Citation: Manitoba Métis Federation Inc. v. Canada (Attorney General) et al., 2010 MBCA 71

Date: 20100707
Docket: AI08-30-06872

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Scott
Mr. Justice Michel A. Monnin
Madam Justice Freda M. Steel
Madam Justice Barbara M. Hamilton
Mr. Justice Martin H. Freedman

B E T W E E N:

MANITOBA MÉTIS FEDERATION INC., YVON DUMONT, BILLY JO DE LA RONDE, ROY CHARTRAND, RON ERICKSON, CLAIRE RIDDLE, JACK FLEMING, JACK McPHERSON, DON ROULETTE, EDGAR BRUCE JR., FREDA LUNDMARK, MILES ALLARIE, CELIA KLASSEN, ALMA BELHUMEUR, STAN GUIBOCHE, JEANNE PERRAULT, MARIE BANKS DUCHARME and EARL HENDERSON	)	***T. R. Berger, Q.C., J. Aldridge, Q.C.*** *and* ***H. I. Schachter*** *for the Appellants*
	)	***R. A. Dewar, Q.C., P. R. Anderson*** *and* ***C. D. Clark*** *for the Respondent Attorney General of Canada*
(Plaintiffs) Appellants	)	***H. S. Leonoff, Q.C.*** *and* ***M. A. Conner*** *for the Respondent Attorney General of Manitoba*
- and -	)	
ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF MANITOBA	)	*Appeal heard:* ***February 17, 18, 19, 20, 23, 24, 25 and 26, 2009***
(Defendants) Respondents	)	*Judgment delivered:* ***July 7, 2010***

Appeal from 2007 MBQB 293, 223 Man.R. (2d) 42
See 2008 MBCA 131, 231 Man.R. (2d) 178; 2009 MBCA 17, 236 Man.R. (2d) 84

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SCOTT C.J.M.

PART I
OVERVIEW

1 Manitoba's birth as a province took place on July 15, 1870, following passage of the *Manitoba Act 1870*, S.C. (33 Vict.), c. 3 (the *Act*), the constitutional document by which Manitoba entered Confederation. By virtue of s. 31 of the *Act*, a grant of 1.4 million acres was made in the new province "towards the extinguishment of the Indian Title … for the benefit of the families of the half-breed residents," to be selected and divided among their children by the Lieutenant Governor pursuant to regulation.

2 Section 32 of the *Act* was intended to quiet title and assure to the settlers recognition of their existing property rights.

3 Sections 31, 32 and 33 of the *Act* state:

> 31 And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, it is hereby enacted, that, under regulations to be from time to time made by the Governor General in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada, and the same shall be granted to the said children respectively, in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine.
>
> 32 For the quieting of titles, and assuring to the settlers in the Province the peaceable possession of the lands now held by them, it is enacted as follows:

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> (1) All grants of land in freehold made by the Hudson's Bay Company up to the eighth day of March, in the year 1869, shall, if required by the owner, be confirmed by grant from the Crown.
>
> (2) All grants of estates less than freehold in land made by the Hudson's Bay Company up to the eighth day of March aforesaid, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.
>
> (3) All titles by occupancy with the sanction and under the license and authority of the Hudson's Bay Company up to the eighth day of March aforesaid, of land in that part of the Province in which the Indian Title has been extinguished, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.
>
> (4) All persons in peaceable possession of tracts of land at the time of the transfer to Canada, in those parts of the Province in which the Indian Title has not been extinguished, shall have the right of pre-emption of the same, on such terms and conditions as may be determined by the Governor in Council.
>
> (5) The Lieutenant-Governor is hereby authorized, under regulations to be made from time to time by the Governor General in Council, to make all such provisions for ascertaining and adjusting, on fair and equitable terms, the rights of Common, and rights of cutting Hay held and enjoyed by the settlers in the Province, and for the commutation of the same by grants of land from the Crown.

> 33 The Governor General in Council shall from time to time settle and appoint the mode and form of Grants of Land from the Crown, and any Order in Council for that purpose when published in the *Canada Gazette*, shall have the same force and effect as if it were a portion of this Act.

4 In 1981, the appellants commenced these proceedings. They seek a declaration that Canada breached the fiduciary obligation it owed to the Métis of Manitoba by the manner in which it implemented ss. 31 and 32 of

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the *Act*. They request this declaration to assist their future negotiations to achieve a land claims agreement. They submit and seek to correct a claimed historic injustice, caused they say by Canada and Manitoba's failure to implement ss. 31 and 32 of the *Act* as they ought to have been.

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5 The appellants claim that the federal Crown had a fiduciary obligation under both ss. 31 and 32 to act in the Métis' best interests, which duty was breached in a number of ways. Grants under s. 31 should have been made promptly, grouped according to family; all children should have received grants upon attaining majority, their land being protected from speculators in the meantime. With respect to s. 32, the appellants say that there was great delay and Canada failed to implement the section in a "liberal manner."

6 The appellants also submit that Manitoba passed unconstitutional legislation which exacerbated the breach of fiduciary duty.

7 The trial judge dismissed the appellants' action declining on factual and legal grounds to grant the declaratory relief requested. He found that the action was barred by the limitation period or laches. He concluded that the Manitoba Métis Federation did not have standing. He found that there was no Aboriginal title held by the Métis, no fiduciary duty owed by the Crown under s. 31 of the *Act*, and no breach of the *Act*.

8 The trial judge also found that there was no fiduciary duty or obligation with respect to s. 32, and that the Crown had not erred in its implementation of the section.

9 Manitoba's legislative initiatives, he held, were not unconstitutional.

10 While many important issues were argued on this appeal, it is first necessary to determine whether the entire proceedings are barred by the provisions of *The Limitation of Actions Act*, C.C.S.M., c. L150, or by the doctrine of laches or mootness. I conclude that the appellants' action is barred by the combined operation of the limitation period/laches/mootness.

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11 This finding brings an end to the matter. But given the uniqueness and importance of the issues raised in this appeal, it is desirable to consider whether the Crown owed a fiduciary obligation to the Métis and, if so, whether the appellants succeeded in proving a breach of the asserted fiduciary duty.

12 A brief summary of my conclusions concerning ss. 31 and 32 of the *Act* are:

a) The trial judge's exercise of his judicial discretion not to grant declaratory relief should not be interfered with.

b) Even if a fiduciary duty was owed by Canada with respect to s. 31 of the *Act*, the appellants have failed to prove there was a breach of fiduciary duty in any respect.

c) No fiduciary duty or obligation was owed to the Métis with respect to s. 32 of the *Act*.

13 I therefore agree with the trial judge's disposition of the action. The appeal should be dismissed.

PART II
HISTORICAL BACKGROUND

II.1 Introduction

14 Since at its root, this action is dependent on its historical facts, a detailed review of the evidence presented is essential.

15 It is self-evident, given the passage of time since enactment of the *Act* in 1870, that the factual foundation for this historic action depends entirely on the surviving documentary record.

16 When considering the extensive historical chronology that follows, it is important to keep in mind the cautionary note expressed by the trial judge near the beginning of his judgment (paras. 20, 22) that "[a]ll of the surviving sources need to be read in the light of the biases of their authors" (*per* Catherine Macdonald, "Report on the Events of the Red River Resistance of 1869-70" (March 2004) at p. 3). A primary example is the diary kept by Abbé Noel-Joseph Ritchot during the discussions in Ottawa in April/May 1870 between the Red River delegates (the delegates), Prime Minister John A. Macdonald and George Cartier (Macdonald and Cartier) that led to passage of the *Act*. His diary, which is the only chronicle in existence of their momentous meetings, contains blanks – caused it would appear by illegible handwriting. It was written by a person described by Ms Macdonald as "devoted to the cause of the people he adopted," who played a significant role in the events in the settlement that led up to the historic discussions.

17 Other sources are incomplete; for example, parliamentary debates

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were not always reported verbatim in the first years of Canada's existence, extending beyond 1870. Thus, "even the plaintiffs acknowledge that while documents record information, there is contextual uncertainty as to the degree of reliability of the documents" (at para. 23). These observations, as we shall see, apply to various historical documents where essential context is lacking.

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18 Finally, it is evident that counsel for all parties have, before and over the decades since these proceedings were commenced in 1981, scoured available archival sources to locate all relevant documents, covering the period from 1869 to approximately 1885. Notwithstanding, there are gaps – some extensive – in the documentary trail, leaving unanswered questions in many instances.

II.2 The Red River Settlement

19 Every Canadian schoolboy or girl knows that in 1670 the Hudson's Bay Company (HBC), by Royal Charter, acquired a vast land mass, most of which is now part of Canada (and, to a lesser extent, the United States), extending westward from Lake Superior to the Rocky Mountains and north to the Arctic Ocean.

20 Not as well known, except in Manitoba, is that in 1811 HBC granted an extensive tract of land to Lord Selkirk centred on the confluence of the Red and Assiniboine Rivers. This grant of land extended well beyond the limit of the Red River Settlement as it was in 1870.

21 In 1817, Lord Selkirk entered into a treaty with a number of Indian

bands which granted and confirmed "unto our Sovereign Lord the King" land for two miles on either side of the Red River, all the way from Lake Winnipeg to the north to what is now Grand Forks, North Dakota, in the south, and similarly on the Assiniboine River to a point west of what is now Portage la Prairie. This two-mile strip became known as the settlement belt. Subsequently, the Selkirk Treaty, as it came to be known, was considered to constitute an extinguishment of "Indian title" to the lands in question, a concept about which we will read much more.

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22 As will be explained in more detail, as the Red River Settlement grew, certain customary rights came to be accepted by settlers in an additional two-mile strip behind the settlement belt principally for haying purposes, but also for pasturing, wood lot activities, and even cultivation; this despite the fact that Indian title had not been formally extinguished by the Selkirk Treaty. This area of land soon became known as the Outer Two Miles (OTM).

23 For a while an intense rivalry existed between the HBC and an energetic competitor known as the Northwest Company, but when these two firms merged in 1821 an inevitable change in operations took place. This change resulted in a number of employees of both companies moving from the Northwestern Territories to the Red River Settlement.

24 As the Red River Settlement grew and prospered along the Red and Assiniboine Rivers, the community became organized by parishes, with those north of the junction of the Red and Assiniboine Rivers, commonly known as "The Forks," mostly English-speaking and Protestant and those to

the south French-speaking and Roman Catholic. The vast majority of the inhabitants were of mixed blood (*i.e.* Indian and European) or, as they were referred to at the time, "half-breeds" (hereinafter Métis).

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25 In 1835, HBC purchased the interest of Lord Selkirk's estate and became the owner of all of the land originally granted to Lord Selkirk.

26 In the same year, HBC commissioned George Taylor to conduct a survey of the settled parts of the settlement belt. One of the results of the survey was to validate the custom that had developed of long, narrow lots that fronted on the Red or Assiniboine Rivers and stretched back to the limit of the settlement belt. The total number of surveyed lots was 1,542. Thereafter, a land registry book called "Register B" was created so that the names of the legal owners could be entered.

27 Nonetheless, registration was voluntary. Land within the settlement belt would often change hands without further (or any) registration having taken place. The trial judge found that a tradition of land tenure based on occupation developed, mostly outside the surveyed part of the settlement belt.

28 Starting in about 1839, the Council of Assiniboia – the governing legislative authority presided over by the HBC Governor – passed a series of laws giving river lot owners within the surveyed portion of the settlement belt the exclusive right to cut hay for a further two miles beyond their property, up to a maximum of the width of their own river lot. Thus, in the area of the Taylor survey the landowners had an entitlement not only with respect to the inner two miles, but the right of use over the adjacent OTM for

haying purposes. Haying and other privileges also existed in other areas both inside and outside the settlement belt pursuant to the "custom of the country." Since Indian title had not been extinguished, there were no written instruments confirming any form of tenure outside the settlement belt.

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29 There is no evidence to suggest that the Indians were opposed to the practice of settlement residents using land outside the settlement belt.

30 Once the markets began to open up in the 1840s, the buffalo hunt became one of the important backbones of the Red River Settlement economy as a vigorous buffalo robe trade developed. The Métis were involved as traders not only with the HBC – as its monopoly weakened – but also with buyers from the United States. However, when the buffalo began to move farther and farther to the west – due to diminishing numbers resulting from the effects of the organized hunts – this had a profound effect on the Red River Settlement. As the trial judge observed (at para. 50):

> … By the fall of 1848, the Settlement was bordering on starvation. The 1850s brought better crops, but the 1860s were again very poor. The combination of a strong buffalo robe market and very poor crops led to increased abandonment of agriculture by the Métis and some emigration from the Settlement to points west following the buffalo. By 1869, the buffalo were so far west and south of Red River that the buffalo hunt no longer originated in the Settlement.

31 Well before 1869, the Red River Settlement had developed legislative and judicial institutions. Many of the community representatives were Métis, and there was an organized judicial system. "The Town of Winnipeg was home to a small but growing commercial centre of retail stores,

warehouses, hotels, trading businesses and saloons” (Macdonald at p. 11).

32 There can be no doubt that the community was a vibrant one and that the Métis played an important role. For example, the *Nor’Wester* newspaper article of July 13, 1867, reported:

> … the half castes not only far outnumber all the other races put together but engross or did lately all the more important and intellectual offices in the colony; furnishing from their number the sheriff, the principal medical officer, the postmaster, the schoolmasters and teachers through out [*sic*] the country, a fair portion of the magistrates and clergy and one of the editors and proprietors of the only newspaper of the Hudson’s Bay Territories.

This highlights the sophistication and importance of the community.

33 The French-speaking Catholic Métis generally tended to cluster together in their parishes, whereas the English Métis were not nearly as cohesive a group. But even in the French Métis communities there were divisions between the wealthy and influential merchants and the poorer Métis. In both the French and English communities, for the most part the Métis did not practise a communal lifestyle; rather, they owned land or squatted on an individual basis.

34 The Métis considered themselves to be, and were, distinct from the Indians. They were not wards of the state, believed in private enterprise, and regarded themselves as full citizens in every respect. There is no evidence that they believed themselves to be a vulnerable people.

35 Canada became a country on July 1, 1867, and soon thereafter Parliament petitioned the Imperial Crown for the admission to Canada of Rupert’s Land and the Northwestern Territories. The Imperial government

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agreed to accept from the HBC a surrender of part of its 1670 grant and eventually to cede that land, which encompassed what we now identify as Manitoba, Saskatchewan and Alberta, and beyond, to Canada. Canada for its part agreed to pay £300,000 to HBC, which would retain one-twentieth of the land and acreage around its trading posts in the Northwest.

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36 These arrangements required an Act of the Imperial Parliament and one was eventually enacted, effective July 31, 1868. There were ongoing negotiations between Canada and Britain concerning the details.

37 As awareness of the intended transfer spread within the Red River Settlement, concerns arose amongst the local inhabitants. Their state of anxiety was not mollified by the unannounced arrival of road building and surveying crews in 1869; tension escalated as a result of attempts by Canada to begin work on a road and to begin surveying activities within the Red River Settlement. This is the genesis of what became known as the Red River Resistance.

II.3 The Red River Resistance

38 The level of concern was greatest amongst the French Catholic Métis who were especially worried that their language and religion would be submerged by the arrival of numerous new settlers from Canada.

39 Referring to this period, Catherine Macdonald wrote, “There was a feeling that the lands outside the settlement belt that they had occupied and used by custom and tradition were under the jurisdiction of the ‘Métis Nation’ [a phrase found in Father Ritchot’s writings] and that no authority –

neither the HBC nor Canada – had any rights there without the permission of the Métis people. How widely this view was held among the French Métis is hard to judge" (at p. 24).

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40 In July 1869, William Dease and several other prominent French-speaking Métis convened a public meeting at the court house. Dease's position was that the £300,000 that Canada had agreed to pay to the HBC belonged to the people of the Northwest as the real owners of the land. Others, including Louis Riel, opposed Dease's proposal and it was defeated. This is one of the first recorded indications of a sense of entitlement to the land.

41 In October 1869, surveyors from Canada were confronted by a group of French Métis led by Riel and were advised that they "had no right to make surveys without the express permission of the people of the Settlement" (at para. 70). The surveyors then withdrew.

42 In the meantime, William McDougall had been appointed by Prime Minister Macdonald as Manitoba's first Lieutenant Governor, the plan being that McDougall would assume control when the transfer of Rupert's Land to Canada, now scheduled for December 1, 1869, took place. The Métis National Committee, a group of French Métis that had been formed in the meantime by Riel and his followers, erected a barrier to prevent McDougall's entry and on October 1, 1869, McDougall was so advised.

43 Notwithstanding, on November 2, 1869, McDougall tried to enter Rupert's Land and was turned back by the French Métis.

44 That very day Riel and the French Métis seized Fort Garry, the Red River Settlement's main building and fortification. The officials of HBC were detained. The English-speaking members of the Council of Assiniboia were unanimously opposed to this action on the part of Riel and his followers. Nor did Riel's actions have the unanimous support of the French Métis.

45 On November 6, 1869, Riel issued a public notice on behalf of the Council of French-speaking representatives inviting the English-speaking parishes to send 12 representatives to meet with an equal number of representatives from the French parishes to discuss the present political situation.

46 On November 16, 1869, the meeting, referred to as the Convention of 24, took place and discussions ensued over several sessions thereafter, with the two sides far apart on several issues, the two principal ones being a request by the English-speaking parishes that the French Métis lay down their arms, and, secondly, whether McDougall should be allowed to enter the settlement.

47 Eventually, a provisional government was formed on Riel's initiative by the French Métis alone on November 23rd, the English representatives wishing to consult with the people of their parish respecting this controversial development.

48 There can be no doubt that Prime Minister Macdonald was aware of events taking place in the Red River Settlement and their seriousness. The reality was that the French Métis were the effective military force in the Red

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River Settlement and had taken control. Macdonald concluded that the best course of action was to postpone the transfer to Canada including the payment of money to HBC.

49 Unfortunately, in the early morning hours of December 1st McDougall, not being aware of Canada's change of plans, entered a short distance into Rupert's Land and read his proclamation of the takeover, which was posted in the Red River Settlement that very day.

50 On the same day, the Convention of 24 met again. McDougall's proclamation was read. A list of rights (the first list of rights) was adopted by the French-speaking delegates setting out the conditions upon which they were prepared to become part of Canada. The English-speaking delegates wanted no part of this plan and the meeting ended on this note. On December 10th, Riel and several of his followers hoisted the flag of the provisional government at Fort Garry.

51 In an effort to resolve the impasse and to preserve Manitoba's entry into Canada, Macdonald deputized Donald A. Smith, Chief Agent of the HBC, to go to the Red River Settlement as Special Commissioner. This Smith did and met at length at a mass meeting of the community on January 19 and 20, 1870. At the conclusion of these meetings, on Riel's initiative, the Convention of 24 was expanded into the Convention of 40, equally divided between the French and English representatives.

