

**SASKATCHEWAN**

Court of Queen's Bench  
Judicial Centre of Battleford  
291 - 23<sup>rd</sup> Street West  
Battleford, SK S0M 0E0



**FAX COVER SHEET**

**DATE:** February 10, 2020

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**Number of Pages (including cover sheet):** 16

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**FIAT OF MR. JUSTICE R.C. MILLS**

**COURT FILE #: CRM 5/19; CRM 6/19**

**FILE NAME:** Warren Boyer v. Her Majesty the Queen and Oliver Poitras v. Her Majesty the Queen

**DATE OF FIAT:** February 10, 2020

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**QUEEN'S BENCH FOR SASKATCHEWAN**

Date: 2020 02 10

Docket: CRM 5 of 2019  
Judicial Centre: Battleford

BETWEEN:

WARREN BOYER

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

Docket: CRM 6 of 2019  
Judicial Centre: Battleford

BETWEEN:

OLIVER POITRAS

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

Counsel:

R. James Fyfe  
Clement Chartier, Q.C. and Kathy L. Hodgson-Smith

for the Crown  
for the accused

JUDGMENT  
February 10, 2020

MILLS J.

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[1] Oliver Poitras was convicted of unlawfully hunting, contrary to s. 25(1)(b) of *The Wildlife Act, 1998*, SS 1998, c W-13.12.

[2] Warren Boyer was convicted of angling without a licence, contrary s. 11(1) of *The Fisheries Regulations*, RRS c F-16.1 Reg 1, on March 27, 2014. This decision deals with an appeal of those convictions.

### **Background to Trial Decision**

[3] In three separate instances, the two accused, plus Billy Myette, were found by conservation officers to be fishing or hunting for food. All three were Métis. Billy Myette was hunting along the Rush Lake Fire Guard Road, which is approximately 31 kilometres east of the Town of Meadow Lake. Oliver Poitras was hunting on the Sundance Fire Guard Road, approximately 37 kilometres south of Meadow Lake. Warren Boyer was fishing for food at Chitek Lake.

[4] The acts of fishing and hunting in respect of each individual were admitted by an agreed statement of facts before trial.

[5] No issue was taken with respect to the three accused being Métis.

[6] The legal and factual issues raised by the accused were similar and the parties agreed to conduct a single trial in respect of all three individuals. There were two issues that the parties wished to have the Court address. The first was whether each of them had a Métis Aboriginal right to fish or hunt for food in their community, which was alleged to have included the area in which they were actually fishing or hunting. The second was whether s. 12 of the *Natural Resources Transfer Agreement*, SS 1930, c 87 [NRTA] when using the word "Indians", included "Métis."

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[7] The Provincial Court judge hearing the three cases had also presided over a decision in *R v Laviolette*, 2005 SKPC 70, 267 Sask R 291 [*Laviolette*]. That case was decided on July 15, 2005. The issues in *Laviolette* were generally the same as *Poitras and Boyer*. In *Laviolette*, the defence called two experts. Dr. Frank Tough was qualified to give expert evidence on Métis history, historical Aboriginal resource use and lifestyle, and on the history of the application of conservation policies to Aboriginal peoples in Canada. John Thornton was qualified to give expert evidence on Métis history generally and on the history of Green Lake, in particular. The issue was whether Mr. Laviolette had met a right to fish for food in the area that he was so doing. The parties proceeded on calling evidence to answer the questions posed in *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207 [*Powley*].

[8] *Powley* determined that the questions to be addressed were:

- (1) characterization of the right;
- (2) identification of the historic rights-bearing community;
- (3) identification of the contemporary rights-bearing community;
- (4) verification of the claimant's membership in the relevant contemporary community;
- (5) identification of the relevant time frame;
- (6) determination of whether the practice is integral to the claimants' distinctive culture;
- (7) establishment of continuity between the historic practice and the contemporary right asserted;
- (8) determination of whether or not the right was extinguished;
- (9) if there was a right, determination of whether there is an

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infringement; and

(10) determination of whether the infringement is justified.

