BRIEFING NOTE:
R. v. GRUMBO, Queens Bench, August 2, 1996

The decision in *Grumbo* dealt with the interpretation of the Natural Resources Transfer Agreement of 1930 between the province of Saskatchewan and the government of Canada. When the province of Saskatchewan was created in 1905, the federal government kept the ownership of the lands and resources within Saskatchewan (the same applies to Manitoba and Alberta). In 1930 the federal government turned over the lands and resources to the three prairie provinces, through separate agreements with each province. Legislation in each province was passed, as well as in Parliament, ratifying those Agreements. The British Parliament in England also passed a constitutional amendment ratifying those Agreements.

In all three Agreements, there is a paragraph which provides:

> 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.

It must be noted that the Agreement did not define the term "Indian". As the Agreement is part of the Constitution of Canada, it is argued that the term "Indian" in the NRTA 1930 must have the same meaning as that term is used in the 1867 Constitution. Under section 91(24) of the 1867 Constitution, the federal government is given jurisdiction and responsibility over, amongst other matters, "Indians and lands reserved for the Indians". Again, the term "Indian" in the 1867 Constitution was not defined.

In 1939, the Supreme Court of Canada ruled that the "Eskimos", now known as "Inuit" were "Indians" for the purposes of s. 91(24). However, the Inuit are not "Indians" for the purposes of the "Indian Act". The Supreme Court of Canada in 1939 said the term "Indian" in the 1867 Constitution included the "aborigines" of Canada. They have yet to deal with whether or not the Metis are also covered by s.91(24), although some lower courts are now agreeing that Metis are covered under s. 91(24) and paragraph 12 of the NRTA 1930. Basically, you can be a "Constitutional Indian", without being an "Indian Act Indian". Basically, before the term "Aboriginal peoples" was introduced into the Constitution in 1982, the term "Indian" meant

"Aboriginal peoples" or "Aborigines" as that term was used by the Supreme Court of Canada in the 1939 *Re Eskimos Case*.

In a nutshell, the Court of Queen's Bench in the *Grumbo Case* agreed that the Metis, as Aboriginal people, fall under the term "Indian" as contained in the Constitution of Canada, in both 1867 and 1930.

What then are the implications of *Grumbo*?

First of all, the Supreme Court of Canada in prior Treaty Indian hunting and fishing cases has ruled that the NRTA 1930 only applies to provincial laws, not federal laws, such as the Federal Fisheries Act or the Migratory Birds Convention Act.

As a result, any provincial laws, such as the Wildlife Act and its regulations cannot over-ride the constitutional right of the Treaty Indians and Metis to hunt, trap and fish "for food". For a further clarification of the rights protected under paragraph 12 of the NRTA 1930, please review the pamphlet put out by the province entitled: "How Wildlife and Fishing Laws Apply to Status Indians in Saskatchewan". For the purposes of the Metis, all you have to do is read-in "Metis", where-ever there is a reference to "Status Indians".

With respect to federal laws, the situation is different as mentioned above. However, due to an amendment to the definition section in the Federal Fisheries Act, the *Grumbo* decision is important. Until last year, the definition of "Indian" was controlled by the *Indian Act*. At that time, the definition was changed to provide that the meaning of "Indian" in the Fisheries Act, was the same as that found in the 1930 NRTA. As a consequence, based on the *Grumbo* interpretation, Metis fall within the "Indian" food fishing provisions in the federal fisheries legislation, and are not subject to the provincial fisheries legislation and regulations when fishing for "food". Again, see the SERM pamphlet for greater detail.

Unfortunately, the *Grumbo* decision does not affect the *Migratory Birds Convention Act*, which deals with duck and goose hunting. Here the Metis still have to rely on asserting an "existing Aboriginal right" to hunt migratory birds under s. 35 of the *Constitution Act, 1982*. The Metis of course can also assert the right to do so based on the *Metis Wildlife and Conservation Act* and regulations passed by the Metis Nation Legislative Assembly in Batoche in July 1994. Further, the Metis of North-western Saskatchewan can assert that right based on the judgment of Judge Meagher in the case of *Morin & Daigneault* which held that the Metis of northwestern Saskatchewan have an existing Aboriginal right to fish, which would also extend to hunting. That case has been appealed by the Crown and will be argued in Court of Queen's Bench in Battleford on February 27 & 28, 1997.