52 After the election of representatives, the Convention of 40 met for the first time on January 26th and several meetings followed thereafter, some attended by Smith. Eventually a second list of rights was approved which,

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while more detailed and realistic than the first list, still did not contemplate Manitoba's entry as a province. On February 8th, the Convention accepted Smith's invitation to send delegates to Canada; the next day the English representatives agreed to become part of the provisional government and Riel was elected President. Father Ritchot, Judge Black and a local businessman, Alfred Scott, all nominated by Riel, were selected as delegates (the delegates).

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53 Throughout this period unrest within the Red River Settlement continued. Several arrests and re-arrests were made and on March 4, 1870, one Thomas Scott, an English-speaking resident, following a brief court martial, was executed. This action, predictably, resulted in outrage in Canada, especially in Ontario. Macdonald proposed a British-led military expedition which Britain was prepared to entertain only if "satisfactory assurances" were in place with respect to the interests and reasonable demands of the Red River settlers.

54 The inaugural session of the provisional government council took place on March 9, 1870. On March 15th, Archbishop Taché read a telegram from Joseph Howe, Secretary of State for the provinces, inviting the delegates to come to Ottawa. The delegates, who did not have authority to conclude an agreement with Canada, were provided with a letter of instructions dated March 22, 1870, and a further list of rights from the provisional government. This third list of rights, amongst other things, provided for Manitoba entering Confederation as a province and for the local legislature to have full control over public land.

55 While not terribly pertinent for our purposes, it would appear that there was a fourth list that Ritchot had in his possession when the delegates travelled to Ottawa, which included a demand for denominational schools.

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56 The delegates left the Red River Settlement on March 24, 1870, and arrived in Ottawa on April 11th. Following very extensive discussions between the delegates and Canada, the latter being represented exclusively by Macdonald and Cartier, matters were resolved through passage of what became known as *The Manitoba Act* by Parliament on May 10th, receiving Royal Assent on May 12th.

57 On June 23, 1870, the Imperial government passed an Order in Council admitting Rupert's Land and the Northwestern Territories into Canada effective July 15, 1870.

58 An official census of the Red River Settlement was carried out in late 1870 under the direction of Lieutenant Governor Adams G. Archibald. On December 9, 1870, Archibald reported to the Secretary of State for the provinces that there were residing, at that time, according to two enumerators (one English and one French):

	English	French
Whites	1,611	1,565
Indians	578	558
French Half-breeds	5,696	5,757
English Half-breeds	4,082	4,083
[Total number of Half-breeds]	[9,778]	[9,840]
Total	11,967	11,963

59 In the first election in the province following its creation, 24 members were elected to the provincial Legislative Assembly; 11 or 12 were Métis and four others French-speaking non-Métis.

II.4 The Delegates in Ottawa: The Birth of Sections 31 and 32 of the *Act*

60 Discussions in Ottawa between the delegates on the one hand and Macdonald and Cartier on the other began in earnest on April 25, 1870. The delegates' agenda included, in addition to the terms of the possible entry of the Red River Settlement as the next province of Canada, a general amnesty for Riel and his followers.

61 Progress was gradually made; as the trial judge found "[i]t appears that the Red River delegates understood on April 27 that Canada would retain ownership of the public lands, as it was only when that fact was made clear to the delegates that the idea of the children's land grant first emerged" (at para. 111) and "Indian title" became part of the discussions. The Métis, up to this point, had not attempted to advance their interests on the basis of Indian title; indeed, there is no reference to it in any of the lists of rights prepared by the Convention of 40 or the provisional government.

62 Further meetings had to be postponed because of Macdonald's illness, but on April 29th discussions took place with Cartier which included the children's land grant, its size and conditions.

63 Detailed discussions began again in the afternoon of May 2nd when Macdonald rejoined the group. The delegates wanted 1.5 million acres. The ministers proposed 1.2 million. Ritchot's diary records:

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> … we agreed … the land will be chosen [pursuant to what became s. 31] throughout the province by each lot and in several different lots and in various places, if it is judged to be proper by the local legislature which ought itself to distribute these parcels of lands to heads of families in proportion to the number of children existing at the time of the distribution; that these lands should then be distributed among the children by their parents or guardians, always under the supervision of the above mentioned local legislature.

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64 On the same day, Macdonald wrote out in his own hand what was obviously the progeny of s. 31 but with some differences. It refers to the Métis "partly inheriting the Indian rights," 1.5 million acres to be selected "by the said Legislature . . . having regard to the usages and customs of the country . . . to be distributed as soon as possible" (at para. 114).

65 The subject of the Red River Settlement becoming part of Canada was introduced in Parliament without a written Bill by Macdonald that evening (that is to say May 2nd). In his speech, he referred to the fact that the reservation of land in the amount of 1.2 million acres was for the purpose of extinguishing Indian title, that the land not belonging to individuals would belong to Canada, and "[i]t is proposed to invoke the aid and intervention, the experience of the Local Legislature upon this point, <u>subject to the sanction of the Governor General</u>" (at para. 115) (emphasis added).

66 Cartier also spoke, stating that "[t]hese lands were not to be dealt with as the Indian reserves, but were to be given to the heads of 'families to settle their children'" (at para. 116). In a further speech that evening, Macdonald referred to land for allotment being placed under the control of the province (at para. 118).

67 A serious debate in Parliament ensued that evening and during May 3rd with heavy opposition, there being great animosity towards Riel and the Métis. The printed Bill was presented to Parliament by Macdonald for the first time on the evening of May 4th, who moved second reading (para. 126). There were material changes to it compared to what had been described to Parliament when it received first reading on May 2nd. Portage la Prairie was now included and the land grant was increased to 1.4 million acres. It provided that grants were to be made "in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine" (at para. 129). These provisions were explained in the House at length by both Macdonald and Cartier. Macdonald indicated that no land would be reserved for speculators, "the land being only given for the actual purpose of settlement," that the "half-breeds had a strong claim to the lands, in consequence of their extraction, as well as from being settlers," and that such conditions were necessary to ensure that "Parliament . . . would show that care and anxiety for the interest of those tribes which would prevent that liberal and just appropriation from being abused" (at para. 132).

68 Not surprisingly, these changes from the speeches made in Parliament by Macdonald and Cartier on May 2nd did not sit well with the delegates. The May 5th entry in Ritchot's diary refers to the Bill being "very much modified. Several clauses displeased me fundamentally. . . . we complained to them [Macdonald and Cartier]" (at para. 133). Ritchot's diary records that the two ministers promised that an Order in Council would be authorized so that "the persons we would choose to name ourselves" would

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"form a committee charged with choosing and dividing, as may seem good to them, the 1,400,000 acres of land promised." But in all events, Ritchot noted, friends advised him it was "necessary to strive to get it passed" as the Bill was advantageous for them.

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69 On May 6th, Ritchot's diary records that the delegates went anew to see Macdonald and Cartier. Assurances were given, he wrote, that they would be given "all the desired guarantees before our departure," but they were also advised that, "[i]t is impossible to get the Bill passed, if it is changed in this respect" (referring to the land grant). Ritchot's diary states, "[s]eeing that it is impossible to obtain what we ask, we content ourselves with remarking that it would only be in accord with the conditions that we made between us, and which we mutually accept, that we can take it upon ourselves to get them adopted by our people" (at para. 135).

70 On May 9th, Cartier, during debate in Committee – Macdonald apparently being indisposed – indicated that since the Dominion government would control the lands with the new province, it was only just to give something in return (referring to the land grant), the government desiring to be "liberal to provide for the settlement of those who had done so much for the advancement of the Red River country" (at para. 137).

71 The Opposition's motion to delete the provision for a land grant from the Bill was defeated. Ultimately, on May 10th the Bill was read a third time and passed. On the same day there was vigorous debate in the House concerning what came to be known as the Wolseley expedition. This was a military expedition consisting of Canadian militia and British troops led by

Colonel Garnet Wolseley. It was organized in response to outrage about the execution of Thomas Scott, and the rebellion in general, to restore order in the Settlement.

72 According to Ritchot's diary, nothing much seems to have happened after passage of the *Act* until May 18th. On that date, in a letter to Cartier, Ritchot again expressed concern about the change in the method of the selection and division of the s. 31 lands from the local legislature to the Governor General in Council. The letter refers to discussions with Macdonald and Cartier wherein, Ritchot wrote, the delegates had been promised before their departure that the Governor General in Council would authorize "a committee composed of men whom we ourselves were to propose to select these lands and divide them among the children of the half-breeds," and that Macdonald had proposed to appoint Archbishop Taché as one of the members of the committee. Other matters were raised, including an amnesty for Riel and his followers, and the question of ownership of land where Indian title had not been extinguished (referring to the OTM and beyond).

73 On May 19th, Cartier took Ritchot and Alfred Scott to visit the Governor General. In Ritchot's diary it is noted that Cartier confirmed that he had "received my letter of comments, he is working to arrange things."

74 On May 23rd, Ritchot visited Cartier at his office. According to his diary, Cartier had been working to answer his comments of the 18th and "he showed me the jumble." Further discussion about an amnesty for Riel and his followers ensued.

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75 On Friday, May 27th, two days after the Wolseley expedition departed, Ritchot saw Cartier yet again. He was given a letter dated May 23rd, written by Cartier, as promised, but Ritchot handed it back to have him add, as his diary states, some guarantees "on the subject of the 31st clause of the Act regarding the choice and division of lands that were to be distributed to the children."

76 There is nothing in his diary or elsewhere to indicate that the delegates sought assurances at any time about grants being in family blocks or clusters, conditions of settlement or entailment.

77 The letter dated May 23rd dealt in the main with s. 32(4). It affirms, following the meeting on May 19th with the Governor General, that a liberal policy would be followed. There are two postscripts (likely as a result of the meeting on the 27th), the latter of which states in relation to s. 31 that, "the regulations ... will be of a nature to meet the wishes of the half-breed residents, and to guarantee, in the most effectual and equitable manner, the division of that extent of land amongst the children of the heads of families ...." As we shall see, the meaning to be placed on this second postscript is much debated.

78 We do not know exactly when Ritchot received the letter; what we do know is that when he returned to the Red River Settlement and addressed the Legislative Assembly of Assiniboia on June 24, 1870, the May 23rd letter was read to the Assembly by Thomas Bunn, Secretary of State for the provisional government. As it was recorded, during discussion Ritchot indicated that the s. 31 grants were being given to the Métis not as minors

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"as under the Confederation Act" (referring to Indians) but on their own behalf. He is reported to have said that "satisfactory assurances" had been received regarding the land question so that, in his opinion, "wherever there is a doubt as to the meaning of the Act, let me state, it is to be interpreted in our favour." He also advised that while "the Half-breed title, on the score of Indian blood, is not quite certain," it was deemed best to regard it as certain in order to make a "final and satisfactory arrangement." The record of the event does not indicate discussion about any restriction or alienation of the grants. As for a land reserve, Ritchot reported:

> … we were anxious to secure the land reserve, for the benefit of all the children in the country, white and Half-breed alike. We tried hard to secure this; but were told by the Ministry that it could not be granted, as the only ground on which the land could be given was for the extinguishment of Indian title. It was reasonable that in extinguishing the Indian title, such of the children as had Indian blood in their veins, should receive grants of land; but that was the only ground on which Ministers could ask Parliament for the reserve. It was to be a reservation for minors with Indian blood – but not for adults, for the latter are allowed every liberty of self-government and all the rights of white people. …

He went on to say:

> As to the result of the mission of your delegates generally, I have only to say that as the Canadian Government seem really serious, they have to be believed and we can trust them.

79 These are the facts concerning the birth of Manitoba as they relate to the land claims of the Métis, as we have them, keeping in mind the potential frailties of the record.

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II.5 The Implementation of Sections 31 and 32 (Post-July 15, 1870)

80 Archibald was appointed Lieutenant Governor of Manitoba on July 30, 1870, and arrived in early September, just after the Wolseley expedition. One of his first tasks was to organize electoral divisions and undertake a census. The census was promptly completed. There were just under 12,000 persons in the province, only 1,600 of whom were described as "white Europeans." (We were told during argument that within a decade the population of the new province was close to 60,000.) Approximately 6,000 Métis were 20 years of age or under. Dr. Thomas Flanagan, Professor of Political Science, University of Calgary, in his report, "Historical Evidence in the Case of Manitoba Métis Federation v. The Queen" (January 1998) at p. 43, expressed the view that the 1870 census was completed in haste and was therefore inadequate due to "technical defects in the listing of children and heads of families." Interestingly, an Order in Council dated January 13, 1872, authorized a further census to be completed. There is no record as to why this was not done.

81 Archibald wrote two important letters in December 1870. The first, dated December 20th, reviewed the landholdings as they existed at July 15, 1870 (in other words s. 32), together with the system of surveys to be employed. He recommended that the scheme of survey as it then existed in the United States based on a system of six miles square, be used for the "residue" of land after deducting for the existing entitlements.

82 The second letter dated December 27th, and by far the most important for our purposes, concerned recommendations for the selection of land under s. 31 of the *Act*. Noting that there were very few descendents of the Indian

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tribes who had previously occupied the lands in Manitoba, he presumed "the intention was not so much to create the extinguishment of any hereditary claims (as the language of the Act would seem to imply) as to confer a boon upon the mixed race inhabiting this Province, and generally known as Half-breeds" (at para. 163). Thus, "some liberty must be taken with the language" and he recommended that all half-breeds, adults and children alike, should be included under the umbrella of s. 31.

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83 Archibald reviewed the differences between the wishes of the French- and English-speaking Métis. The French Métis had a strong disposition to have their reserve laid off "in one block" in the vicinity of existing parishes of their own people, while the English Métis wanted to have the liberty of selecting their lands wherever they wanted. This difference arose, Archibald opined, because for the French Métis it was a matter of race and language rather than business. He wrote that "the French, or their leaders" wished the s. 31 lands to be tied up so as to prevent it from passing out of the family for a generation, the practical effect of which he concluded would be to restrict sales of a significant portion of the land for as long as three generations. In his opinion, this was against all the "tendency of modern legislation," which was not to entail land. It would also not be in the best interests of the new country to lock up a large portion of the land "and exclude it from the improvements going on in localities where land is unaffected." He therefore strongly recommended that "whatever is given under the half-breed clause should be given absolutely."

84 Even then, he wrote, a significant portion of the land would be tied up for a long time because more than one-third of the Métis residents were

under the age of ten and three-fifths under the age of 20. In his opinion, this was "clog enough to impose upon the transfer of these lands."

85 Archibald's recommendation was not based on his view alone. He entrusted Molyneux St. John to make inquiries and report; St. John's advice was that, "It appears to be the general desire that the land given to the half-breeds should not be inalienable."

86 The first, and most important Order in Council under s. 31, was passed on April 25, 1871, despite an argument by McDougall in Parliament that s. 31 did not authorize grants to adults, as recommended by Archibald. As the trial judge observed (at para. 167):

> … The acceptance of Archibald's recommendation as to who was entitled to share in the section 31 grant and the rejection of McDougall's position would result in a delay in the implementation process.

87 The Order in Council provided for the distribution of the 1.4 million acres amongst "all half-breed residents" in Manitoba, with the method of survey to be as recommended by Archibald. Given that there were approximately 10,000 Métis in Manitoba at the time, this resulted in an allotment of 140 acres for each such resident. The most liberal construction was to be put on the word "resident." The Order in Council stated that the Lieutenant Governor would designate the townships or parts of townships for the allotment. No conditions of settlement were to be imposed, and there were to be no restrictions other than "restrictions as to their power of dealing with their lands when granted … which the laws of Manitoba may prescribe." Claimants over the age of 18 were to receive their patents

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"without unnecessary delay, and minors on arriving at that age."

88 The Order in Council provided that grants should be made by way of random lottery. There is only one proposal in evidence inconsistent with the lottery method. On April 28, 1871, John Norquay, a Métis and future Premier, made a motion before the Legislative Assembly to petition the Governor General to allow the location of s. 31 land to "be optional with the parties to whom it is given." The other Métis members supported the motion, which passed. It appears that the Legislative Assembly may not have been aware of the April 25, 1871 Order in Council passed by Canada. Notably, the Legislative Assembly also requested, by the same motion, that a further appropriation be made to non-Métis "born and brought up in this province."

89 Any sense of tranquility in Manitoba did not last long. Firstly, there were serious incidents of physical altercations and abuse on the part of the Wolseley expedition soldiers towards some of the Métis population. Secondly, by the spring of 1871 new immigrants began to arrive which caused anxiety and unrest among the residents. The state of unease could only have increased by the passage of the May 26, 1871 Order in Council. This Order in Council, based on the recommendation of Colonel J. S. Dennis, the Surveyor General of Dominion Lands, permitted the establishment of rights of homestead or preemption on lands not yet surveyed, and did not exempt the OTM. Flanagan calculated that this decision, in the end, rendered about two to four percent of the OTM unavailable for s. 31 grants. This must have been particularly upsetting to the settled residents as Canada, despite Archibald's eagerness to start, was

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not prepared to commence the s. 31 allotments until the surveys were complete.

90 Not surprisingly, Archibald received inquiries from worried inhabitants, not only with respect to ss. 31 and 32 lands, but also concerning rights of common and haying privileges.

91 On June 9, 1871, Archibald responded to a letter dated May 24, 1871, published in the local newspaper by six members of the Manitoba Legislature in which they expressed concern about rights in common, hay cutting rights as well as "possession of the lands guaranteed" by the *Act*, in light of the arrival of new immigrants. In his reply, also made public in the local paper, Archibald reminded the residents that it was his responsibility under s. 31 to designate the townships or parts of townships in which the allotments were to be made; however, "[s]hould I be called upon to act under this rule, I shall consider that the fairest mode of proceeding will be to adopt, as far as possible, the selections made by the Half-breeds themselves" (at para. 174). He undertook that if a choice "of a particular locality" was notoriously well known and could be identified in defined terms so as to prevent settlers from entering in ignorance, he would, if the duty was assigned to him, confirm the selection so long as it did not do violence to the "township or sectional series."

92 The trial judge found that Archibald endeavoured to follow this course, and did eventually set aside lands from which, to a large extent, the s. 31 lands were selected. The trial judge also found that when he wrote his response, Archibald was not aware of the May 26, 1871 Order in Council.

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93 Later in June, Archibald wrote to Joseph Howe, Secretary of State for the provinces, providing copies of the exchange of correspondence. He noted the great unease within the province resulting from the arrival of immigrants. He reported that the French Métis claimed that their rights were superior to all others (except existing settlers), relying on Cartier's letter of May 23, 1870, for support. Therefore, Archibald said, "the French Half-breeds have all along understood they were to have a first choice," a perspective that was directly challenged by the new settlers. In the result, he stated that he considered – dreading an outbreak – that he did not have any choice but to respond as he did "at the risk even of not being sustained by His Excellency the Governor General."

94 It is evident that Archibald feared an insurrection, partly prompted by the Fenians, and was very anxious to maintain good relations with the Métis. The Fenians were a group of American Irish agitators, hostile to British (and hence Canadian) rule. A raid of sorts had taken place by this group and with some Métis support on the HBC's post at Pembina in October 1871. Archibald's concern that such activity might spread led him to "shake hands" with Riel at a public event in the province, an act that generated a great deal of criticism in Parliament and elsewhere. This caused Archibald, in December 1871, to offer his resignation.