[9] In the context of those parameters and based on the specific evidence heard by the trial judge in *Lavolette*, he was acquitted of the charge. The trial judge determined that there was evidence "to support the existence of a regional historic rights-bearing Metis community, which regional community is generally defined as the triangle of the fixed communities of Green Lake, Ile-a-la-Crosse and Lac la Biche and includes all of the settlements within and around the triangle including Meadow Lake." This finding was made as the trial judge was concerned with following the *Powley* decision which provided that Métis Aboriginal rights are site specific.

[10] The Crown and accused, Myette, Boyer and Poitras, agreed that all of the evidence heard at the *Lavolette* trial could be applied at their trial. The purpose of this was to primarily have the expert evidence of Dr. Tough and John Thornton to be placed before the Court for consideration without the necessity of time and expense in calling them at the current trial.

[11] In *Lavolette*, the trial judge determined that Mr. Lavolette met the criteria in *Powley* to establish a Métis right to hunt for food and acquitted him of the charge. As such, it was not necessary to deal with the question of whether the word "Indian" in s. 12 of *NRTA* included "Métis".

[12] At the Poitras, Boyer and Myette trials, significant additional evidence was called. Both sides called expert evidence from historians.

[13] The defence filed a notice of constitutional question as part of the case. Generally speaking, the issue addressed in the constitutional question related to whether

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Poitras and Boyer had hunting and fishing rights which could be exercised within the entire province, including north, central and southern Saskatchewan. The Crown requested from the trial judge a pre-trial ruling on whether this argument could be advanced in light of *Powley*.

[14] The defence argued that the *Powley* decision was meant to deal with who the "people" are that have the specific rights. They argued that the courts are confusing the concept of "people" with "settlement". If they were allowed to deal with the concept of "people", then they would have led evidence respecting the occupation of almost all of the Province of Saskatchewan. Part of the argument was that the Métis were highly mobile and to look at a specific regional location is inappropriate in the context of their lifestyle. They argued that the issue of fishing is the core issue to examine, not fishing at a particular location. The judge rejected this approach. I think he was correct in so doing. The expert evidence identified that the Métis of northwest Saskatchewan were a distinct community and that they were based on settlement as opposed to a nomadic lifestyle that was followed by the Métis further south.

[15] The trial judge ruled that Métis fishing and hunting rights are to be considered on a site-specific basis using a regional approach as directed in *Powley*. The judge ruled that constitutional questions claiming rights of the Métis nation throughout Saskatchewan and parts of Manitoba and Alberta would result in him making findings beyond his jurisdiction and contrary to the *Powley* decision. He went on to restrict his approach to determine whether the accused were part of the Métis community of northwest Saskatchewan in exercising his harvesting rights within that context.

[16] The trial judge determined that Mr. Myette was hunting in an area between Meadow Lake and Green Lake in and around identified historic Métis communities and was part of the historic Métis community of northwest Saskatchewan.

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Mr. Myette was therefore found not guilty of the charge.

### **Trial Judge's Determinations**

[17] The trial judge's pre-trial ruling left three issues before the Court for trial purposes. These were identified by the trial judge. [Transcript of Decision, Provincial Court, Prince Albert, April 25, 2016]

...

In respect of Mr. Boyer, I find that the issue is whether or not at Chitek Lake and the area around Chitek Lake is part of the historic Métis community of northwest Saskatchewan, whether he is a member of that community, and whether that area, then, being within northwest Saskatchewan is an area that he's permitted as a member of that community to fish.

In respect of Mr. Poitras, I find that the issue is whether or not Jackfish Lake and the Cochin areas are part of the community -- historic Métis community of northwest Saskatchewan, whether he is a member of that community, and whether or not as a result, he has a right to hunt in the area that it was indicated that he was hunting. ...

Whether the definition of Indian in s. 12 of the *Natural Resource Transfer Act* in Saskatchewan includes a Métis person.

[18] The trial judge focussed on the *Powley* decision and identified the questions that need to be put and answered when raising an Aboriginal right to hunt or fish in the particular area. The trial judge proceeded on the basis of this principle. In *Lavolette*, the trial judge had determined that there was a historic Métis community of northwest Saskatchewan. Part of the question in the Boyer and Poitras files dealt with whether the particular areas in which they were exercising harvesting rights fell within that community.

