

## A New Basis for Specific Claims?

By Kate Buttery

As Bruce McIvor explained in his recent post on the Supreme Court of Canada's decision in *Manitoba Métis Federation v. Canada*, by elevating the concept of the honour of the Crown to a legal obligation, the Court created a new remedy available to Aboriginal people when the Crown fails to act diligently to fulfil a constitutional promise. In this post, I consider how this new legal remedy might be relied on by First Nations as part of the Specific Claims process.

### Legal Obligations under the *Specific Claims Tribunal Act*

The most common basis for a claim under the *Specific Claims Tribunal Act* is the Crown's failure to fulfil a legal obligation in relation to various matters including the provisioning and administration of reserve lands and obligations arising under the *Indian Act* or other legislation.

To date, most First Nations have grounded their claims for a breach of a legal obligation on Canada's alleged breach of a fiduciary duty. Proving the existence and breach of a fiduciary duty, especially in relation to reserve creation, can be an onerous and difficult exercise. The law is in flux and as its decision to seek a judicial review of the Tribunal's Kitselas decision demonstrates, Canada is fighting hard to limit its liability based on breach of fiduciary duty.

### Honour of the Crown as a Legal Obligation

If basing a claim on a breach of fiduciary duty is not a viable option for a First Nation, what of basing it on a breach of the honour of the Crown? The first consideration would be that the Court in the *Manitoba Métis* decision was clear that not all failures or delays by Canada in fulfilling its promises will constitute a breach of the honour of the Crown. The First Nation must establish that the Crown failed to act diligently to fulfil the purpose of a constitutional promise. While an inordinate and unexplained delay by Canada to set aside lands under the historical treaties or pursuant to British Columbia's Terms of Union might qualify, failures to adhere to *Indian Act* requirements may not.

A second consideration is what level of compensation a First Nation could expect if successful in convincing the Tribunal that Canada breached a legal obligation to act honourably. The Tribunal will base its compensation award on legal principles. Unlike breaches of fiduciary duty, as of now we do not have a clear idea of what the legal principles would be for establishing compensation due to a breach of the honour of the Crown. Importantly, there is

no obvious reason why the level of compensation should be any less than for Canada's failure to fulfil any other legal obligation open to consideration by the Tribunal.

These are early days. While the *Manitoba Métis* decision provides Aboriginal people with a new basis on which to ground a claim for compensation for past grievances against the Crown, the requirements and effectiveness of such a claim are uncertain. For now, First Nations unable to prove Canada's breach of a fiduciary duty may want to at least consider pursuing a claim based on a breach of the honour of the Crown.

*Kate Buttery is Affiliate Counsel with First Peoples Law. Kate practices Aboriginal law in B.C. and Ontario.*