95 No doubt another cause for concern on Archibald's part were continuing reports of "linguistic and religious intolerance of the new settlers arriving from Canada" as well as the Wolseley soldiers, toward the Métis. See Dr. Gerhard J. Ens, "Migration and Persistence of the Red River Métis 1835-1890," (December 1987, revised June 1998) at p. 24. Ens described

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this as a "reign of terror," and states that "virtual mob rule" prevailed in Winnipeg in 1871-72. In a letter written by Archibald to Macdonald on October 9, 1871, he described this behaviour as "a frightful spirit of bigotry among a small but noisy section of our people."

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96 Howe wrote to Archibald on November 4, 1871. The bulk of the letter is taken up with a discussion of the amnesty for Riel and his followers so earnestly sought by Ritchot and Taché. Howe expressed regret that Archibald had written as he had "giving countenance to the wholesale appropriation of large tracts of Country by the Half-breeds." Howe was opposed to appropriating large tracts of land "until these have been surveyed and formally assigned by the land Department." He suggested that Archibald permit the government and the land department to carry out their policy "without volunteering any interference." This, Howe stated emphatically, had been neither promised nor asked for "in any formal shape," and would have resulted in the disintegration of the government if pressed.

97 At the same time, the federal government, after negotiations, entered into Treaties 1 and 2 in August 1871 which extinguished Indian title throughout the new province. The practical effect of the Treaties was to remove any impediment to the availability of lands outside the OTM for s. 31 grants.

98 Some "spontaneous demands" from Métis parishes requested that grants be distributed on a community basis. But, in a further letter to Archibald on December 6, 1871, Howe reiterated, "[w]hen the million and a

half acres have been surveyed, the Government must then see not that any particular 'ring' gets a particular block, but that each individual Half-breed including minors and infants who are in no condition to scramble just now is put in possession of his quarter section, if it should turn out that he has not helped himself in this quiet and reasonable way in the meantime."

99 Taché strongly endorsed Archibald, in his January 23, 1872 letter to Macdonald, indicating he was entirely satisfied that Archibald had acted wisely in attempting to please the Métis, though his enthusiasm proved to be rather short lived.

100 The state of unrest continued and on February 8, 1872, the Legislative Council and Assembly of Manitoba sent an address to the Governor General expressing concern about the delay in making grants, exacerbated by the fact that new settlers were being allowed to take up land in the meantime. The address requested that Canada honour the selection of reserves made by the Métis population that "have received the unqualified approbation" of Archibald, stating that "reserves in block taken by the Half-breed population are in accordance with the letter and spirit of an official document signed at Ottawa on the 23rd of May, 1870" (*i.e.* Cartier's letter). The address asserted that:

> … this grant [s. 31] constitutes an absolute right of property in favour of the recipients, and that the considerations for which the grant was given entitle the recipients to the rights assured by common law to the owners of individual property.

101 The Legislative Council and Assembly also requested that they be

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given "the privilege … of naming administrators or guardians to take charge of the administration of the land reserved and set apart for the Half-breed minors," and advocated a grant to the original white settlers.

102 There is no record of any response being made to this joint address for almost a year, at which time the Privy Council advised it was the sole responsibility of the Governor in Council to regulate the distribution of the grants, "all the provisions of the Manitoba Act . . . are now being carried out as rapidly as circumstances will permit." There is no explanation as to why such a delay occurred, but shortly after the joint address of February 8, 1872, Colonel Dennis and Gilbert McMicken, the Dominion Lands Agent in Manitoba (the senior government officials), suggested that the Secretary of State proceed with the selection of lands on an urgent basis. McMicken recommended distribution generally in the localities desired by the Métis, and that they be given the privilege of "selling their claims and improvements."

103 A few months later the Order in Council of April 15, 1872, was passed, which declared that since surveys in Manitoba were by then sufficiently far advanced, selection of the 1.4 million acres under s. 31 could begin. By telegram dated July 17, 1872, Archibald was instructed to make the selection of Métis lands without delay. This he did, reporting just ten days later that by withdrawing from the market those lands likely to be selected (comprising about one-sixth of the new province), the "excitement amongst the half-breeds has subsided" and opining that once the final selections were made and title passed, a market for the land "will be infinitely extended."

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104 A few weeks later on August 12, 1872, Archibald wrote to J. C. Aikins, by then the Secretary of State for the provinces, reporting upon a petition from the residents of High Bluff and Poplar Point who were requesting that the land they had selected (subject to surveys) in accordance with Archibald's letter of June 9, 1871, be confirmed. Archibald advised (at para. 192):

> I have been governed in my approximate selection, by a desire, as indicated in that letter [of June 9th], to meet the views of the half-breeds, as far as I can, conformably to the governing idea of making the selection a fair average of Townships, …

105 Archibald also repeated his view that "[i]n the interests of the public, it is better that the lands there situate [referring to the area between the Assiniboine River and the shores of Lake Manitoba] should be in the hands of purchasers and settlers, and so be open to the general market" (at para. 193), rather than to underage Métis. In the result, he suggested alternate suitable locations for these two parishes, which eventually was implemented.

106 In the summer of 1872, Archibald began to designate the townships, eventually totalling 68 in all. This was essentially completed by August except for the five northernmost parishes, where it took until December to complete the task. The reason for this latter delay is not known, but may well have been caused by problems with the survey.

107 As one of his last acts as Lieutenant Governor, Archibald wrote the Secretary of State on August 26, 1872, confirming that the Métis had been made to understand that the only effect of his "preliminary" selections of the townships where the allotments would take place was to withdraw them

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from the market, "pending the inquiries required to determine as to their absolute selection" (at para. 195). Understandably, once the preliminary selection of reserves commenced, both the Métis and the government wanted the drawing of individual allotments to begin. According to Dr. Gerhard J. Ens, "Manitoba Métis Study: The Métis Land Grant and Persistence in Manitoba" (September 2006) at p. 46, Archibald and Alexander Morris made their selections "for the various parishes based on the desires and requests of the Métis themselves." It would appear that the land set aside for the reserves, for the most part, was in townships contiguous to or close to the parish where the grantees resided. For example, St. James and Headingley received almost exactly what had been reserved for them, but the sheer size and number of s. 31 grants made it unlikely that all Métis grantees could be settled, where they desired, or as a group.

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108 In the fall of 1872, Alexander Morris became the new Lieutenant Governor. Shortly thereafter, he recommended to the Secretary of State that he be authorized to proceed with the s. 31 allotments and s. 32 grants. In his response of December 6, 1872, the Secretary of State confirmed these instructions, advising that "an early distribution of the Half-breed Grant . . . has been a matter of anxiety to the government, and it is with much relief they are at length enabled to look forward to a speedy allotment of the lands." Dennis arrived back in Winnipeg in late December 1872 and was dispatched to meet with the Métis situate in those parishes where land selections had not been completed. In his report, Ens indicates that there is nothing in the historical record to indicate that these latter selections were unsatisfactory to the Métis (at p. 43).

109 On January 3, 1873, Dennis informed Morris that applications were being made daily by residents of various parishes who said there were half-breeds left out of the 1870 census "through the neglect of the enumerators."

110 On February 14, 1873, Morris wrote to Macdonald advising that there was a movement, originated by Taché and Ritchot, demanding the lands of the half-breed heads of families be entailed, but that a deputation from St. Norbert opposed it, and it was already "dead."

111 After some correspondence back and forth with the Secretary of State, Morris finalized the selection of townships and on February 22, 1873, began the allotment process, personally drawing lots for the individual grants of 140 acres at the rate of 60 per hour. There seems to have been no complaint of delay on Morris's part, at least up to this point in time.

112 Not surprisingly, the drawing of allotments did not turn out to be an easy task. There were two complications identified by the trial judge. The first was the resurfacing of the question whether it was appropriate for the grant to be for all Métis residents or for the Métis children only.

113 After further questioning in Parliament, Macdonald announced that there had been a change of mind on the part of the government and that only children of Métis heads of families were entitled to receive allotments under s. 31. This change, confirmed by the Order in Council of April 3, 1873, was supported by Riel. As the trial judge dryly observed, "[t]he deletion of heads of families from the children's grant created problems and delay" (at para. 202).

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114 In the end, legislation enacted in 1874 authorized the granting to each Métis head of family of 160 acres of land or scrip for $160. The legislation also provided for grants of $160 scrip to the "original white settlers" who had settled in the Red River region before 1835. Eventually, the grant to the Métis heads of families was restricted to scrip. Three thousand one hundred eighty-six scrips were issued to Métis heads of families and 800 to original white settlers. Drs. Flanagan and Ens noted in "Métis Family Study: A Report Prepared for the Department of Justice" (January 1998) that the issuance of supplementary scrip with respect to the children's allotment is not well documented.

115 The elimination of heads of families obviously reduced the number of Métis eligible for the grant and the second allotment, this time for 190-acre grants, started afresh in August 1873. It is not clear how the number 190 was arrived at.

116 The second problem related to the hay privilege issue under s. 32(5) of the *Act*, which had initially been considered to be a minor issue but by this time had become controversial, due to concerns about the possible loss of the hay privileges in the OTM, which was included in the area where the townships were to be set aside for the s. 31 grants. The Métis believed that the OTM should be available to the river lot settlers under s. 32. (It should be noted that there was no OTM in nine of the parishes as the OTM only existed "behind" the inner parishes.) In the result, on September 6, 1873, an Order in Council was passed withdrawing the OTM from the s. 31 lands. The deficiency was to be made up from "unclaimed" Dominion lands upon the "rear of the allotment." The Order in Council also caused the

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cancellation of those s. 31 lands that had already been allotted within the OTM. The policy reversal also created more work for the surveyors because the OTM, which had first been surveyed on the rectangular "American system," had to be redone as an extension of the river lots.

117 The trial judge found (at paras. 208-9) that speculators and others even at this early stage had succeeded in acquiring the interests of some Métis children in their land grants. As early as 1872, articles were appearing in the local press urging the Métis to beware of speculators, advising them not to sell their reserve land. This reality was later acknowledged by Macdonald in a speech to the House of Commons, *House of Commons Debates*, Vol. XX (6 July 1885) at 3113, wherein he confirmed:

> The claims of the half-breeds in Manitoba were bought up by speculators. It was an unfortunate thing for those poor people; but it is true that this grant of scrip and land to those poor people was a curse and not a blessing. The scrip was bought up; the lands were bought up by white speculators and the consequences are apparent.

118 There can be no doubt, as also found by the trial judge, that a variety of legal devices, including powers of attorney – sometimes to "buyers of convenience" – and mortgages attached to the land of the parent of the Métis child, were all used so that, by 1873, "many sales of the interests in s. 31 land were occurring" (at para. 209). Such sales would have included dispositions by heads of families prior to the April 3, 1873 Order in Council, as well as those by children.

119 In response to reports of very low prices reportedly being received for s. 32 and s. 31 entitlements, the Manitoba Legislature on March 3, 1873,

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passed *The Half-breed Land Grant Protection Act*, S.M. 1873 (37 Vict.), c. 44 (the "*1873 Act*") which provided that no promise or agreement made by a Métis to sell his interest in a grant prior to issuance of the patent would be enforceable, nor could damages be awarded, though any remuneration received by the Métis was recoverable as a debt, with interest, from the date of the patent. Norquay opposed the legislation on the basis that it interfered with freedom of contract and was an insult to the Métis. Morris reserved his assent to the *1873 Act*, but in February 1874 it was given Royal Assent upon the advice of the Minister of Justice who, despite reservations, recommended it not be disallowed as it would protect the future interests of the Métis, very many of whom having already agreed to sell "in perfect ignorance" as to their rights or the value of their entitlement.

120 The trial judge observed (at para. 216):

> … starting in 1874 following the assent of the Governor General to the [*1873*] **Act**, Métis vendors for the next three years were not bound by agreements to sell their interests in land made before the patents to the land issued. …

121 Notwithstanding, Flanagan wrote that the practical effect of the *Act* may simply have been to require different legal techniques as opposed to halting sales altogether.

122 Despite Morris's zeal to move ahead with the allotments, things still did not go smoothly. Dennis recommended that a process be established to permit investigation of claims of entitlement to an allotment. Morris, by letter dated December 12, 1873, disagreed with Dennis, arguing that to validate claims of the Métis in such a way would involve too much delay.

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Both asserted that their recommended course of action was in the best interests of the Métis. Morris's position was that it would be better to publish not only the list of successful grantees, but the specific lands allotted to them. This would provide a level of certainty both to the claimants and the government, encourage pride of ownership and, upon publication, vest the land in the grantee. Donald Codd, Acting Agent of Dominion Lands, supported Morris's position. During all of this time, allotments continued with the names, but not the description of the land being announced. As well, there were various problems relating to surveying errors and other local difficulties.

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123 The government of John A. Macdonald was defeated in November 1873, and in early 1874 a new Liberal government was formed. There was no discernible progress thereafter with respect to the allotments until early 1875, and then only after questions were asked in Parliament about the delay. As well, in early 1875, a number of parishes in Manitoba sent to Canada and the Governor General nearly identical petitions complaining about the delay of nearly five years without one grantee being "in possession of one acre of said lands or deriving any benefit therefrom," pointing out that it was having a "very damaging effect upon the prosperity of the Province." This request was followed up by an address to the Governor General from the provincial government.

124 In December 1874, the second provincial election was held. Of the 24 members elected, eight were Métis and four were identified as French Canadian supporters.

125 Finally, on April 26, 1875, an Order in Council was passed which essentially accepted the advice of Dennis; it provided for the publication of the names of the successful grantees but not of the description of the land actually allotted to them. It also recommended that commissioners be appointed for the special purpose of investigating and reporting on the applications made, after which it was anticipated that the patents should issue "forthwith."

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126 There is no explanation why it took the new government over a year to address the continuing delays in moving ahead with the allotments.

127 In May 1875, John Machar and Matthew Ryan were appointed commissioners by Canada to verify the claimants entitled to a s. 31 grant. The commissioners worked expeditiously compiling returns for each parish which were approved in January 1876 by Dennis, and David Laird, Minister of the Interior, as the authoritative list. In doing so, they started with the 1870 census notwithstanding concerns by some about its completeness, updating it wherever possible. The commissioners also recommended that no more tracts of land be reserved to satisfy any future claims and that, if necessary, scrip be issued instead. The Métis heads of families and the original white settlers were therefore enumerated at the same time.

128 But this was still not the end of the delays. The approved names were substantially fewer in number than had been anticipated, and there were serious concerns about this discrepancy.

129 In the meantime, Manitoba attempted to amend *The Half-breed Land Grant Protection Act, 1873* by an Act to Amend Cap. 44, Vict. 37, intituled:

The Half-breed Land Grant Protection Act, S.M. 1875 (38 Vict.), c. 37 (the *1875 Act*), passed May 14, 1875, the effect of which would have been to reduce the protections provided under the *1873 Act*. But Canada, in contrast to its decision with respect to the *1873 Act*, disallowed the *1875 Act* in October 1876.

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130 Order in Council of March 23, 1876, cleared the way for the Department of the Interior to commence issuing patents. Significantly, it provided that, "with a view to discourage the operation of speculators in these lands," assignments before patent would not be recognized by Canada. This provision remained in force until it was repealed in 1893.

131 But as we have seen, there were already a number of legal devices in place by speculators and purchasers to "get around" the *1873 Act* of Manitoba. As the trial judge concluded, "between 1874 and 1877, sales of claimant's interests had continued by various means," there being pressure "not only from speculators and new settlers but from many Métis to enable binding sales before patent" (at para. 233).

132 Doubts about the accuracy of the authoritative list developed by the Machar/Ryan Commission continued, with Dennis expressing concern to Codd in the summer of 1876 that the 190-acre allotments might now be too large. Codd was asked to give his opinion, which he did in August of that year. In his detailed explanation, and while admitting surprise at "this state of affairs," he expressed confidence that all then resident in Manitoba were on the list, so that only those "now resident in the North West Territory needed to be determined." In his opinion the total number of recipients

would not likely exceed 5,814. The number was eventually fixed at 5,833 to permit an individual allotment size of 240 acres. Doubtless, the fact that the Machar/Ryan Commission identified only 5,088 entitled to share in the grant was a major factor in Codd's conclusion.

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133 Codd's advice was accepted by Order in Council dated September 7, 1876, which noted that "no satisfactory explanation appears of the difference between the numbers of children" in the 1870 census, as compared to Codd's estimate. The Order in Council necessitated the cancellation of the second allotment, even though it appears to have been essentially completed, and the commencement of a third allotment with the larger grant size of 240 acres. This caused yet more delay.

134 The third allotment commenced in October 1876 and was not actually completed until 1880 despite the fact that the public notices for the third allotment indicated that it would proceed with "all due diligence." As late as February 1880, the Manitoba Legislature complained of the long and unnecessary delay.

135 The explanation for the delay given at the time, and the only one we have, was that Codd (who told Morris that until Ottawa sent assistance, he could only devote two days a week to the job), and laterally Morris's replacement as Lieutenant Governor, Joseph Cauchon, did not have the time to deal with the matter personally and were unwilling to permit assistance by a clerk. This was due to concerns about confidentiality with respect to the location of individual allotments; the worry being there could be a public perception that possession of such information enabled Codd to assist

speculators. Cauchon was also troubled by indications of dissatisfaction with the process.

136 Soon after the third allotments commenced, Morris reiterated his earlier proposal that the lots assigned to a successful grantee under s. 31 of the *Act* be made known at the time of selection to enable a grantee, who intended to settle on the land, to know where the lots were so as to protect the timber there located. It was recognized that patents would not likely issue for many years "owing to the great extent of the lands." Of even greater significance was his final recommendation that the land be vested in the allottees upon completion of the allotment process.

137 Surely not by coincidence, the Executive Council of Manitoba in November 1876 sent an address to the Privy Council requesting that as soon as allotments were drawn, public notice be given so that children of full age should be able to settle upon or sell the lands allotted to them rather than having to wait for a patent to issue. This request was rejected by the federal government by Order in Council dated January 17, 1877. Declining to enter into any discussion of the matter, the Privy Council stated that it was the government of Canada alone that was responsible to Parliament and that it would deal with the issue "in the manner which the Government believe to be most favourable to the public interests" (at para. 242).

138 In the end, after further entreaty by Morris and the Executive Council of the province of Manitoba, later in 1877 Canada permitted the publication of allotments with a legal description, which had first been recommended by Morris almost four years earlier.

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139 In total 11 percent of the sales that Flanagan reviewed in the "Métis Family Study" were made before the legal descriptions of the allotments began to be made known.