[19] It is useful to identify the standard of review as it relates to a summary

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conviction appeal. The oft-cited decision of *R v Helm*, 2011 SKQB 32 at paras 19 and 20, 368 Sask R 115, provide guidance:

19 On the factual grounds, the standard of review is whether there is evidence upon which a trier of fact, properly instructed, could reasonably reach the verdict. See *R. v. Bigsky*, 2006 SKCA 145, [2007] 4 W.W.R. 99 at para. 74; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381; and *R. v. Yebes*, [1987] 2 S.C.R. 168. The appellate court ought not substitute its own view of the evidence for that of the trial judge. However, the appellate court is entitled to review, re-examine and re-weigh the evidence, but only for the purpose of determining if the evidence was reasonably capable of supporting the learned trial judge's conclusion. See *R. v. Burns*, [1994] 1 S.C.R. 656.

20 On a question of law, the standard is correctness, and the appellate court should intervene if the decision is not correct in law unless, in the case of defence appeals, there has been no substantial wrong or miscarriage of justice that has occurred. See *R. v. Shepherd*, 2007 SKCA 29, [2007] 4 W.W.R. 659; and *R. v. Henry (B.)*, 2006 SKQB 469, 286 Sask. R. 154.

[20] It is trite law that findings of fact reasonably interpreted based on the evidence presented are not to be overturned or, in other words, the appeal court is not to substitute its view of the evidence for the trial judge's.

[21] It is worthwhile to keep this principle in mind. The very thorough brief filed by the appellants goes at great lengths to identify the evidence in support of their position that was presented in the *Laviolette* case and in the trial of this case to support the appellants' right to harvest for food. It is also clear that the trial judge rejected the appellants' version of the facts, especially the evidence from its experts, and preferred the expert evidence of the Crown. This is especially important as in *Laviolette* the trial judge did not have any expert evidence from the Crown. The only expert evidence called in *Laviolette* was called by the defence. The situation in *Boyer and Poitras* was much different. The Crown called significant and substantial evidence on the *Powley* issues. The trial judge preferred the Crown's evidence on those issues to that of the

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appellants' experts. It is not open to this Court to reverse that process and prefer the expert evidence provided by the appellants.

### **The Boyer Decision**

[22] Mr. Boyer was determined to be a Métis person from the Hamlet of Chitek Lake. He was fishing for food on Chitek Lake, which was located 60 kilometres southeast of Meadow Lake and some 24 to 30 kilometres directly south of the most southerly end of Green Lake. The Chitek Lake area was outside of the historic Métis community of northwest Saskatchewan, as determined in *Lavolette*. The issue of whether Chitek Lake was part of this community needed to be addressed as it had not been in *Lavolette*. The trial judge examined, firstly, when the date of effective European control had occurred in this area. He had determined in *Lavolette* that the date of effective European control was 1912. He relied on *Powley and R v Langan*, 2013 SKQB 256, 425 Sask R 42, for the proposition that he was to determine when Europeans established political and legal control in the area which was when colonial policies shifted to encouraging settlement through negotiating Treaties and other activity from what used to be a policy of discouraging settlement.

[23] He reviewed the expert evidence provided primarily through the Crown's expert, Dr. Clint Evans, and came to the conclusion that the effective date of European control was between 1876 to 1881 for the historic Métis community of northwest Saskatchewan. This is different from *Lavolette* because the additional evidence, which he accepted, led him to this conclusion.

[24] The trial judge found that Mr. Boyer has a historical connection to this community and that he was a present member of this community. The trial judge made a short generalization of the salient facts presented to him and determined that there

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was not a Métis community at Chitek Lake prior to effective European control and that it was not part of the historic Métis community of northwest Saskatchewan. Having determined that to be the case, Mr. Boyer did not have the right to fish for food in the Chitek Lake area.

**Oliver Poitras**

[25] The trial judge determined that Mr. Poitras was a Métis person from Meadow Lake and hunting for food some 37 kilometres south of Meadow Lake. Mr. Poitras was found to be a Métis person and that hunting for food was a practice integral to Métis life in the area. The trial judge reviewed the evidence of the experts in a general fashion and came to the conclusion that the area that Mr. Poitras was hunting in was not part of the historic Métis community of northwest Saskatchewan. The trial judge found as a fact that the Métis community in this area was not established until the late 1880s, which was after effective European control, and that the Métis community originated from an area of the province south of where Mr. Poitras was hunting and so not part of the northwest Saskatchewan community, in any event.

