

A New Legal Remedy for Aboriginal People

Case Comment on *Manitoba Métis Federation v Canada*, 2013 SCC 14

By Bruce McIvor

The Supreme Court of Canada's decision in *Manitoba Métis Federation v. Canada* is a classic example of the Court going off in its own direction instead of following the parties' specific arguments. As a result, we now have a new legal remedy available to all Aboriginal people seeking to enforce the Crown's constitutional obligations. How effective this new remedy will be in providing Aboriginal people with justice is an open question.

What it is about

The case raised numerous historical and legal issues surrounding Canada's promise in 1870 to set aside lands for the Métis at Red River. The main issue was a consideration of section 31 of the *Manitoba Act, 1870* through which Canada, as part of "the extinguishment of the Indian Title" in Manitoba, agreed to set aside 1,400,000 acres of land to be divided among Métis children. The long history of injustice that followed Canada's failure to fulfil its promise has been at the centre of Métis consciousness for nearly 150 years.

In 2010 the Manitoba Court of Appeal held that, among other things, even if Canada did owe a fiduciary duty to the Métis based on section 31, the duty was not breached, and that any claim for breach of a fiduciary duty was now barred by statutory limitations and the Métis' delay in bringing their claim.

What the Court said

The Supreme Court rejected the Métis' argument that Canada breached a fiduciary duty to the Métis children based on section 31 of the *Manitoba Act, 1870* because the Métis could not meet the requirements for establishing a fiduciary duty. As part of its reasons on this question, the Court held that the Manitoba Métis could not make out a claim for Aboriginal title because theirs was an individual, not communal, interest in land, and they had historically been willing to sell their interest to others. Both these facts, according to the Court, were contrary to the meaning of Aboriginal title.

But the Court did not stop there. Instead it ultimately found for the Métis based on an argument none of the parties had specifically made. The Court held that while the Métis had not proven that Canada had breached a fiduciary duty, Canada had failed to act honourably in fulfilling its constitutional promise to provide lands for the Métis children. And, because constitutional obligations to Aboriginal people are solemn promises intended to foster

reconciliation, the Métis were entitled to a declaration from the Court that Canada had failed to act honourably in providing lands under section 31 of the *Manitoba Act, 1870*.

Finally, the Court held that Manitoba and Canada could not rely on limitations statutes or arguments about delay to stop the Court from issuing a declaration that Canada's conduct was dishonourable. The Court concluded that it is the protector of the constitution and when a constitutional promise to Aboriginal people is at stake, it cannot be muzzled by mere legislation.

Why it matters

After over 100 years of denial by Canada that it had done wrong by the Métis, the importance of the highest court in the country calling Canada to account should not be underestimated. The Court's decision is a powerful vindication of Métis history and an acknowledgement that the outstanding wrong should be remedied, to the extent that it can, through present-day, good faith negotiations.

Of importance to all Aboriginal people, the Court has solidified the principle of the honour of the Crown in Canadian common law and has created a new legal remedy available whenever the Crown fails to act diligently to fulfil the purpose of a constitutional promise to Aboriginal people. Canada's ongoing failure to live up to the specific promises embedded in the historical treaties is just one area where First Nations are likely to seek declarations from the courts based on this new remedy.

The unanswerable question at present is how effective this new type of court declaration will prove. In the case of the Métis, the Court obviously expects Canada to enter into negotiations to right the wrong done to them. But the Court's declaration does not demand any particular type of resolution. It may be that negotiations, at least in the eyes of the Métis, will prove unsatisfactory.

Ultimately, a court declaration that Canada has failed to act honourably to fulfil a constitutional promise to Aboriginal people may prove most valuable on the international stage. Such a declaration, especially if from the Supreme Court, combined with the United Nations *Declaration on the Rights of Indigenous People*, may ultimately shame Canada into fulfilling outstanding constitutional obligations to Aboriginal people.

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