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140 Once the final allotments got underway, which allowed the grantees for the first time, if they wished, to dispose of a described piece of land rather than the unspecific fruits of a random lottery, there followed a flurry of activity on the part of the Manitoba Legislature (and presumably purchasers). On February 28, 1877, *The Half-breed Land Protection Act, 1877,* S.M. 1877 (40 Vict.), c. 5 (the "*1877 Act*"), was passed which provided that sales by deed and for valid consideration, by any Métis having "legal right to a lot of land" pursuant to s. 31 of the *Act* would be "legal and effectual for all purposes" to transfer "the rights of the vendor thereto." The *1877 Act* applied to grantees over the age of 21. Canada did not disallow the *1877 Act*. Flanagan notes that by this time it was generally understood that immediate sales of allotments were permitted.

141 Notwithstanding, the delays continued. In an exchange in the Senate on March 14, 1877, Minister Scott, the new Secretary of State, acknowledged that the distribution of the grants "was attended with many embarrassments and reserves were being allotted as rapidly as possible."

142 In February 1878, Manitoba passed two further Acts. *An Act to Enable Certain Children of Half-breed Heads of Families to Convey Their Land*, S.M. 1878 (41 Vict.), c. 20 (the "*Lands of Half-breed Children Act*"), enabled Métis between the ages of 18 and 21 to sell their lands with the consent of the parents and the approval of a judge or two justices of the

peace, who were directed to examine the child in the absence of parents to ascertain if the child's consent was "free and voluntary."

143 Flanagan considered this group to be particularly vulnerable and concluded "some abuses were unquestionably entailed in allowing eighteen-year-olds to sell."

144 At the same time, Manitoba passed *The Act Respecting Infants,* S.M. 1878 (41 Vict.), c. 7 (the "*Infants Act*"), which provided rules for the disposition of estates and properties of infants upon approval by a judge of the Court of Queen's Bench, if found to be "necessary or proper, in the interest of the infant." As the trial judge found, "[t]he result was that many eligible s. 31 recipients sold their interests in lots at varying times and for varying prices" (at para. 251). Flanagan in his report notes that there were 560 sales carried out between December 1878 and October 1881 under court guidance pursuant to the *Infants Act*. Here, too, Flanagan's opinion was that abuses had taken place. (It appears that Flanagan is in error in his report when he states that these sales made up less than ten percent of all children's allotments. During cross-examination, he conceded that this figure applied only to sales by Métis under the age of 18. While it is not entirely clear, it would appear that Flanagan's "mental arithmetic" while on the witness stand resulted in his agreeing that about 35 to 40 percent of the sales involving Métis "children" were by those under the age of 21.)

145 Flanagan, in answer to the question, "Why did the Métis children sell?" was of the view that "keeping the land for long-term investment was probably not a realistic option for most Métis" because there was so much

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land given to each family unit. He estimated that the typical Métis family received hundreds of dollars of scrip and over one thousand acres of land.

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146 As the allotment process continued, it became evident that a mistake had been made by Codd and those who accepted his recommendation in the estimate of the number of persons eligible for a s. 31 grant. As it transpired, even though a total of 1.44 million acres of land was eventually granted, 993 children were left out.

147 In May 1884, it was recommended that scrip be issued to the children and all eventually received scrip in the amount of $240 in lieu of land, which the Order in Council of April 20, 1885, implemented. The Order in Council also established a deadline of May 1, 1886, for filing claims for children's scrip, as well as for heads of families and original settlers. This deadline was extended at least four times.

148 Deputy Minister of the Interior A. M. Burgess was initially unable to account for Codd's error when it first came to his attention in early 1884, other than to suggest that the "census must have been an incomplete one." But from Burgess's subsequent analysis a year later, it seems that the error likely arose from Codd's failure to fully take into account the transitory nature of Métis families, many of whom would have been absent from the province during the Machar/Ryan Commission proceedings.

149 To further expedite matters, the Privy Council on July 4, 1878, by Order in Council, provided authority for the issuance of patents forthwith to all s. 31 claimants whose claims had been approved "irrespective of age or sex," to vest the lands in fee simple. By this time, sales were frequently

taking place, with advertisements appearing in the local press; in fact, the vast majority of sales took place between 1877 and 1882/83.

150 Entirely consistent with this activity, the Manitoba Legislature on May 25, 1881, in order to remove "great doubt" concerning the "true interpretation and effect" of certain Manitoba statutes, and the resulting concerns about titles to the land in question, enacted *The Half-breed Lands and Quieting Certain Titles Act*, S.M. 1881 (44 Vict.), c. 19. This legislation provided that in any court proceeding all deeds of conveyance purporting to convey an interest in s. 31 lands would be sufficient whether before or after patent or allotment to vest the interest or rights of such child in the purchaser.

151 As a result of continuing concerns about the role of the courts in permitting improvident sales by minors to speculators and others, a Commission to Investigate the Administration of Justice in the Province of Manitoba commenced its work in November 1881. During the unusual proceedings that took place, court officials and others testified, as well as Chief Justice Wood and Justices Miller and Dubuc of the Court of Queen's Bench.

152 During the Commission hearings, Chief Justice Wood opined that one-third of the whole grant to the Métis had been swept away in a stampede of transactions, at prices ranging from $40 to $100 for 240 acres of land, which he considered to be "appalling." Flanagan considered this evidence to be inaccurate, but does note that returns on judicial sales were the poorest of all. It is noteworthy that concern about Chief Justice Wood's conduct as a

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judge, and his own role in the process, was one of the major reasons for the creation of the Commission.

153 Also of significance is the independent report of the counsel to the Commission in which he described the practice of the court with respect to the protection provided by *The Infants Act* as "characterized by an almost utter recklessness and disregard of the interests of the court's wards." In the end, the matter was so delicate that the Commission elected not to make a report, but simply transmitted the evidence to the Attorney General.

154 Eventually, Manitoba passed *The Quieting of Titles Act, 1885* (assented to on May 2, 1885, and known as *The Half-breed Lands Act*, S.M. 1885 (48 Vict.), c. 30) on the same day as legislation that introduced the Torrens system to the province. The purpose of *The Quieting of Titles Act*, which applied to "lands which belong to Half-breeds," was to cure any "defect, irregularity or omission in the carrying out and completion" of sales of patented or allotted lands belonging to infant half-breeds pursuant to court order.

155 As a final postscript, by Order in Council dated December 4, 1893, the March 23, 1876 Order in Council, which provided that assignments before grant would not be recognized, was rescinded. The recital to the 1893 Order in Council declared: "if it could have served the purpose for which it was adopted – that is discouraging speculation in Half-breed lands, which is very doubtful – the period of its usefulness has certainly passed."

156 Of considerable assistance in explaining events leading up to, and following, the creation of the new province of Manitoba is a debate that took

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place in the House of Commons on July 6, 1885, between Macdonald, once again Prime Minister, and Edward Blake and others on behalf of the Opposition. In *House of Commons Debates*, Vol. XX (6 July 1885), Macdonald looked back, with the benefit of 15 years of hindsight, on the creation of the new province (at p. 3113):

> … the Government of the day entered into negotiations with certain delegates from the Province of Manitoba, which culminated in the Act of 1870, creating Manitoba a Province. In that Act it is provided that in order to secure the extinguishment of the Indian title 1,400,000 acres of land should be settled upon the families of the half-breeds living within the limits of the then Province. Whether they had any right to those lands or not was not so much the question as it was a question of policy to make an arrange[ment] with the inhabitants of that Province, in order, in fact, to make a Province at all – in order to introduce law and order there, and assert the sovereignty of the Dominion. ... it was provided that, after a careful calculation, 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, because the half-breeds did not allow themselves to be Indians. If they are Indians, they go with the tribe; if they are half-breeds they are whites, and they stand in exactly the same relation to the Hudson Bay Company and Canada as if they were altogether white.
> [emphasis added]

157 The highlighted remarks are entirely consistent with the view of Chief Justice Wood, who in *Aikins v. Black* (4 July 1879) (Man. Q.B.) wrote that s. 31 grants were made "under the specious guise of the extinguishment of the Indian title . . . but in truth for the benefit of the half-breeds" (at p. 217).

158 With respect to the census taken under Lieutenant Governor Archibald, Macdonald opined (at p. 3113):

> ... If the census that had been taken and returned by Governor

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> Archibald had been accepted there would have been land enough in the appropriation to have settled all trouble, as well for the half-breeds who were actually registered and got their lands as for the half-breeds who happened to be away on the plains at the time the final adjudication was made. But it did not suit the Government of the day to accept that. Oh, no. The claims of the half-breeds in Manitoba were bought up by speculators. It was an unfortunate thing for those poor people; but it is true that this grant of scrip and land to those poor people was a curse and not a blessing. The scrip was bought up; the lands were bought up by white speculators, and the consequences are apparent. …

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159 But as we have seen, the accuracy of the 1870 census is by no means certain.

160 With respect to the long delay in the issuance of the patents, the appellants rely on Flanagan's "Historical Evidence" report at p. 59 where he states that "[d]epending on administrative difficulties, weeks, months, or years might elapse between the Lieutenant Governor's certification and the Department's approval of the grant." His analysis seems to be virtually the only source of information we have on this topic. Part of the delay may have been caused by the fact that verification of the thousands of allotments took place in Ottawa. Whatever the explanation, there can be no doubt that Canada too was frustrated by the delays. Burgess observed in 1883 that he was "heartily sick" of the "disgraceful delay which is taking place in issuing patents." In a later excerpt from the same quote, Flanagan notes that there were difficult claims which required the gathering of new information, sometimes resulting in extensive delays. He concluded that the issuance of patents usually took between one and two years after completion of the drawings in a parish. The first grouping of s. 31 patents arrived in August 1877, but patents for the large parish of St. Andrews, for example, were still

arriving two years later.

161 The bulk of patents were issued by 1881, though individual grants continued to be approved for many years thereafter. A partial explanation for the delay in issuing patents may be that with almost 6,000 s. 31 patents and approximately 3,000 s. 32 patents, this was likely a formidable administrative challenge over a century ago.

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162 With the exception of Codd's error concerning the number of eligible s. 31 grantees in the summer of 1876, there is next to no evidence to explain the multitude of delays, some quite lengthy; for example, the delay for over a year after Macdonald's government fell in November 1873, the delay in issuing the patents, and others of shorter duration.

163 In the introduction to his report "Historical Evidence," Flanagan states, "[t]he major finding of my research is that the federal government appears to have fulfilled or even overfulfilled its obligations under ss. 31 and 32 of the Manitoba Act" (at p. 4). He attributed much of the cause for the delay from trying to respond to demands emanating from Manitoba. With respect to the role of Canada, he concluded (at p. 5):

> There is no evidence that anyone in the federal government – in Parliament, cabinet, or the public service – intended to implement the Manitoba Act in such a way as to deprive the Métis of their legal benefits or to encourage them to sell land and scrip and leave the province. On the contrary, there is a great deal of evidence that federal officials and statesmen conscientiously tried to meet the desires of the Métis in carrying out the Act.

164 While it is true that the Métis did not always get their choice (for

example, the early homestead claims that preempted a portion of the OTM from the s. 31 grants), administrative difficulties were to be expected Flanagan wrote, “in a newly acquired and thinly settled frontier province in an age when transportation and communications were poor and civil service was small” (at p. 4). To the extent that benefits were sold, Flanagan concluded they took place in many instances for substantial amounts of money by the standards of the day.

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165 Finally (at p. 47):

> In the last analysis, the Métis got more or less, but not exactly, the lands they wanted for their reserves. They had to accept second choice in lieu of perhaps half a dozen townships, and they had to accept a percentage of homesteaders in some townships. It is a matter of interpretation and judgment as to whether the degree of impact was enough to violate Cartier’s promise to Ritchot that “the regulations to be established from time to time by the Governor General in Council, respecting that reserve, will be of a nature to meet the wishes of the half-breed residents” [referring to the letter from Cartier to Ritchot of May 23, 1870].

166 It is important to keep in mind that neither Flanagan nor Ens focussed on the identity of the eventual “owner” when transactions had taken place before delivery of the patent. We do not know, as we do in the case of scrip, how it came to be that purchasers obtained the patents – the critical first step to obtain title – and how they came to be registered in the land titles office.

167 Nor do we know for certain in how many instances there were intermediate “sales” before the patent was issued, for example following allotments with a legal description once this was permitted in 1877. Filing a deed or power of attorney in the absence of patent registration constituted

notice, but not a legally valid sale. It would seem that if a s. 31 grantee executed a power of attorney, no further action on their part was required to effect registration once the patent was issued.

168 In contrast to the views expressed by Chief Justice Wood (see para. 152), the "Métis Family Study" concluded that the Métis children's allotments were often sold, but, for the most part, not for extremely low prices. The price received by those who sold after allotment was about twice as much as those who sold beforehand. The going price for scrip, like pre-allotment s. 31 land, was about half of its face value.

PART III
SECTION 31

III.1 The Trial Judge's Findings

169 The trial judge described the appellants' submissions with respect to s. 31 as follows (at para. 558):

> … [re s. 31], the plaintiffs assert that Canada, through Macdonald and Cartier, who were the senior members of the Federal Government at the time, negotiated a treaty or an agreement with the Red River delegates, or at the very least made representations to them, for the purpose of effecting the entry of Rupert's Land into Canada as the Province of Manitoba. The plaintiffs assert that in so doing, Canada was dealing with aboriginals, the Métis, who enjoyed aboriginal title. They argue that while there was no surrender of the subject land to the Crown as exists in the Indian cases, there was an extinguishment by statute which was recognized by s. 31 of the **Act**. They assert that in providing for land grants to the children of the half-breeds, Canada intended to recognize this extinguishment of aboriginal title and to ensure the continuance of a land base for the Métis in Manitoba.

170 As we have seen (paras. 63, 64), the appellants rely on Ritchot's diary

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record and Macdonald's handwritten note of May 2nd as strong support for their assertion that a binding agreement was reached with Macdonald and Cartier on May 2, 1870. But the trial judge held that Ritchot's diary entry of May 2nd recorded agreement amongst the delegates alone and not between the delegates and Macdonald and Cartier. Macdonald's handwritten note of the same date, he concluded, was simply his record of the position taken by Ritchot on behalf of the delegates, and was not evidence of a binding agreement.

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171 In a key finding, the trial judge found that Canada never agreed to place any of the lands in the new province under the authority or control of the local legislature (at para. 491). On the evening of May 2, 1870, Macdonald, prior to the introduction of the printed Bill two days later, stated that the assistance of the local legislature was subject to the "express sanction of the Governor General." Further confirmation was provided by Ritchot's telegram to Bunn on May 4th in which the former stated that "we" found the Bill satisfactory, with "other points to be settled" (at para. 503). In the trial judge's opinion it was not tenable that Cartier and Macdonald, had they entered into a binding agreement earlier in the day of May 2nd, would resile from it just a few hours later.

172 In the result, the appellants' assertion that negotiations began on April 25th and concluded on May 2nd was rejected by the trial judge: "The evidence, even relying upon Ritchot's diary, is clearly otherwise" (at para. 507).

173 The facts, the trial judge found, pointed not to the negotiation of a

treaty or agreement (referring in particular to ss. 31 and 32 of the *Act*), but rather to a Bill en route to passage in Parliament.

174 The trial judge concluded that:

> Sections 31 and 32 were not intended for the protection of minorities. There was no evidence that the Métis considered themselves to be a minority in the Red River Settlement. The English and French Métis together constituted a substantial majority of the persons in the Red River Settlement and effectively controlled the new Legislature until at least 1876, if not later.
>
> Section 31 grants, based on the evidence, were given to recognize the past and present role of the Métis in the Red River Settlement, so as to ensure the peaceful entry of the Red River Settlement into Canada. Section 31 was intended to give the children of the Métis "on a onetime basis an advantage in the life of the new province over expected immigrants" (at para. 544).

175 The delegates anticipated that the provisions of what became s. 32 could be implemented with reasonable dispatch, and intended that the province would control the public lands. But the situation changed dramatically when Canada announced on April 27th that it wished to retain control of public lands.

176 The trial judge noted that the delegates, none of whom were Métis, were negotiating on behalf of all members of the Red River Settlement and

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were not empowered to enter into a binding agreement.

177 The preamble to s. 31 begins with "And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate …." The trial judge concluded that, "[p]laced in historic context, the evidence in this case is overwhelming that the Métis were not Indians" (at para. 600). He found that the Métis viewed the Indians as "being inferior" (at para. 601). The Métis saw themselves as fully enfranchised citizens. They were an active and vital part of a settlement that had well-developed legislative and judicial institutions in which they participated. They were not vulnerable or unsophisticated. The Métis were recorded in the census of the Red River Settlement as separate from the Indians. While most Métis lived contiguous to one another in parishes laid out on the basis of language and religion, they did not hold land communally but individually and were not believers in the non-alienability of their land.

178 With respect to s. 31 generally, while Ritchot objected to the language of s. 31 he was told by Macdonald and Cartier on May 5, 1870, that if it was changed the Bill would not pass; the delegates and their principals knew that the meaning of the reference in the *Act* to the land grant being "towards the extinguishment of the Indian Title" was not clear. The trial judge relied in particular on the comment to the same effect made by Ritchot to the provisional government of Manitoba on June 24, 1870.

179 It was "evident" to the trial judge that the delegates and their principals knew that Parliament alone would make the decision with respect to the rights of the settlers. The delegates' request that the selection of land

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be made by the Lieutenant Governor on the advice of the local community was not acceptable to Macdonald and Cartier (who wanted the Lieutenant Governor to be under the direction of the Governor General in Council), which the delegates knew as early as May 2, 1870. The delegates also knew what was happening in Parliament, including the strong opposition to providing any benefits for the Métis.

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180 Any suggestion, the trial judge found, that the Métis desired to own their land other than individually, was not supported by the evidence and "intuitively makes no sense given their history and culture" (at para. 928). While the Métis lived in parishes, there was no communal ownership of land, and no unanimity among the Métis as to the selection of s. 31 land.

181 Nowhere in the record of discussions or Parliamentary debates was there any evidence of a promise to create or reserve a Métis land base; rather, the purpose of s. 31 was to provide a benefit to the Métis by way of a grant to the children, an interpretation supported by the joint address of the Manitoba Legislature on February 8, 1872, which confirmed that the land to be given under s. 31 was to be given absolutely, without restrictions. The trial judge accepted Canada's argument that the *Act*, when looked at in its entirety, was an essential step in building the new nation.

182 As for Cartier's letter of May 23, 1870, the trial judge noted that another interpretation – other than the one advanced by the appellants that the Métis would be able to pick the lands as they wished – might be that the land would be selected and distributed in such a way as to satisfy the people that the process was fair to all recipients. This was accomplished by the

random lottery.

183 While Ritchot and Taché wanted conditions imposed that would entail the children's grants and restrict to some extent their ability to sell, the Manitoba Legislature and "the people on the ground" did not share that view (at para. 39). This is consistent, the trial judge concluded, with the language of s. 31 of the *Act*, which did not impose any conditions once the land was granted, leaving the details of the distribution of the s. 31 grants to the discretion of the Governor General in Council.

184 Although Archibald erred in his letter of December 27, 1870, in recommending that all Métis heads of families as well as children should share in the s. 31 grants, the only adverse effect from his mistake was to cause delay in the allocations.