[26] As a consequence, he found Mr. Poitras guilty of the offence.

[27] Once again, the trial judge relied heavily upon the evidence of Dr. Evans in preference to the expert evidence proffered by the appellants.

[28] The appellants, in their extensive brief, thoroughly analyzed and offered up the evidence as presented by them at trial to suggest that the findings of fact were inaccurate. That is not this Court's role.

[29] The defence argues that they were hamstrung in their approach as a result of the judge's pre-trial ruling. The defence wished to present evidence that showed that

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the historic Métis community encompassed far more than the site-specific area of northwest Saskatchewan. Indeed, that it included all of Saskatchewan and parts of the other provinces. The defence argues that the trial judge's failure to allow them to call such evidence was an error of law.

[30] This Court disagrees with the appellants' position. The trial judge was bound by the Supreme Court of Canada decision in *Powley* and simply followed that direction.

[31] The defence did call evidence on the issue of the boundaries of the historic Métis community of northwest Saskatchewan in an attempt to show that it included the areas in which the appellants were convicted, that evidence was not preferred.

[32] It is common in the advancement of Indigenous rights to have them arise in the context of right to harvest food. The cases proceed, however, on the defence leading evidence respecting its rights and the Crown then providing rebuttal evidence on the issues raised by the defence. It is a cumbersome method that does not necessarily involve all of the issues that are, in reality, at stake and the evidentiary context is not always fully presented in respect of those issues. Claims for declaratory relief that would include and allow for discovery of documents and questioning of parties in advance of trial would seem to be a far better way of dealing with these important issues.

***Natural Resources Transfer Agreement, 1930***

[33] In addition to Messrs. Boyer and Poitras arguing their right to harvest for food as part of their distinctive Métis rights, they have argued that they have the right

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to hunt for food as they are included in the reference to "Indian" under para. 12 of the *NRTA*. On March 20, 1930, a memorandum of agreement was entered into between the Government of Canada and the Government of Saskatchewan, the purpose of which was to transfer natural resources, i.e., fisheries and water, among other things, to the Province of Saskatchewan. At the same time, virtually identical agreements were entered into between the Government of Canada and the provinces of Alberta and Manitoba.

[34] Sections 10, 11 and 12 from the Saskatchewan agreement are germane to the issue at hand:

10. All lands included in Indian reserves within the Province, including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, and the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfil its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof.

11. The provisions of paragraphs one to six inclusive and of paragraph eight of the agreement made between the Government of the Dominion of Canada and the Government of the Province of Ontario on the 24th day of March, 1924, which said agreement was confirmed by statute of Canada, fourteen and fifteen George the Fifth chapter forty-eight, shall (except so far as they relate to the Bed of Navigable Waters Act) apply to the lands included in such Indian reserves as may hereafter be set aside under the last preceding clause as if the said agreement had been made between the parties hereto, and the provisions of the said paragraphs shall likewise apply to the lands included in the reserves heretofore selected and surveyed, except that neither the said lands nor the proceeds of the disposition thereof shall in any circumstances become administrable by or be paid to the Province.

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12. 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.

[35] Paragraph 12 provides Indians with the continued right of hunting, trapping and fishing for food at all seasons of the year. The appellants argue that the term "Indians" referred to in para. 12 includes "Métis" and, as such, they are granted the right to harvest for food when they did. It is acknowledged that the appellants were harvesting on unoccupied Crown land. Extensive argument was provided by the appellants in relation to this issue. The appellants immediately face a significant hurdle, the case of *R v Blais*, 2003 SCC 44, [2003] 2 SCR 236 [*Blais*]. That case stated at para. 1 that the issue is whether Métis are Indians under the hunting rights provisions of the Manitoba *NRTA* (para. 13). The Court said they were not. The decision in *Blais* is clear and unequivocal and not subject to nuanced interpretations. The Court describes the *NRTA* objectives at para. 32:

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*, [[1978] 1 SCR 95], at p. 100; *Moosehunter*, [[1981] 1 SCR 282], at p. 285; *Horseman*, [[1990] 1 SCR 901], at pp. 931-32; and *Badger*, [[1996] 1 SCR 771], 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

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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. ...

