter-argument that the ambiguity principle precludes extending the protection of para. 13 to the Métis because this would "dilute" the value of Indian hunting rights in Manitoba. If "Indians" in para. 13 includes the Métis, then such an interpretation will prevail whether or not "dilution" results.

(3) The "Living Tree" Principle

39 We decline the appellant's invitation to expand the historical purpose of para. 13 on the basis of the "living tree" doctrine enunciated by Lord Sankey L.C. with reference to the 1867 *British North America Act*: *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136. The appellant, emphasizing the constitutional nature of para. 13, argues that this provision must be read broadly as providing solutions to future problems. He argues that, regardless of para. 13's original meaning, contemporary values, including the recognition of the Crown's fiduciary duty towards Aboriginal peoples and general principles of restitutive justice, require us to interpret the word "Indians" as including the Métis.

40 This Court has consistently endorsed the living tree principle as a fundamental tenet of constitutional interpretation. Constitutional provisions are intended to provide "a continuing framework for the legitimate exercise of

governmental power": *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, *per* Dickson J. (as he then was), at p. 155. But at the same time, this Court is not free to invent new obligations foreign to the original purpose of the provision at issue. The analysis must be anchored in the historical context of the provision. As emphasized above, we must heed Dickson J.'s admonition "not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore . . . be placed in its proper linguistic, philosophic and historical contexts": *Big M Drug Mart*, *supra*, at p. 344; see Côté, *supra*, at p. 265. Dickson J. was speaking of the *Charter*, but his words apply equally to the task of interpreting the *NRTA*. Similarly, Binnie J. emphasized the need for attentiveness to context when he noted in *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 14, that "'[g]enerous' rules of interpretation should not be confused with a vague sense of after-the-fact largesse." Again the statement, made with respect to the interpretation of a treaty, applies here.

41 We conclude that the term "Indians" in para. 13 of the *NRTA* does not include the Métis, and we find no basis for modifying this intended meaning. This in no way precludes a more liberal interpretation of other constitutional provisions, depending on their particular linguistic, philosophical and historical contexts.

III. Conclusion

42 We find no reason to disturb the lower courts' findings that neither the Crown nor the Métis understood the term "Indians" to encompass the Métis in the decades leading up to and including the enactment of the *NRTA*. Paragraph 13 does not provide a defence to the charge against the appellant for unlawfully hunting deer out of season. We do not preclude the possibility that future Métis defendants could

argue for site-specific hunting rights in various areas of Manitoba under s. 35 of the *Constitution Act, 1982*, subject to the evidentiary requirements set forth in *Powley*, *supra*. However, they cannot claim immunity from prosecution under the Manitoba wildlife regulations by virtue of para. 13 of the *NRTA*.

43 The appeal is dismissed. Each party shall bear its own costs.

44 The constitutional question is answered as follows:

> Is the appellant Ernest Lionel Joseph Blais, being a Métis, encompassed by the term "Indians" in para. 13 of the *Natural Resources Transfer Agreement, 1930*, as ratified by the *Manitoba Natural Resources Act*, (1930) 20-21 Geo. V, c. 29 (Can.), and confirmed by the *Constitution Act (1930)*, 20-21 Geo. V, c. 26 (U.K.), and therefore rendering s. 26 of *The Wildlife Act* of Manitoba unconstitutional to the extent that it infringes upon the appellant's right to hunt for food for himself and his family?

Answer: No.

APPENDIX

Relevant Constitutional and Statutory Provisions

Constitution Act, 1930

Manitoba — Memorandum of Agreement

> 13. 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 lands to which the said Indians may have a right of access.

The Wildlife Act, R.S.M. 1987, c. W130

26. No person shall hunt, trap, take or kill or attempt to trap, take or kill a wild animal during a period of the year when the hunting, trapping, taking or killing of that species or type of wild animal is either prohibited or not permitted by the regulations.

Appeal dismissed.

Solicitor for the appellant: Aboriginal Centre Law Office, Winnipeg.

Solicitor for the respondent: Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General for Saskatchewan: Deputy Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Alberta Justice, Edmonton.

Solicitors for the intervener the Métis National Council: Pape & Salter, Vancouver.

Solicitor for the intervener the Congress of Aboriginal Peoples: Joseph Eliot Magnet, Ottawa.