185 The trial judge's final comments with respect to s. 31 were (at paras. 651, 653, 656, 658):

> When one considers the available evidence, it is unrealistic and in my view wrong to conclude that Parliament, by enacting section 31, intended to create aboriginal title or anything tantamount to it, or to create a land base, particularly a contiguous land base, for the Métis.
>
> And, as a practical matter, the evidence leads to the conclusion that faced with the demands of the delegates, the directions of the Imperial Government, the comments of Macdonald and Cartier in particular as to their wishes and Canada's obligations to the HBC and the Indians, and the strong opposition in Parliament to giving anything to Riel and his followers, the Government could not, or at least would not, have proceeded to create something tantamount to aboriginal title, including a land base and particularly a contiguous land base for the Métis.
>
> In my view, a fair conclusion considering all of the relevant evidence is that the language … [in the preamble to s. 31] … was a political

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> expedient used successfully by Macdonald and his government to satisfy the delegates and make palatable to the Opposition in Parliament the grant of land to the children of the half-breeds and to thereby ensure passage of the **Act**.
>
> In short, what had existed in connection with Métis landholdings before the passage of the **Act** would continue thereafter even in respect of the children's land grant, namely, that the Métis would continue to be entitled to own land on an individual rather than communal basis, and to hold that land or alienate it as they chose.

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III.2 The Appellants' Position Re Section 31

186 The appellants summarized the essence of their claim in the introduction to their factum as follows:

> 2. By section 31 of the *Manitoba Act* the Aboriginal title of 7,000 Métis children was extinguished and provision made for a grant of land to each of them. Thus section 31 gave rise to a fiduciary obligation on the Crown to act in the best interests of the children in administering the grant of 1.4 million acres.
>
> 3. The provision for grants to the 7,000 children was intended to be for the benefit of the Métis families, the land to be grouped according to family, divided and granted promptly, all children to receive grants and the land to be protected from speculators until granted and until the grantees reached the age of majority.
>
> 5. The Crown was in breach of its fiduciary obligation in disposing of the children's grant by lottery, in delaying the implementation of the grants for more than a decade, in failing to ensure that all children received grants, in allowing sales before grant and before the age of majority, and in standing idly by while *ultra vires* legislation was passed by Manitoba which enabled and facilitated such sales.

187 Virtually all of the trial judge's principal evidentiary findings are challenged by the appellants in their factum, notwithstanding their position

during the oral hearing that it was not, strictly speaking, necessary for them to do so. This challenge comes as no surprise since, should the trial judge's findings be sustained, the appellants' ability to persuade this court that there were breaches of fiduciary duty with respect to s. 31 or s. 32 of the *Act* becomes virtually impossible.

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188 The appellants' first argument is that the trial judge was wrong to ignore the evidence that the Métis used the prairies collectively to pursue their livelihood and that the commons and hay lands were communal. Furthermore, the trial judge erred when he concluded, notwithstanding the plain language of the *Act*, that the 1.4 million acres set aside in s. 31 was not for the purpose of extinguishing Indian title, but a political expedient to make palatable to the Opposition the grant of land and thereby ensure passage of the *Act*. What Cartier and Macdonald told the House on May 2nd and on May 9th, when they referred to the Métis having "Indian blood," is what "the court must go by."

189 Similarly, the trial judge erred in concluding that the delegates knew the reference in the land grant to extinguishment of Indian title "was not clear" (at para. 649). While it is true that Ritchot did report to the Legislative Assembly of Assiniboia on June 24, 1870, that "the half-breed title, on the score of Indian blood, is not quite certain," he went on to explain that "as the only ground on which the land could be given was for the extinguishment of Indian title … [i]t was reasonable that in extinguishing the Indian title, such of the children as had Indian blood in their veins should receive grants of land." In effect, what the trial judge found, say the appellants, was that Macdonald and Cartier misled the delegates and Parliament.

190 The appellants submit that there is evidence to support the conclusion that it was in the children's best interests for the land to stay within the Métis families as a community. Support is found for this, it is argued, from Flanagan's description of the Métis way of life in the Red River Settlement and Ritchot's diary entries for May 2nd, which contemplate the local legislature ensuring the continuance of the lands in the Métis families "to settle the children." The same diary entries record agreement with this position being addressed by the delegates. Reliance is also placed on Macdonald's handwritten note of May 2nd, which stated that the land was to be selected "in separate or joint lots having regard to the usages and customs of the country," and "distributed as soon as possible amongst the different heads of half-breed families."

191 The appellants say that further support for the argument that the children's interest was best served by a Métis land base comes from speeches made by Macdonald and Cartier in the House, where they said that the lands were for the purpose of settlement of the Métis children. For example, Macdonald on May 4th confirmed in the House that the land was not being reserved for the benefit of white speculators, and Cartier commented in the House on April 13, 1871, that "until the children came of age the government were the guardians" of the land.

192 It is argued that the key to understanding s. 31 is that the grant was to be "for the benefit of the families of the half-breed residents." This placed a limit on Canada's discretion, and was to be accomplished by grouping grants according to family, contiguous to or in the neighbourhood of their families' land, rather than scattering the grants randomly. It was not in their best

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interests that 993 children did not receive grants.

193 Cartier's letter of May 23rd is strong evidence, it is argued, of Canada's commitment to comply with the wishes of the Métis families; the trial judge was quite wrong to say that there was no discussion about children's grants at the meeting with the Governor General on May 19th.

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III.3 The Respondents' Position Re Section 31

194 In their factums and oral argument on the factual issues we are now considering, Canada and Manitoba succinctly endorsed the findings and conclusions of the trial judge.

III.4 How to Approach the Historical Documentary Evidence

195 I am of the view that while the court must approach historical evidence in proceedings involving aboriginal claims with sensitivity and a broad understanding of the evidentiary difficulties that inevitably arise in such cases, the "special rules" regarding evidence adduced by aboriginal claimants first referred to in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, are geared exclusively toward non-traditional (primarily oral) evidence. They have no application where the action, as here, proceeded to trial based entirely on documentary evidence.

196 Nor do the fundamental precepts of evidentiary law change when a claim is made by an aboriginal band against the Crown for breach of fiduciary duty and honour of the Crown. In *Chippewas of Mnjikaning First Nation v. Ontario (Minister of Native Affairs)*, 2010 ONCA 47, the plaintiff argued that the trial judge erred in failing to permit the fiduciary duty "to

inform his perspective of the evidence-weighing process" (at para. 216).

197 A unanimous Ontario Court of Appeal characterized this argument as (at para. 220):

> … essentially an attempt to persuade the court that because the Supreme Court of Canada has underscored the importance of the *sui generis* fiduciary obligation owed by the federal Crown to First Nations with respect to dealings involving First Nations' lands – and has stated that "*treaties and statutes* relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians" (*Nowegijick* [[1983] 1 S.C.R. 29], at p. 36) – the trial judge must resolve *conflicting testimony* about the words and conduct of parties in favour of Aboriginals on the same basis. …

198 To this submission the court emphatically responded (*ibid.*):

> … A trial judge must weigh and assess conflicting evidence in the same way as he or she always does – dispassionately, against the record as a whole, and with due consideration for any particular sensibilities (cultural or otherwise) that may impact upon a witness's testimony. …

199 I am in entire agreement with this conclusion.

200 Even with respect to those instances where oral histories are the only available evidence in a Crown-Aboriginal dispute, so that an accommodation has developed for such testimony to be admitted for justice to be done (see *R. v. Van der Peet,* [1996] 2 S.C.R. 507 at para. 68, and *Delgamuukw* at para. 87), there are limits. The purpose of this accommodation was to place such histories "on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents" (*Delgamuukw* at para. 87).

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201 In *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, McLachlin C.J.C. confirmed that "[o]ral histories are admissible as evidence where they are both useful and reasonably reliable, subject always to the exclusionary discretion of the trial judge" (at para. 31). And (at para. 38):

> … consciousness of the special nature of aboriginal claims does not negate the operation of general evidentiary principles. While evidence adduced in support of aboriginal claims must not be undervalued, neither should it be interpreted or weighed in a manner that fundamentally contravenes the principles of evidence law, which, as they relate to the valuing of evidence, are often synonymous with the "general principles of common sense" ….

III.5 Burden of Proof

202 In several instances, the appellants argue there was no evidence that the arrangements as allegedly contemplated by the Métis with respect to the s. 31 lands (non-alienability of the land, families clustered together, and the like) would not have worked successfully (and therefore were in the best interests of the Métis children). The trial judge was also wrong, they say, in failing to draw an adverse inference from the very long, unexplained delay in implementing the s. 31 grant.

203 These arguments directly raise the issue of onus. There are some authorities in fiduciary litigation that place the onus of proof upon the defendant (such as in determining damages or when a fiduciary has put itself in a conflict of interest), that have been applied in Crown-Aboriginal fiduciary cases including *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development),* [1995] 4 S.C.R. 344, and *Guerin v. The Queen,* [1984] 2 S.C.R. 335. The Supreme Court of

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Canada has also referred to a "presumption" that fiduciary obligations may arise within a fiduciary relationship in cases such as *Lac Minerals Ltd. v. International Corona Resources Ltd.,* [1989] 2 S.C.R. 574, and *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6, but that presumption, if this is what it is, has not been applied in the Supreme Court's Crown-Aboriginal fiduciary cases.

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204 One of the situations in which a reverse onus is applied is when a fiduciary is engaged in self-dealing or otherwise in a conflict of interest.

205 Forbidding a fiduciary from self-dealing is explained by Donovan W. M. Waters, Q.C., ed.-in-chief, *et al*., in *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Thomson Carswell, 2005) as follows (at p. 877):

> It is a fundamental principle of every developed legal system that one who undertakes a task on behalf of another must act exclusively for the benefit of the other, putting his own interests completely aside. …. [N]o one may allow his duty to conflict with his interest. …

Waters notes that the burden of proof is "particularly heavy where the nature of the fiduciary relationship is intense" (at p. 887, n. 140).

206 The onus applying to self-dealing fiduciaries was raised by McLachlin J., as she then was, in *Blueberry River*. She wrote in dissent, but the majority concurred with her on this issue (at para. 1). The issue arose with respect to whether the Crown had breached its fiduciary duty by selling the Bands' land to the Director under *The Veterans' Land Act* at an inadequate price. McLachlin J. wrote, "[t]he trial judge was correct in finding that a fiduciary involved in self-dealing, i.e. in a conflict of interest, bears the onus of demonstrating that its personal interest did not benefit from its fiduciary

powers" (at para. 53).

207 For our purposes there are two main points that arise from the Supreme Court's decision in *Blueberry River*:

- A self-dealing fiduciary carries the onus to prove on a *prima facie* basis that the sale price was reasonable, upon proof of which the onus shifts to the beneficiary to prove that the price was unreasonable. Significantly for our purposes, the trial judge's finding that the onus was on the plaintiff bands to prove other, non-self-dealing breaches of fiduciary duty was not questioned in the Court of Appeal or Supreme Court.
- No special onus rule was applied to any other part of the case.

208 We need not consider under what circumstances the Crown can be a self-dealing fiduciary; this is because it is clear that the Crown's role in the present case does not constitute self-dealing. As J. C. Shepherd explains in *The Law of Fiduciaries* (Toronto: Carswell, 1981) at 157-59, cited by McLachlin J. at para. 53, the basis of the reverse onus in a self-dealing situation lies in the fiduciary's wide variety of options to misuse their power (and to avoid detection) and the beneficiary's lack of awareness.

209 Another aspect of fiduciary litigation in which the onus is sometimes placed on the fiduciary is in determining damages, an issue that arises only after it has been proven both that there is a fiduciary obligation and a breach. This rule was applied in the Crown-Aboriginal context in *Guerin* (*per* Wilson J.) and in *Whitefish Lake Band of Indians v. Canada (Attorney*

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General), 2007 ONCA 744, 87 O.R. (3d) 321. The appellants have relied upon some of the case law pertaining to the reverse onus regarding damages in their factum, arguing this case law applies as well to their request for a declaration.

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210 La Forest J., writing under the heading "Damages" for four of seven judges in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, wrote that there is a "… long-standing equitable principle that where the plaintiff has made out a case of non-disclosure and the loss occasioned thereby is established, the onus is on the defendant to prove that the innocent victim would have suffered the same loss regardless of the breach …." (at p. 441).

211 It should be noted that *Hodgkinson* and two other authorities referred to therein, *Commerce Capital Trust Co. v. Berk* (1989), 57 D.L.R. (4th) 759 (Ont.C.A.) and *London Loan & Savings Co. v. Brickenden*, [1934] 2 W.W.R. 545 (P.C.), all dealt with a fiduciary whose breach was non-disclosure, and who sought to prove that the beneficiary would have taken the same course of action even if proper disclosure had been made.

212 In *Whitefish*, the Crown admitted that there was a fiduciary duty and that it had been breached, leaving the content of the fiduciary duty and damages in issue. Laskin J.A., for the court, noted as follows: "In the absence of evidence to the contrary – and there is virtually none – equity presumes that the defaulting fiduciary must account to the beneficiary on a basis most favourable to the beneficiary" (at para. 102), and "equity presumes that the trust funds [for the band] will be invested in the most profitable way or put to the most advantageous use" (at para. 49).

213 In the appellants' factum, after acknowledging that no claim for damages or equitable compensation was being advanced, they state:

> There was no evidence to establish that if the Crown had acted in a timely way, Métis-owned lands, grouped according to family, would not have been possible to achieve for all the children.

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214 The appellants rely on *Hodgkinson* and *Whitefish* for support. In my opinion, the reliance placed on the reverse onus regarding damages is misplaced given that there is no claim for damages.

215 It seems to me that the appellants are, in effect, attempting to apply a reverse onus to the question of whether or not a fiduciary duty has been breached. But because a fiduciary's conduct is measured not by results but by its actual behaviour, complaints by the Métis about the end result cannot lead to the conclusion that a fiduciary duty was breached.

216 Ultimately, the fact that beneficiaries are given the benefit of the doubt in the course of determining damages cannot be used to demonstrate a breach of fiduciary duty. These are two separate steps, based on separate conclusions. Only facts relevant to whether the fiduciary's conduct was below the standard can be used to determine whether a duty was breached.

217 In my opinion, it can safely be said that there is no general rule which provides that there is a general onus on the fiduciary, including with respect to whether a fiduciary obligation exists.

218 Thus, as in virtually all other instances the *dictum* "he/she who asserts bears the burden of proof" is alive and well (see *Authorson (Litigation*

Administrator of) v. Canada (Attorney General), 2007 ONCA 501, 86 O.R. (3d) 321 at para. 137, hereinafter "*Authorson,*" leave to appeal refused, [2007] S.C.C.A. No. 472 (QL)). It applies to the question whether Canada's actions constituted a breach of any fiduciary duty owed to the Métis.

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219 But I would be remiss if I did not briefly note that there is authority which suggests that in some circumstances there may be a "presumption" – once a fiduciary relationship has been established – that a fiduciary obligation of some sort is owed.

220 In a very few cases, but none involving a Crown-Aboriginal fiduciary relationship, the Supreme Court has written about a "presumption" that fiduciary obligations are owed within a fiduciary relationship.

221 Prominent among these decisions is *Lac Minerals*. La Forest J., writing in dissent on this issue, found that a fiduciary duty was owed between parties negotiating a joint mining venture. Writing about fiduciary relationships that existed "because of their inherent purpose or their presumed factual or legal incidents" (at p. 646), he stated "the presumption that a fiduciary obligation will be owed in the context of such a relationship is not irrebuttable, but a strong presumption will exist that such an obligation is present" (at p. 647).

222 In *Lac Minerals*, Sopinka J. and Wilson J. made similar comments about a presumption of fiduciary obligations within what Sopinka J. referred to as "traditional relationships" (at p. 598) and Wilson J. as "certain relationships which are almost *per se* fiduciary" (at p. 631). See as well *M.(K.) v. M.(H.)*.

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223 More recently, in *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, Cromwell J., writing for the court, commented (at para. 36):

> Certain categories of relationships are considered to give rise to fiduciary obligations because of their inherent purpose or their presumed factual or legal incidents: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* La Forest J., at p. 646. These categories are sometimes called *per se* fiduciary relationships. There is no doubt that the solicitor-client relationship is an example. It is important to remember, however, that not every legal claim arising out of a *per se* fiduciary relationship, such as that between a solicitor and client, will give rise to a claim for a breach of fiduciary duty.
>
> [emphasis added]

224 *Per se* fiduciary duties are to be contrasted with *ad hoc* fiduciary duties which can arise in non-"traditional" circumstances.

225 In my opinion, the most that can be said is that the Supreme Court has recognized that there is an assumption that some kind of fiduciary obligations exist within a fiduciary relationship; but at the same time most fiduciary cases make no reference to it – significantly, the Supreme Court's Crown-Aboriginal fiduciary duty cases. In *Galambos*, the court was content to indicate that fiduciary relationships are considered (rather than presumed) to give rise to fiduciary obligations.

226 For the purposes of this appeal, I prefer to treat the "presumption" as simply a common sense recognition that fiduciary obligations are likely to arise with respect to some issues within a fiduciary relationship.

227 None of this assists the appellants on the facts before the court. The "presumption," whatever its strength, cannot operate so as to reverse the

burden of proof or place an onus on the Crown when it comes to the existence and content of any fiduciary obligation.

III.6 Standard of Review

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228 As every lawyer who does appellate work well knows, the standard of review for findings of fact or mixed findings of fact and law is palpable and overriding error where a question of law is not extractable from the factual matrix. The standard of review for pure questions of law is, as it always has been, correctness.

229 In *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, the majority of the Supreme Court ruled that the standard of review in assessing both direct findings of fact and findings based on inferences of fact was that of palpable and overriding error. This standard was confirmed in *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401.

230 The application of the palpable and overriding error standard was recently reviewed by Steel J.A. of this court in *Knock v. Dumontier et al.*, 2006 MBCA 99, 208 Man.R. (2d) 121 (at paras. 21-23):

> … Justices Iacobucci and Major, writing for the majority, in **Housen v. Nikolaisen et al.**, [2002] 2 S.C.R. 235; 286 N.R. 1; 219 Sask.R. 1; 272 W.A.C. 1; 2002 SCC 33, also set out the standard of appellate review for both "findings of fact" and "inferences of fact". Addressing "inferences of fact", the justices commented (at para. 23):
>
> > We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere

> with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts.

What is palpable and overriding error? In **Housen**, the Supreme Court accepted the dictionary definitions of the word "palpable", pointing out that "[t]he common element in each of these definitions is that palpable is plainly seen" (at para. 6). The Ontario Court of Appeal, in **Waxman et al. v. Waxman et al.** (2004), 186 O.A.C. 201; 44 B.L.R. (3d) 165 (C.A.), gave some examples of palpable error (at para. 296):

> Examples of "palpable" factual errors include findings made in the complete absence of evidence, findings made in conflict with accepted evidence, findings based on a misapprehension of evidence and findings of fact drawn from primary facts that are the result of speculation rather than inference.