[36] The Court in dealing with the language utilized in para. 13 have the following to say:

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.

[37] The Court went on to deal with other arguments raised in that case and found that none of them apply. Paragraph 12 of the Saskatchewan *NRTA* is identical to

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para. 13 of the Manitoba *NRTA* that was discussed in *Blais*.

[38] The appellants argue firstly that the trial judge was not bound by *Blais* as the issue of *stare decisis*, as enunciated in *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 [*Carter*], provided the opportunity for the trial judge to come to a different conclusion. In *Carter*, it was stated that reconsideration of higher court rulings were available when a new legal issue was raised or where there was a change in circumstances or evidence that refrained the issue in argument.

[39] The appellants argued, firstly, that there was evidence presented by the appellants in this case that shifted the parameters of the debate. In particular, they rely on the testimony of Dr. Tough, who concluded that the term “Indian” included the phrase “Métis people” or “half-breeds”. They go on to recite the evidence relied on by Dr. Tough. Additionally, the appellants argue that correspondence between the federal government and the Province of Alberta showed that the interpretation put on by the federal government for the term “Indians” included “Métis”. The Province of Alberta did not agree with that interpretation, however. Dr. Tough’s opinion was not accepted by the trial judge, which was contrary to *Blais* and every other decision dealing with that issue. The evidence tendered by the Crown contradicted the rationale and conclusions of Dr. Tough.

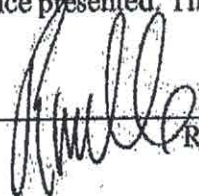
[40] The appellants further argue that the decision in *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 SCR 99 [*Daniels*], changes the interpretive landscape of the *NRTA* as found in *Blais*. In *Daniels*, the Supreme Court determined that Métis and non-status Indians are Indians under s. 91(24) of the *Constitution Act, 1867*. The appellants argue that that interpretation should be extended to the *NRTA*. The Crown argued in *Daniels* that *Blais* was inconsistent with such a finding. The Supreme Court, however, distinguished *Blais* and stated that the issues between the two cases were different; in particular, in *Blais*, the Court expressly

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stated that it was not deciding whether Métis were included in the words "Indians" under s. 91(24) of the *Constitution Act, 1867*. That matter was not before the Court in the *Blais* appeal. *Daniels* does not overrule *Blais*. The references in *Daniels* to the interchangeable use of the word "Indians" with other Indigenous peoples are in reference to the issue that the Court was deciding.

[41] The appellants argue that new legal issues have arisen and, as such, the opportunity to re-examine the decision in *Blais* as it relates to Saskatchewan has come forward. The appellants rely on the case of *R v Grumbo* (1998), 168 Sask R 78 (CA), a decision of our Court of Appeal. That decision was handed down before the Supreme Court of Canada ruled in *Blais*. The appellants argue that a decision of the Saskatchewan Provincial Court in *R v Laliberte* (19 June 1996) Green Lake (Sask Prov Ct) [*Laliberte*], unreported, should be followed. In that case, White PCJ determined that on the authorities and evidence in front of him he believed the word "Indians" in para. 12 of the *NRTA* also included "Métis". The evidence before White PCJ in *Laliberte* was not the same evidence before the trial judge in the instant case and White PCJ did not have the benefit of the interpretation of the Manitoba *NRTA* by the Supreme Court in *Blais*.

[42] The appellants argue that the new evidence presented should result in the Court reconsidering the issue of whether Métis are included in the reference to Indians in the *NRTA*. That argument can only move forward if that evidence was accepted by the trial judge. It was not. There was significant evidence presented by the Crown in each area of challenge made by the appellants on this issue. The Crown's evidence was preferred. The trial judge had the right to make that determination and, in any event, I would have ruled in the same fashion based on the evidence presented. The appeals are dismissed.

  
\_\_\_\_\_  
R.C. MILLS J.