Not only must the error be palpable, but it must also be overriding. The court in **Waxman** went on to define an "overriding" error (at para. 297):

> An "overriding" error is an error that is sufficiently significant to vitiate the challenged finding of fact. Where the challenged finding of fact is based on a constellation of findings, the conclusion that one or more of those findings is founded on a "palpable" error does not automatically mean that the error is also "overriding". The appellant must demonstrate that the error goes to the root of the challenged finding of fact such that the fact cannot safely stand in the face of that error: **Schwartz v. R.**, [1996] 1 S.C.R. 254 … at 281.

231 The policy reasons upon which this standard of review is based go beyond recognizing the trial judge's superior position in assessing *viva voce* evidence to include preserving judicial resources and promoting the autonomy and integrity of trial proceedings. In addition, the trial judge's advantage in making factual findings is not limited to instances where *viva voce* evidence has been heard but extends to their relative expertise in

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weighing and assessing evidence and their familiarity with the case in its entirety.

232 In The Honourable Roger P. Kerans & Kim M. Willey, *Standards of Review Employed by Appellate Courts,* 2nd ed. (Edmonton: Juriliber, 2006) at 148, the authors wrote that in the wake of *Housen*, "it is clear that the main reason for deference, as now confirmed, is that it is not appropriate for reviewing tribunals to re-try cases." Kerans and Willey thus recognized that the palpable and overriding standard of review applies to inferences of fact, but, without citing any authority, suggested a caveat to that strict standard (at pp. 150-51):

> … The truism about the appeal court being equally competent to draw an inference does not warrant interference, because it should only intervene if it is better able to draw an inference.
>
> We can, however, think of cases where the inference drawn may be precedential, and many others where guidance is required. It is the duty of the reviewing court to make rules to overcome errors in conventional wisdom, or examples of cultural blindness. We should not think that the standards of review in any way prevent intervention on that ground.

233 But subject to this cautionary note, even when an appellate court is as well placed as the trial judge to make a finding, strong reasons for deference remain.

234 Recent appellate authority, with which I agree, makes clear that no less deference should be shown to trial judges' inferences and conclusions of fact drawn from documentary evidence.

235 In *FL Receivables Trust 2002-A (Administrator of) v. Cobrand Foods*

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Ltd., 2007 ONCA 425, 85 O.R. (3d) 561, Laskin J.A., for the court, explained the rationale for deference as follows (at para. 46):

> … The principle of appellate deference to a trial judge's fact-finding and inference-drawing applies even when the entire trial record is in writing. That is so because the principle of deference is grounded in more than a trial judge's ability to see and hear the witnesses. Deference recognizes that even on a written record, the trial judge "lives through" the trial while a court of appeal reviews the record only through the lens of appellate review. Deference also preserves the integrity of the trial process, maintains the confidence of litigants in that process, reduces the number and length of appeals and therefore, the cost of litigation, and appropriately presumes that trial judges are just as competent as appellate judges to resolve disputes justly.

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236 See as well *Gottardo Properties (Dome) Inc. et al. v. Regional Assessment Commissioner, Region No. 9 et al.* (1998), 111 O.A.C. 272. The Alberta Court of Appeal came to the same conclusion in *Andrews v. Coxe*, 2003 ABCA 52, 320 A.R. 258, writing that *Housen* had "by plain implication" rejected the appellants' contention that "an appeal court can upset fact findings more easily when the evidence is written, not oral" (at para. 16). Similarly, the same court in *J.N. v. G.J.K. et al.*¸ 2004 ABCA 394, 361 A.R. 177, held that "deference is appropriate whether the evidence is oral or documentary" (at para. 21).

237 I conclude that the standard of review as mandated by the Supreme Court in *Housen* and *H.L.* applies with full force to the findings of fact and inferences therefrom made by the trial judge from the historical documentary evidence before him.

III.7 Analysis and Decision

238 With very few exceptions – to be reviewed shortly – there was evidence, in many instances overwhelming evidence, to support the trial judge's conclusions with respect to the context and purpose of s. 31 of the *Act*, as well as the inferences that he drew from them. In summary, his critical findings are:

a) there was no request for, expectation of or consideration given by Canada to create a Métis homeland or land base, contiguous family or community holdings of s. 31 grants; the phrase "family block" was not recorded as having been used in the discussions with the delegates, or in Parliament. (Indeed, there is no reference to this goal in Ritchot's diary or any other contemporaneous document.) More specifically, not only was there no intention or obligation on the part of Parliament to create a "family block," there was no suggestion by the delegates that the Métis had a land base, or wanted one;

b) the Métis had always owned land individually, not communally, and bought and sold land as such; there was no evidence of any desire to the contrary. What had existed for Métis landholdings before the *Act* would continue for the s. 31 grants;

c) contrary to the wishes of Taché and Ritchot, "the people on the ground" did not want to entail the land, or otherwise restrict the ability of Métis children to sell. The Métis did not believe in the non-alienability of their land;

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d) the s. 31 grant was intended to give the individual Métis child a leg up or head start in light of the expected influx of immigrants but not to create a right of first choice;

e) by the evening of May 2, 1870, Macdonald made it clear in Parliament that while it was "proposed to invoke the aid and intervention, the experience of the local legislature," with respect to the s. 31 grants, such involvement was subject to "the sanctions of the Governor General"; nor did Macdonald or Cartier commit Canada to involving the local legislature;

f) s. 31 was essentially a political expedient to bring about Manitoba's entry as a new Canadian province; and

g) with respect to whether a binding "agreement" or undertaking was made by Cartier and Macdonald on behalf of Canada with the delegates "to ensure the continuance of a land base," Ritchot's diary entry for May 2nd and the handwritten note of Macdonald bearing the same date (which appears to be a rough draft of what ultimately became s. 31) were not evidence of an agreement or undertaking by Macdonald and Cartier, but simply represented the position of the delegates.

239 As we have seen, the trial judge's findings of fact are owed deference. This is so even if the trial judge was mistaken about the applicable law. As this court noted in *R. v. Blais (E.L.J.)*, 2001 MBCA 55, 156 Man.R. (2d) 53 (at para. 48):

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> Notwithstanding the trial judge's error in his legal focus, deference is still owed to findings of fact made at trial, even in constitutional cases that involve an examination of historical fact. In **Delgamuukw,** Lamer, C.J.C., explained that (at paras. 79-80):
>
> > The policy reason underlying this rule is protection of "[t]he autonomy and integrity of the trial process" (**Schwartz v. Canada**, [1996] 1 S.C.R. 254, at p. 278), which recognizes that the trier of fact, who is in direct contact with the mass of the evidence, is in the best position to make findings of fact, particularly those which turn on credibility. Moreover, **Van der Peet** clarified that deference was owed to findings of fact even when the trial judge misapprehended the law which was applied to those facts, a problem which can arise in quickly evolving areas of law such as the jurisprudence surrounding s. 35(1).

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240 I find that the evidence strongly supports the trial judge's conclusions. None of the foregoing findings of the trial judge constitute error, let alone palpable and overriding error.

241 The appellants take exception to the trial judge's conclusion that Canada did not take control of land formerly controlled by the Métis people. But at least with respect to s. 32, this finding is quite correct since the purpose of that section was to quiet titles and ensure peaceful possession of existing landholdings. Insofar as s. 31 is concerned, until 1871 almost all the land utilized for the s. 31 grants was outside the settlement belt where Indian title was not extinguished.

242 The same thing can be said with respect to the trial judge's conclusion that s. 31 was essentially a political expedient and the reference to "extinguishment of the Indian Title," was the vehicle of convenience chosen to accomplish it. A review of the history of the discussions in Parliament in

early May 1870, references to Ritchot's diary, and Macdonald's statements in the House in 1885 earlier referred to, are all evidence supporting the trial judge in this instance.

243 There can be no doubt, as the trial judge found, that the aboriginality of the Métis was (and is) distinctly different than that of the Indians. Strong support for this conclusion is found in the comment made by Macdonald in 1885, noted earlier in these reasons at para. 156 and referred to by the Supreme Court in *R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236 at para. 22.

244 There can also be no doubt that the Métis were the cornerstone of a thriving settlement; and so they were until the Wolseley expedition soldiers arrived on the scene in the fall of 1870, after which serious incidents of discrimination and improper behaviour toward the Métis occurred for a time (see para. 95). Fortunately for all, as Ens testified, the reporting of such incidents almost entirely occurred in the early 1870s.

245 The important differences between Indians and Métis (in the nineteenth century and today) and the fact that this is not a traditional historic land claim could well be factors when considering the nature and extent of any fiduciary obligation owed to the Métis. But, as we shall see, assessing the significance of these factors is not an easy task.

III.7.1 Discretionary Nature of Declaratory Relief

246 At the outset, it must be noted that the appellants are not seeking personal remedies, but are instead seeking declaratory relief, admittedly in

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aid of extra-judicial political redress. As described by the trial judge in the opening paragraph of his judgment: "Their purpose in seeking such relief is simply to assist them in future negotiations with the Governments of Canada and Manitoba to achieve a land claims agreement and thereby correct the asserted historical wrong." The specific declarations sought by the appellants were listed by the trial judge in para. 5 of his reasons for decision.

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247 As Lazar Sarna, *The Law of Declaratory Judgments*, 3rd ed. (Toronto: Thomson Canada Limited, 2007) explains at p. 2, "[t]he inherent function of the court is to declare, in the sense of confirm, the rights of the parties seeking judicial intervention. The premise underlying the declaratory recourse is that judicial recognition of certain rights should not be withheld from the parties for reasons relating strictly to the procedural obstacles characteristic of other judicial remedies." A declaratory judgment "is a judicial statement confirming or denying a legal right of the applicant. Unlike most rulings, the declaratory judgment merely declares and goes no further in providing relief to the applicant than stating his rights. While consequential relief may be joined or appended, the court has the power to issue a pure declaration without coercive direction for its enforcement" (at p. 1). In Manitoba, s. 34 of *The Court of Queen's Bench Act*, C.C.S.M., c. C280, provides that "[t]he court may make a binding declaration of right whether or not consequential relief is or could be claimed."

248 It is well settled that the granting of declaratory relief is discretionary. See *Solosky v. The Queen,* [1980] 1 S.C.R. 821 at 832-33; *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53; *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167 at 191-92, and Sarna at pp. 2, 18. On appeal,

Canada emphasized the discretionary nature of declaratory relief and submitted that the trial judge properly refused to exercise his discretion.

249 Where a trial judge's decision is discretionary, it is well settled that the appropriate standard of review to be applied is that enunciated by the Supreme Court of Canada in *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, referred to by this court in *Homestead Properties (Canada) Ltd. v. Sekhri et al.*, 2007 MBCA 61, 214 Man.R. (2d) 148 at para. 13, namely, that the decision should not be overturned unless the judge has misdirected himself as to the law, his decision is so clearly wrong as to amount to an injustice, or he committed a palpable and overriding error: see, for example, *Hozaima v. Perry et al.*, 2010 MBCA 21 at para. 17, and *Penner et al. v. Quintaine (P.) & Son Ltd.*, 2007 MBCA 159, 225 Man.R. (2d) 44 at para. 16.

250 As declaratory relief is discretionary, the trial judge's decision not to exercise his discretion to grant such a remedy in this case is entitled to significant deference. For the reasons set out herein, I have not been persuaded to interfere with the trial judge's alternative ruling to exercise his discretion to deny the appellants the declaratory relief they seek.

III.7.2 Standing

251 Another preliminary issue to be addressed in this case is the standing of the appellants to advance these claims. As explained by Sarna in his text on declaratory judgments (at p. 19):

> *Locus standi* [or "standing"] refers to the right of a party to appear or plead before the court on a question which is deemed to be of interest to that party. Standing or interest confers upon an applicant the right to be heard as distinct from the right to succeed in an action or proceeding for relief. …

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252 At trial, Canada and Manitoba conceded that the individual appellants had standing, but argued that the Manitoba Métis Federation (the "MMF") did not. The trial judge denied the MMF standing in the action, which finding is now appealed.

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253 As described in para. 345 of the trial judgment, the individual appellants were conceded by Canada and Manitoba to be "members of the Manitoba Métis community and descendants of persons … entitled to land and other rights pursuant to ss. 31 and 32 of the **Act**." In para. 347, the trial judge noted that there was no evidence regarding ancestral links between the membership of the MMF and the Métis of the area prior to and at July 15, 1870.

254 While the trial judge recognized that the MMF filled a role as a representative of Métis in Manitoba in a political sense, he was not convinced that they had legal standing to participate in this case. He rejected the appellants' argument that standing had been decided at an earlier point in the case and that the respondents were therefore estopped from challenging the MMF's standing at this point. Alternatively, he would have exercised his discretion and not allowed the doctrine of issue estoppel to prevail in the circumstances. Moreover, he was not persuaded that the MMF met the test developed by the Supreme Court regarding public interest standing. For these reasons, he concluded that the MMF did not have standing to advance these claims.

III.7.2(a) *Positions of the Parties Re Standing*

255 On appeal, the appellants argue that the trial judge erred in denying

the MMF standing. They submit that the relevant criteria for establishing public interest standing are present in this case. Furthermore, they stress that all appellants have a collective interest in obtaining a resolution of the issues raised in this case. As such, they say that the MMF should be granted standing.

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256 In response, Canada points to the deferential standard of review applicable to decisions regarding standing. They argue that the trial judge did not err in denying the MMF standing in this matter. Furthermore, they observe that the benefits provided by ss. 31 and 32 of the *Act* inured to individuals, not collectives or corporate entities such as the MMF. Canada denies that the Red River Métis were a collective prior to passage of the *Act* and says that the *Act* clearly bestowed rights on individual persons, not on a collectivity. Citing examples from the jurisprudence, Canada argues that courts have denied corporate plaintiffs standing in aboriginal cases dealing with historic grievances, where interested individuals are capable of bringing the claims forward. For these reasons, Canada supports the decision of the trial judge denying the MMF standing.

257 Like Canada, Manitoba emphasizes the deferential standard of review applicable to decisions regarding standing. As stated in para. 34 of its factum, "Manitoba submits that granting public interest standing is discretionary and the trial Judge's decision is deserving of deference and can only be disturbed on the basis of palpable and overriding error." Manitoba argues that the trial judge did not commit any palpable or overriding error on this point.

258 Manitoba's concession regarding the standing of the individual appellants is explained as follows (at para. 178 of its factum):

> The genealogical and land titles evidence tendered at the trial established that eleven of the seventeen named Plaintiffs had ancestors who entered into transactions involving section 31 lands. These transactions would have been governed by the Manitoba statutes that the Plaintiffs seek to have declared unconstitutional. Manitoba took no exception at trial to the standing of these individuals to challenge the constitutionality of the impugned enactments.

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259 However, Manitoba noted that none of the appellants, including the MMF, alleged that any transaction of an ancestor was affected by *The Lands of Half-breed Children Act*. Thus, Manitoba argues, all of the appellants lack standing to challenge this particular statute.

260 With respect to the MMF, Manitoba submits that it lacks direct standing, as it was not directly impacted by any of the impugned statutes. Similarly, the trial judge did not err in finding that the MMF could not satisfy the test for obtaining public interest standing.

III.7.2(b) *Conclusion Re Standing*

261 It is trite to say that a trial judge's decision regarding standing is discretionary (see, for example, *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 at 253). As such, the deferential standard of review applicable to discretionary decisions described above in connection with declaratory relief is also applicable to the issue of standing.

262 As explained, decisions regarding standing and declaratory relief are

both discretionary in nature. As to the relationship between standing and declarations, Sarna writes (at pp. 19-20):

> In seeking guidance from the case law for principles governing the use of discretion to grant a declaration, one is met with a double world of discretionary power which unfortunately blurs analysis. The court has sufficient leeway, perhaps tantamount to outright discretion, to decide whether or not an applicant for relief has legal interest to sue; at the same time, the court in its absolute discretion may decide whether or not declaratory relief is suitable and should be granted. Although standing, or the right to request relief, is a matter entirely different from, but not independent of, the right to relief, the decision to deny legal standing has usually been made not in the name of discretion to determine standing, but in the name of the declaratory discretion, as if the reasons for denial are unique to and characteristic of the declaratory remedy. In other instances, it has been assumed that the *locus standi* of an applicant must be determined in light of the special relief sought, and that accordingly declaratory discretion and discretion on standing must unavoidably suffer a degree of fusion.

263 In this case, the trial judge appropriately addressed the issues of standing and declaratory relief separately, though both related to the exercise of his judicial discretion.

264 The issues of standing and mootness are closely related. Questions of standing often arise where a matter is moot before it is even brought to court, whereas the mootness doctrine is usually only engaged when a live dispute becomes moot during the course of its progress through the courts. Professor Peter W. Hogg, *Constitutional Law of Canada*, looseleaf (Toronto: Carswell, 2007) explains (at para. 59.3(a)):

> … Mootness is like an absence of standing in that the court is being invited to rule on an issue that has no direct impact on the parties to the proceedings. The difference is that standing is judged at the commencement of the proceedings, whereas mootness is judged after

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> the commencement of the proceedings. The parties to a moot case had a real dispute when the proceedings commenced, but the passage of time caused the dispute to disappear. …

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265 Hogg observes that "[m]ootness, it has been said, is 'the doctrine of standing set in a time frame'" (at p. 59-19, n. 78). Hogg further notes that "[t]he rule against deciding moot cases flows from the same policy considerations as those that support restrictions on standing" (at para. 59.3(b)).

266 Robert J. Sharpe, ed. (now Mr. Justice Sharpe) shares this view of the interconnection between mootness and standing. In *Charter Litigation* (Toronto and Vancouver: Butterworths, 1987) he wrote (at pp. 331-32):

> The term "moot" is used to describe those situations where a concrete issue once divided the parties, but by the time the case comes on for decision, that issue has for some reason ceased to exist. Mootness presents a problem similar to that encountered in cases dealing with standing and hypothetical or abstract issues in that the parties are not seeking a precise remedy they can implement, but rather are asking for the court's opinion on a point of law. There is, however, an important difference. Standing and hypothetical or abstract question cases typically present situations where no concrete issue ever existed. …. In a mootness situation, at some time, usually even after suit was commenced there was a tangible and undeniably litigable question on which the parties could join issue in the usual adversarial way. Mootness cases are, then, a rather special version of the phenomenon of public law litigants' concern over a point of law rather than a specific remedy. The parties have, at one time, been able to concretize, in the form of a traditional adversarial dispute, the point they want resolved, but that concrete dispute has disappeared before the final resolution of the case and before the court has pronounced upon the point of law the parties hope to resolve.

267 In this instance, the arguments of the parties regarding mootness

might more accurately have been directed at the issue of standing, as there is no assertion by any party that the alleged mootness arose after this matter came before the courts. However, the respondents chose not to challenge the standing of the individual appellants, but chose to argue mootness instead. Given that it does not appear to be an absolute requirement of the mootness doctrine that a concrete legal dispute exists between the parties at some point after the commencement of the suit, this court will follow the approach taken by the parties and address these issues in connection with mootness, instead of with respect to the appellants' standing.

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268 As for the trial judge's decision that the MMF did not meet the criteria for public interest standing, I have not been persuaded to interfere with his discretionary decision. The trial judge referred to and properly applied the leading cases. He relied in particular on the leading authority of *Canadian Council of Churches*, where Cory J., for the court, wrote (at pp. 252-53):

> It has been seen that when public interest standing is sought, consideration must be given to three aspects. First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?

Cory J. observed that it is the third criteria that can give rise to real difficulty, noting (at p. 252):

> The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private

> litigant. The principles for granting public standing set forth by this Court need not and should not be expanded. The decision whether to grant status is a discretionary one with all that that designation implies.
> …

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There is no justification for interfering with the trial judge's exercise of discretion to deny standing to the MMF.

III.7.3 Limitations

269 A threshold issue to be addressed in this case is whether or not any or all of the claims advanced by the appellants are barred by statutory limitation periods. In addressing this issue, the appellants' claims may be categorized as a claim for breach of fiduciary duty and claims alleging unconstitutionality. As noted above, the appellants are not seeking personal remedies, but are instead seeking declaratory relief, admittedly in aid of extra-judicial political redress.

270 The trial judge found that the relevant events occurred between 1869 and, at the very latest, 1890. He noted that the appellants' claim was only filed on April 15, 1981. With respect to the limitations arguments raised by the Crown, the trial judge found that the appellants' action was statute-barred, either under the legislation in force at the time the events took place or at the time the claim was filed, with the possible exception of their constitutional claims. Specifically, the trial judge found as follows (at paras. 438-41, 445-48):

> Limitation of actions statutes were known to the law in 1870 and thereafter. The laws of England applicable to Manitoba in 1870 included such legislation.

Manitoba itself passed its first limitation of actions legislation in 1931, namely, the **Limitation of Actions Act**, S.M. 1931, Cap. 30. The **Limitation of Actions Act** was reenacted in 1940 (S.M. 1940 (1st), Cap. 29). Excepting for the moment the issue of constitutional validity or challenge, both of those **Acts** contained similar provisions which would have been applicable to the plaintiffs' action. Those **Acts** necessitated that actions for any equitable ground of relief had to be commenced within six years from discovery of the cause of action. They also provided after listing various grounds for action that any other action not specifically provided for in the statute had to be commenced within six years after the cause of action arose. Both **Acts** also contained provision to the effect that if a person had a cause of action which arose before or after the coming into force of the **Act**, such action would not be barred until the expiry of six months after the **Act** came into force.

The **Limitation of Actions Act** in force in Manitoba at the time this action was commenced contained the same provisions material to this litigation as did the **Acts** of 1931 and 1940 to which I earlier referred.

In this action, the plaintiffs seek declaratory relief which is a claim for equitable relief. Excepting the issue of constitutional validity and challenge, there is, in my view, no question that the plaintiffs' action is outside the limitation period statutorily mandated by the **Limitation of Actions Act**.

I am satisfied on the evidence in this case that the residents at the time, or their leaders, would have known of their rights under s. 31 and s. 32 of the **Act**, and would have known that which was actually transpiring in respect of the administration and implementation of those sections, including the federal and provincial legislation and enactments.

As they had demonstrated their willingness to litigate in respect of their rights, one could infer from their conduct respecting ss. 31 and 32 that they were content at least ultimately with the administration and implementation of the **Act**. While I am not prepared to do so, I do infer that they chose not to challenge or litigate in respect of s. 31 and s. 32 knowing of the sections, of what those sections were to provide them, and of their rights to litigate.

In the circumstances as exist in this case, I conclude that t**he Limitation of Actions Act** applies and on that basis I would dismiss the plaintiffs' action.

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> If I am incorrect in that conclusion, it is my view that the only aspect of the plaintiffs' action that would not be statute barred is their request for a declaration pertaining to the constitutional validity of the enactments listed in paragraphs 49, 50, 51 and 52 of their statement of claim including the effect of such legislation upon the plaintiffs' rights as claimed; that is, a declaration as to whether those enactments were *ultra vires* the Parliament of Canada and/or the Legislature of Manitoba respectively.

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271 In this way, the trial judge found the appellants' action to be statute-barred, with the possible exception of the declarations of constitutional invalidity they sought.

III.7.3(a) *<u>The Appellants' Position</u>*

272 The appellants argue that the trial judge erred in finding their claims to be statute-barred. They point to the constitutional nature of their claims, including the breach of a constitutionally mandated fiduciary duty, and take the position that a declaration of *ultra vires* is always available. However, they concede that any request for personal relief, such as damages, would be subject to the applicable statute of limitations. They emphasize that all they are seeking is a declaration of invalidity in aid of extra-judicial relief, which they say is outside the purview of limitations legislation.

273 The appellants appear to take the position that their claim for breach of fiduciary duty is governed by s. 2(1)(k) of the current *Limitation of Actions Act*, C.C.S.M., c. L150 (the *LAA*), which imposes a six-year limitation period for actions "grounded on accident, mistake or other equitable ground of relief." The six-year limitation period runs from "the discovery of the cause of action." They argue that s. 7.1 of the *LAA*, added

in 2002, specifically negates the ultimate 30-year limitation period imposed by s. 7(5), which therefore has no application to their claim.

274 As to the issue of discoverability, they argue that "the requisite knowledge under s. 2(1)(k) goes beyond mere knowledge of the facts giving rise to a claim, and extends to an appreciation that when the law is applied to the facts, a successful claim is a reasonable possibility." The appellants say that the trial judge erred by looking solely to "the knowledge of individuals of their individual causes of action and not the knowledge of the Métis as regards their collective interest in the due and proper administration of the *Manitoba Act*." They say the evidence led at trial "established that the Métis community could not have reasonably discovered either the decisive 'facts' on which their claim was to be based, or all the 'elements' giving rise to a successful claim in respect of their collective rights, until, at the earliest, approximately two years before the claim was filed."

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III.7.3(b) *Canada's Position*

275 Canada submits that the trial judge's decision on limitations was correct. It argues that the *LAA* applies to all causes of action, regardless of the type of remedy sought. It argues that limitation periods also apply to challenges regarding constitutional validity where the legislation in question is no longer in force. It emphasizes that the case at bar revolves around a spent provision of the *Constitution* and ancillary legislation no longer in operation. It says that "ss. 31 and 32 [of the *Manitoba Act, 1870*] are a unique type of constitutional provision. Both of those sections had a one-time delivery aspect to them, unlike the language and denominational school

sections of the *Act*, or the sections setting up governmental institutions, all of which carry an ongoing and continuous obligation." Thus, it argues that "[t]he limitation period therefore runs, in the case of s. 31, from the date the impugned legislation detrimentally impacted upon the one-time delivery of the land asset to a claimant, and the limitation period for s. 32 applies when the impugned legislation resulted in the dismissal of a particular claimant's application under s. 32."

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276 In terms of the applicable legislation, Canada notes that the current s. 2(1)(k) of the *LAA* regarding claims for breach of fiduciary duty existed as early as 1931, as s. 3(1)(i) of *The Limitation of Actions Act*, S.M. 1931, c. 30 (the "*LAA 1931*"). It says s. 2(1)(n), the catch-all limitation period of six years, would apply to all other claims advanced by the appellants. Again, it notes that a similar section existed in Manitoba as early as 1931 (s. 3(1)(l)). In para. 30 of their amended statement of defence, they pleaded and relied upon *The Limitation of Actions Act*, R.S.M. 1970, c. L150, *as am.*, *An Act for the Limitation of Actions and Suits Relating to Real Property*, 3 & 4 William 4, c. 27 (1833) and *An Act for Limitation of Actions*, 21 Jacobi 1, c. 16.

277 With respect to the applicable discoverability principles, Canada points to this court's decision in *Beaudoin et al. v. Conley*, 2000 MBCA 83, 150 Man.R. (2d) 34, leave to appeal denied [2000] S.C.C.A. No. 663 (QL), where the majority opined that "the limitation will begin to toll when the material facts on which a claim is based have been discovered or ought to have been discovered by the plaintiffs by the exercise of reasonable diligence" (at para. 75).

278 In response to the appellants' argument that the trial judge erred by examining the appellants' claims individually rather than collectively, Canada submits that "since individual claims are at the root of any claim under s. 31 or s. 32, it is correct to assess discoverability from the individual's perspective. There is no principled reason why a collective should be in any better position." Moreover, in response to the appellants' argument that they only recently discovered their cause of action due to the historical research that has been conducted, Canada argues that "if the claim had been brought in a timely way, when live witnesses were available, there would have been no need to rely on historical research."

III.7.3(c) *Manitoba's Position*

279 Manitoba joins Canada in supporting the trial judge's finding that the appellants' claims are statute-barred. Like Canada, it emphasizes that all of the impugned statutes have been repealed since 1970. With respect to the potential remedy, Manitoba notes that "[t]he outcome of a constitutional challenge to legislation is that the provision is declared unconstitutional and of no force or effect. The outcome of a paramountcy argument is that the statute is declared inoperative. These outcomes have already been obtained. The statutes are of no force or effect and inoperative because they have been repealed. Thus, this court is being asked to engage in an exercise with no legal consequences."

280 With respect to the governing legislation, Manitoba observes that this province first enacted limitations legislation regarding land transactions in 1883, which came into effect in 1885. *The Real Property Limitation Act*,

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S.M. 1883, c. 26 (the *RPLA 1883*), established a 10-year limitation period for the recovery of land that ran from the date of dispossession. As such, Manitoba argues that "any individual who had sold a section 31 interest would have had 10 years from the date of sale, or from turning twenty-one, to argue that the contract transferring title ought to be voided on the basis that the legislation authorizing the contract was unconstitutional." It is Manitoba's position that "[a]ll of the section 31 recipients would have turned twenty-one by 1891, the bulk of the patents were issued by 1881 and the last patent was issued in 1901. Therefore, by early in the twentieth century at the latest, and decades before the Statement of Claim was issued in 1981, all of the personal actions for the recovery of land by the section 31 grantees, who would have sold pursuant to the Manitoba statutes, would have been statute barred." In para. 35 of its amended statement of defence, Manitoba pleaded and relied upon "*The Limitation of Actions Act*, R.S.M. 1987, c. L150 and the predecessors thereto."

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281 In sum, "Manitoba submits that limitation statutes ought to apply to constitutional challenges dealing with repealed and spent legislation. The theory behind limitation statutes is equally applicable to potential declarations of unconstitutionality as it is to stale private law cases. Since this case is long statute-barred, Manitoba submits it ought to be dismissed on that basis."

III.7.3(d) *Standard of Review*

282 It is trite to say that all questions of law pertaining to the limitation periods applicable to the case at bar are governed by a standard of review of

correctness: *Stuffco v. Stuffco et al.*, 2006 ABCA 317, 397 A.R. 111 at para. 10. However, deference must be shown to the factual findings made by the trial judge, such as those relating to the discoverability of the appellants' causes of action: *Peterson et al. v. Highwood Distillers Ltd. et al.*, 2005 ABCA 248, 47 Alta.L.R. (4th) 225 at para. 17.

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III.7.3(e) *Conclusion Re Limitations*

283 The threshold issue to be addressed on this point is, which limitations statute governs the case at bar. This preliminary question is necessarily related to the issue of whether limitations statutes apply to claims alleging constitutional invalidity.

284 As noted above, the appellants allege that the current limitations statute in force in Manitoba (the *LAA*) applies to their claim for breach of fiduciary duty. Canada observes that the current limitation period for breach of fiduciary duty claims was originally enacted in 1931; thus, it makes no difference whether the provisions of the *LAA* or the *LAA 1931* are applied. Manitoba argues that the *RPLA 1883* operates as a statutory bar to the appellants' claims.

285 By virtue of s. 32 of the current *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, provincial limitation periods generally apply to litigation involving the federal Crown. A provision of this nature has been in force since 1887 (see *An Act to amend "The Supreme and Exchequer Courts Act," and to make better provision for the Trial of Claims against the Crown*, S.C. 1887, c. 16 (50-51 Vict.), s. 18). As such, the provincial limitations statute that governs this matter will also apply to the appellants'

claims against Canada.

286 Turning first to the legislation in force in Manitoba at the time the relevant events occurred, none of these statutes expressly addressed claims for breaches of fiduciary duties or claims involving declarations of constitutional invalidity. Generally speaking, at that time equitable suits (such as for breach of fiduciary duty) were governed by the doctrine of laches, not statutory limitation periods. Thus, as Manitoba asserts, while it is true that all of the personal actions for the recovery of land by the s. 31 grantees, who would have sold pursuant to the Manitoba statutes, would have been statute-barred by the early twentieth century, the appellants' fiduciary duty and constitutional invalidity claims would not have been similarly barred.

287 The *LAA 1931* was the first statute in Manitoba to prescribe a limitation period for "actions grounded on accident, mistake or other equitable ground of relief." This provision has remained in Manitoba's limitations legislation up to the present day and was in force at the time the appellants' claim was filed: *The Limitation of Actions Act*, R.S.M. 1970, c. L150, s. 3(1)(i). Given the transitional provisions contained in that legislation (see ss. 6 and 60), it would appear as though the limitation period prescribed by the 1970 *Act* governs the case at bar. In all of its iterations, the six-year limitation period ran from "the discovery of the cause of action."

288 As previously held by this court, this provision encompasses claims for breach of fiduciary duty: *Beaudoin* at para. 74, and *Johnson v. Johnson*, 2001 MBCA 203, 163 Man.R. (2d) 46. As well, since it includes a built-in

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discoverability principle, Part II of Manitoba's limitations legislation (which gives applicants a one-year window within which to apply for leave to extend the time for commencing or continuing an action, based on discoverability) has no application: *Rarie v. Maxwell* (1998), 131 Man.R. (2d) 184 (C.A.) at para. 31.

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289 Graeme Mew, *The Law of Limitations,* 2nd ed. (Markham: LexisNexis Butterworths, 2004) at 45, succinctly stated, "A cause of action has accrued and, hence, a limitation period starts to run when all of the elements of a wrong exist, such that an action can [be] brought." However, Mew goes on to note that this traditional focus on the accrual of the cause of action "has recently been modified in many cases to instead reflect the time when the plaintiff became aware of the cause of action and remedy available" (*ibid.*).

290 I agree with Canada's submission that the discoverability principles outlined by this court in *Beaudoin* are applicable to the case at bar. In that case, a majority of this court concluded, "… the limitation will begin to toll when the material facts on which a claim is based have been discovered or ought to have been discovered by the plaintiffs by the exercise of reasonable diligence" (at para. 75). See also *Tacan et al. v. Canada*, 2005 FC 385, 261 F.T.R. 161 at para. 73. Thus, if the appellants' cause of action was complete and discoverable more than six years before April 15, 1981, then the action (at least with respect to the claim for breach of fiduciary duty) would be statute-barred. The burden of proof with respect to discoverability rests with the appellants: *Gamey v. Langenburg (Town)*, 2010 SKCA 11, 343 Sask.R. 258 at paras. 33-38; *Authorson* at para. 137.

291 In both *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, and *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372, the Supreme Court emphasized that the rules regarding limitation periods, as well as the policy behind limitation periods, apply as much to aboriginal claims as to other causes of action. As Binnie J. observed in *Wewaykum*, “Evolving standards of conduct and new standards of liability eventually make it unfair to judge actions of the past by the standards of today” (at para. 121). This sentiment was echoed and affirmed in *Lameman* at para. 13, and is equally applicable here.

292 Given the Supreme Court’s rulings in *Wewaykum* and *Lameman*, the evolution of the law regarding the Crown-Aboriginal fiduciary relationship should not play a role in the discoverability analysis conducted with respect to the case at bar. Courts should not countenance plaintiffs delaying the commencement of proceedings, beyond the applicable limitation period, on the basis that the law might change in their favour. In any event, the fact that the appellants’ claim was brought before the Supreme Court’s seminal ruling in *Guerin* would seem to reduce the potential importance of this factor in this case. As well, it must be understood that seeking a political resolution of a dispute does not suspend the limitation period: *Tacan* at para. 79; *Perrot v. Canada (Minister of Fisheries and Oceans)*, 2009 NLTD 172, 291 Nfld. & P.E.I.R. 249 at paras. 27 *et seq*.

293 The trial judge held that the appellants knew of their rights and their entitlement to sue more than six years prior to April 15, 1981. Specifically, the trial judge noted that action had been taken in the nineteenth century by the community concerning asserted breaches of ss. 22 and 23 of the *Act,* that

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the evidence before him was incomplete, and that because of the long delay both Canada and Manitoba had lost the opportunity to take legislative action in response to the appellants' assertions in these proceedings. The trial judge's factual finding regarding discoverability deserves deference. Since the appellants have not demonstrated that the trial judge misapplied the law or that he committed palpable and overriding error in arriving at this conclusion, I affirm the trial judge's ruling that the appellants' claim for breach of fiduciary duty with respect to both s. 31 and s. 32 of the *Act* is statute-barred.

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III.7.3(f) *Equitable Fraud*

294 The concept of equitable fraud is expansive and multi-faceted. In the context of limitations and laches, the doctrine can operate to prevent the running of time against a party whose potential cause of action is concealed by fraud on the part of the defendant. In Manitoba, this equitable concept has been incorporated into the governing limitations legislation. The issue in this case is whether or not the doctrine of equitable fraud, also called fraudulent concealment, should be used to prevent the appellants' fiduciary duty claim from being statute-barred.

295 It does not appear that equitable fraud was argued before the trial judge, as his lengthy judgment does not contain any findings on this point. He merely observed that "there is no claim of dishonesty, sharp dealing or bad faith attributable to the defendants in the claim as advanced" (at para. 1209). He made no findings as to any allegations of fraudulent concealment.

III.7.3(f)(i) *Positions of the Parties*

296 Equitable fraud was not addressed in the pleadings or the written materials filed on this appeal. It was raised for the first time in oral argument at the appeal hearing.

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297 In their reply, the appellants simply stated that "neither the doctrines of laches and acquiescence nor any statutory limitation periods or any estoppel apply" and, in any event, they ought not, in the discretion of the court, to be applied. But at the appeal hearing, they argued that the doctrine of equitable fraud should be applied in this case to prevent any of their claims from being barred. However, they provided no factual basis for that assertion.

298 Canada submitted that "[t]here is ample evidence to support the learned trial judge's finding that there was no bad faith or fraud on the government's part, and none was pleaded." However, neither Canada nor Manitoba made specific written submissions regarding fraudulent concealment.

III.7.3(f)(ii) *Governing Legal Principles*

299 The leading Canadian cases on equitable fraud and limitation periods are the Supreme Court of Canada's decisions in *Guerin* and *M.(K.) v. M.(H.).* In *Guerin*, Dickson J. (as he then was) wrote on behalf of the majority of the court that (at p. 390):

> It is well established that where there has been a fraudulent concealment of the existence of a cause of action, the limitation period will not start to run until the plaintiff discovers the fraud, or until the

> time when, with reasonable diligence, he ought to have discovered it. The fraudulent concealment necessary to toll or suspend the operation of the statute need not amount to deceit or common law fraud. Equitable fraud, defined in *Kitchen v. Royal Air Force Association,* [1958] 1 W.L.R. 563, as 'conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other', is sufficient.

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300 This formulation of the doctrine was affirmed by La Forest J. in *M.(K.)* at pp. 56-57. He stated that "the courts will not allow a limitation period to operate as an instrument of injustice" (at p. 59).

301 As succinctly summarized by Lord Hailsham of St. Marylebone, ed., *Halsbury's Laws of England*, 4th ed. (London: Butterworths, 1979), vol. 28, "Limitation of Actions" (at paras. 919-21):

> . . . . .
>
> It is not necessary, in order to constitute fraudulent concealment of a right of action, that there should be active concealment of the right of action after it has arisen; the fraudulent concealment may arise from the manner in which the act which gives rise to the right of action is performed.
>
> . . . . .
>
> "Fraud" does not necessarily imply moral turpitude; it is enough if the conduct of the defendant or his agent is so unconscionable that it would be inequitable to allow him to rely on the limitation period.
>
> The standard of diligence which the defrauded person needs to prove is high, except where he is entitled to rely on the other person. … it must be shown that there has been something to put him on inquiry in respect of the matter itself, and that if inquiry had been made it would have led to the discovery of the real facts. If, however, a considerable interval of time has elapsed between the alleged fraud and its discovery, that of itself may be a reason for inferring that the fraud might with reasonable diligence have been discovered much earlier.

302 In *Authorson*, the Ontario Court of Appeal described the equitable

fraud doctrine in the following manner (at para. 120):

> The principle of "equitable fraud" is aimed at preventing a limitation period from operating "as an instrument of injustice": *M.(K.) v. M.(H.)*, [*supra*] at para. 66 [p. 59]. It has been described in many ways. Essentially, it involves some form of unconscionable conduct on the part of a wrongdoer who stands in a special relationship with another party, where the conduct conceals the existence of a claim by that party against the wrongdoer and is considered by equity to be sufficient to preclude the wrongdoer from relying on a limitation period defence.
> [emphasis added]

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303 After reviewing the facts, the court concluded that there was no conduct on the part of the Crown amounting to concealment.

304 The court commented on the difference between concealment and denial as follows (at para. 139):

> The Class argues that the Crown's persistent denial of its fiduciary obligations to the veterans over the years, together with its failure to inform the veterans of their right to sue, constitutes equitable fraud. We do not agree. *Concealment* not *denial* is the gravamen of equitable fraud, and breach of the fiduciary obligation itself is not sufficient to trigger its application.

305 With respect to the onus of proof, the court commented that "the motion judge erred in imposing a reverse onus on the Crown, particularly where, as here, equitable fraud had not been pleaded and the Crown had no opportunity to meet the claim at the evidentiary level" (at para. 135). In this way, the Ontario Court of Appeal confirmed that the onus is on the plaintiff to prove equitable fraud on the part of the defendant, even where a fiduciary relationship is alleged to exist between the parties.

306 In *Photinopoulos v. Photinopoulos et al.* (1988), 92 A.R. 122, the Alberta Court of Appeal observed that moral turpitude is not required;

instead, a finding of equitable fraud turns on the unconscionability of a defendant's conduct. In *V.A.H. v. Lynch et al.*, 2000 ABCA 97, 255 A.R. 359, the court noted that, where the parties are in a fiduciary relationship, a mere failure to inform the plaintiff of wrongdoing may amount to equitable fraud on the part of the defendant. As the court stated (at para. 29):

> Even in cases of fraudulent concealment, the plaintiff may be required to exercise reasonable diligence to discover the fraud and thereby uncover the cause of action: **Guerin v. Canada** [*supra*]. What conduct is required of a plaintiff depends on the particular facts of the case.

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307 In the case at bar, there is no factual foundation to support a finding of equitable fraud. Furthermore, as in *M.(K.) v. M.(H.)* and *Authorson*, the applicability of the doctrine of equitable fraud does not appear to have been argued before the trial judge or addressed by the appellants prior to oral argument. In the circumstances, it would be entirely inappropriate to make a finding of equitable fraud on this appeal. For these reasons, I am of the view that the doctrine of equitable fraud should not be employed to delay the commencement of the limitation period with respect to the appellants' fiduciary duty claim.

III.7.3(g) *The Application of Limitation Periods to Claims Alleging Constitutional Invalidity*

308 The leading Canadian cases on the application of limitation periods to constitutional claims are the Supreme Court's decisions in *Kingstreet Investments Parliament v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, and *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181.

309 In *Kingstreet*, the court applied the general six-year limitation period to limit the recovery of unconstitutional taxes. The court held that limitation periods apply to claims for personal remedies that flow from the striking down of an unconstitutional statute.

310 The issue before the court in *Ravndahl* was "whether a statutory limitation period applies to personal claims for constitutional relief, and if so, how the limitation period affects such claims" (at para. 1). The Supreme Court was not called upon to discuss the interaction between limitation periods and declaratory relief under s. 52 of the *Constitution*. *Ravndahl* was thus limited to the issue of personal relief in cases alleging unconstitutionality.

311 The appellant in *Ravndahl* had been receiving a workers' compensation pension as a surviving spouse, but lost that right when she remarried in 1984. She brought an action in 2000 seeking declarations that various provincial statutes were unconstitutional. She also sought an order reinstating her pension, along with damages and interest. The trial judge found that all her claims were statute-barred (2004 SKQB 260, 251 Sask.R. 156). The majority of the Saskatchewan Court of Appeal allowed the appeal, reinstating the claims relating to declaratory relief, but confirming that the claims for personal relief were statute-barred (2007 SKCA 66, 299 Sask.R. 162). Smith J.A., in dissent, would have allowed the appeal in its entirety.

312 The Supreme Court held that the appellant's cause of action arose on April 17, 1985, when s. 15 of the *Canadian Charter of Rights and Freedoms*

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came into effect. Her claim was based on the alleged unconstitutionality of legislation passed in 1978. The court concluded that the appellant's claims for personal relief were statute-barred. As a result, the appeal was dismissed.

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313 While the Supreme Court of Canada did not address limitation periods and s. 52 declarations of invalidity in *Ravndahl*, that issue was canvassed by the Saskatchewan Court of Appeal. The majority stated that, "Section 52 applications for declarations of invalidity are not generally considered to be governed by *The Limitation of Actions Act* [R.S.S. 1978, c. L-15]" (at para. 10). In dissent, Smith J.A. opined that, "No authority has been cited that would justify the application of a statutory limitation provision to a claim for a declaration pursuant to s. 52(1) that a statute or statutory provision is unconstitutional. Such an argument is inherently implausible" (at para. 100). In this way, all members of the panel rejected the notion that limitation periods could be applied to prevent a court from making a declaration that a statute was unconstitutional.

314 This approach is consistent with the Supreme Court's ruling in *Kingstreet*, where only the extent of the recovery for money paid under the *ultra vires* legislation was limited; the limitations legislation did not bar the claim for a declaration of invalidity under s. 52. As this court has previously held, "The courts can determine the constitutional validity of legislation no matter how old it is": *Dumont v. Can. (A.G.)*, [1988] 5 W.W.R. 193 at 207.

315 As noted above, the appellants in this case are seeking a declaration of invalidity in aid of extra-judicial relief and not personal remedies, such as

damages. As demonstrated by the foregoing review of the jurisprudence, the type of relief sought has a significant impact upon whether or not statutory limitation periods will apply to particular constitutional claims. Limitation periods apply to personal actions for constitutional remedies, but they do not apply to applications for declarations of constitutional invalidity of a law. If the retroactive effect of a declaration of constitutional invalidity needs to be curtailed, then the factors enumerated by the Supreme Court of Canada in *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429 may be engaged. As described by the majority (at para. 93):

> The determination of whether to limit the retroactive effect of a s. 52(1) remedy and grant a purely prospective remedy will be largely determined by whether the Court is operating inside or outside the Blackstonian paradigm. When the Court is declaring the law as it has existed, then the Blackstonian approach is appropriate and retroactive relief should be granted. On the other hand, when a court is developing new law within the broad confines of the Constitution, it may be appropriate to limit the retroactive effect of its judgment.
>
> [emphasis added]

316 The majority noted that legal mechanisms such as "the law of limitations" may "mitigate the consequences of declaratory rulings in certain circumstances" (at para. 101). The majority discussed the "well-established doctrine of qualified immunity in respect of the adoption of unconstitutional statutes" (at para. 102). As they went on to explain, "Where legislation is found to be invalid as a result of a judicial shift in the law, it will not generally be appropriate to impose liability on the government" (*ibid.*). Thus, damages will not generally be awarded in such situations, although declarations of constitutional invalidity may be made.

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317 The Crown's argument that the impugned constitutional legislation in this case is no longer in force would seem to have more bearing on the issue of mootness and will therefore be addressed in that context.

318 In view of the Supreme Court's pronouncements in *Kingstreet* and *Ravndahl*, I am of the opinion that the declarations regarding constitutional invalidity sought by the appellants in the case at bar are not subject to any statutory limitation periods. For this reason, I uphold the trial judge's alternative ruling that (at para. 448):

> … the only aspect of the plaintiffs' action that [is not] statute barred is their request for a declaration pertaining to the constitutional validity of the enactments listed in paragraphs 49, 50, 51 and 52 of their statement of claim including the effect of such legislation upon the plaintiffs' rights as claimed; that is, a declaration as to whether those enactments were *ultra vires* the Parliament of Canada and/or the Legislature of Manitoba respectively.
>
> [emphasis added]

III.7.4 Laches

319 Having found that the appellants' fiduciary duty claim is statute-barred, it is unnecessary to consider whether that claim is also defeated by the equitable doctrine of laches. However, as their constitutional claims are not statute-barred, I must now consider whether those claims are barred by laches.

III.7.4(a) *The Trial Judge's Findings*

320 The trial judge concluded that the doctrine of laches and acquiescence applied to all of the appellants' claims and operated as a complete defence to them. He found that there was "grossly unreasonable delay" (at para. 454)

on the part of the appellants in bringing these claims. He reviewed the reasons advanced to explain the delay and the impact of the delay. He noted that a declaration was a form of equitable relief and that a party seeking equitable relief must itself do equity. He found that the appellants did not meet this requirement. The relevant portions of his reasons on the issue of laches are the following (at paras. 454-60):

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> For the reasons already expressed in regard to limitations of actions, I have no hesitation in finding that those entitled to benefits under s. 31 and s. 32 of the **Act** were at the material time aware of their rights thereunder and of their right to sue if they so wished. As well, I conclude that there was grossly unreasonable delay in the commencement of action in respect of those rights and the breaches thereof as now claimed.
>
> The question remains, however, whether the delay of the plaintiffs constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable.
>
> Both Canada and Manitoba assert that both branches of the doctrine of laches and acquiescence apply to this case. As to the former, there was no evidence introduced to explain the delay. The only explanations offered came from counsel and were essentially as follows:
>
> (1) There was animosity in the community towards the Métis which might have deterred their willingness to do anything.
>
> (2) Had the plaintiffs sought legal advice at the time, they would probably have been told that they had no case.
>
> (3) There was objection expressed from time to time by community leaders and, in particular, by certain members of the Manitoba Legislature as to the delays in implementation of the **Act** and as to concerns about the vulnerability of the children who were to receive land under s. 31.
>
> None of these are a justifiable explanation at law for those entitled under s. 31 and s. 32, whether individually or collectively, to have sat on their rights as they did until 1981. Nor, in my view, does this delay in the exercise of their rights square with the evidence as to the conduct

of individuals and the larger community in respect of the steps taken when it was thought that there had been a breach of s. 22 and/or of s. 23 of the **Act**. In my view in law, this amounts to acquiescence.

In addition, the delay results in circumstances that make the prosecution of this action unreasonable. Both defendants assert a number of reasons why the prosecution of this case at this date is unreasonable. Some of those reasons are as follows:

(1) There is incompleteness in the evidence. …

…..

As well, while it is clear from the facts that the selection, allotment and ultimate grant of patents to the land in question, particularly under s. 31, was not done in a timely fashion, it is difficult for one to put that into context given that I am forced to look at that which occurred between 1870 and 1890 largely through 2007 glasses.

(2) When one is considering the constitutionality of legislation, a pith and substance analysis is required in order to understand the purpose and effect of the legislation. Understanding the social context and the culture at the material time is critical to being able to properly undertake this task. Here, there are doubtless different societal attitudes and values than was the case over 125 years ago, including changes in the common law.

(3) The legislation and regulations under attack were passed between 1871 and 1890 re Canada and between 1877 and 1885 re Manitoba. The outcome of a successful challenge to legislation is that the offending legislation is declared unconstitutional and of no force and effect. The outcome of a successful challenge under the doctrine of paramountcy is that the offending legislation is declared inoperable.

Such challenges were available to the forebears of the plaintiffs at the time.

Had there been a successful attack on either basis at the time, the remedy would have been much more easily determined and applied. Often where legislation is struck down as unconstitutional, it is replaced by other legislation which passes constitutional muster. Both Canada and Manitoba were deprived of that opportunity. And, in the meantime, hundreds of

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> transactions have been conducted in accordance with those enactments.
>
> (4) In the present action, the plaintiffs seek declaratory relief to assist them in advancing a land claim in the hope that they will be able to successfully negotiate a land claim agreement. At the material time, the available land was owned by Canada. In 1930, Canada transferred control over ungranted lands to Manitoba and thus lost, to a significant extent at least, an asset which it could have used to settle the claim if a timely and successful attack had been advanced. As the ungranted lands in the province are now owned by Manitoba, it, too, suffers similar prejudice in that had the claim been made successfully in a timely fashion, the remedy would likely have been either to not replace legislation struck down or to replace it with constitutionally valid legislation. Now, however, a settlement will presumably result in payment of monies or land.
>
> Declaratory relief is equitable relief. That is what the plaintiffs seek in this case. As a general rule, one who seeks equity must do so promptly. That certainly cannot be said to be the case here.
>
> For that reason and the reasons given as to why in my view the prosecution of this case at this date is unreasonable, I conclude that the doctrine of laches and acquiescence is here applicable and amounts to a successful defence to the plaintiffs' claim.

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321 In the context of this analysis, it does not appear that the trial judge differentiated between the appellants' claim for breach of fiduciary duty and their *Constitution*-related claims. He found that the doctrine of laches and acquiescence applied and acted as a defence to all of the appellants' claims.

III.7.4(b) *The Appellants' Position*

322 The appellants submit that the trial judge erred in finding that the doctrine of laches applied to this action and acted as a successful defence to it. They stress that delay alone is insufficient to trigger the doctrine of laches. They dispute the trial judge's finding of acquiescence, arguing that

the Métis as a collective did not acquiesce in the flawed administration of ss. 31 and 32 of the *Act*. Furthermore, the "social climate" of the 1870s was not one that favoured bringing a suit. They assert that no one had the authority to acquiesce on behalf of the Métis children or waive their rights. They also argue that, before the founding of the MMF, there was no individual or organization capable of bringing this action. They submit that the MMF only completed its review of the historical record in 1978, commencing this action in 1981. It is their position that this three-year delay was not so lengthy as to constitute laches or acquiescence.

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III.7.4(c) *Canada's Position*

323 Canada relies on the equitable defences of laches, acquiescence and estoppel. It submits that "whatever branch of laches is employed in this case, i.e. either acquiescence, or delay coupled with a detrimental effect on the Defendant, equity bars a remedy for the Plaintiffs." As to the impact of the delay, Canada says prosecution of this case at this late date is unreasonable because (at para. 70 of its factum):

> a) There is evidentiary incompleteness.
>
> b) There are different societal attitudes and values, or changing community standards, than existed 100 years ago, including changes in the common law.
>
> c) The delay in making complaint, if substantiated, has deprived the government of the opportunity to fix the matter at a time when a fix was more practicable. A legislative solution could have been utilized at the time. Moreover, in 1930, Canada transferred control over ungranted lands to Manitoba and thus lost the most suitable asset with which it could satisfy a potential land claim.
>
> d) In assessing its ongoing financial affairs, the government ought

> not to be burdened by the prospect of historical complaints that it felt were settled at an earlier time.
>
> e) The conduct of ancestors of the Plaintiffs amounts to acquiescence upon which Canada could rely.

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324 Canada also disputes the appellants' contention that prior to the formation of the MMF there were no individuals or organizations capable of bringing this action, as cases were brought by individual Métis in the 1880s and 1890s regarding issues of importance to their community.

III.7.4(d) *Manitoba's Position*

325 Manitoba submits that both branches of the doctrine of laches, as identified by the Supreme Court of Canada in *M.(K.) v. M.(H.)* and *Wewaykum*, are applicable in this case. Manitoba notes that the impugned statutes were enacted between 1877 and 1885 and that "hundreds of transactions were conducted in accordance with these statutes. If there was any thought that the statutes were unconstitutional, they could have been challenged at that time. … But no legal challenge was ever taken or petition ever sent. While it is true that no one can consent to an unconstitutional statute, the fact that not one person out of 6,034 chose to challenge the laws suggests that there was strong support for them, or at least acquiescence to their operation." Manitoba submits that "the total lack of any attempt to alter Manitoba law, by legal action or otherwise, is clear evidence of acquiescence to the validity of those laws by the individuals whose contracts were governed by those laws."

326 Furthermore, Manitoba argues that it has been severely prejudiced by

the appellants' delay in commencing this action. Manitoba says this prejudice has manifested in three ways. First, it argues that "having the judicial branch rule on a constitutional issue at a point in time where the executive and legislative branches are impotent to address it, does not serve the constitutional order. … Denying Manitoba the benefit of the constitutional dialogue is an unfairness that cannot now be cured." Second, it alleges prejudice in the form of the court's inability to understand the legal, political and social culture that existed at the relevant time; "the absence of living witnesses to provide insight into the purpose and effect of the impugned legislation, the absence of a complete record of legislative debates, and the absence of total understanding of the legal environment, all impact on the ability of Manitoba to defend its legislation. Ultimately, Manitoba submits that it is unfair to assess the constitutionality of nineteenth century statutes through a twenty-first century lens." See *Wewaykum* at para. 121. Third, Manitoba points to the arrangement it made with the federal government in 1930 when the province assumed administration and control of Crown lands in Manitoba under the *Natural Resources Transfer Agreement*. Thus, "if any Crown land is to transfer, it will have to come from Manitoba. Fairness dictates that Manitoba should have been alerted to this possibility at the time it entered into the *Natural Resources Transfer Agreement* and not fifty years subsequent."

327 Moreover, Manitoba emphasizes the discretionary and equitable nature of the doctrine of laches, submitting that the trial judge's decision should only be overturned on this point if he committed a palpable and overriding error.

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III.7.4(e) *Standard of Review*

328 The doctrine of laches is undoubtedly an equitable construct and its application is discretionary in nature. As such, the deferential standard of review discussed above in connection with declaratory relief is also applicable to the doctrine of laches. However, it should be noted that if the judge erred in applying the legal standard that a party must meet in order to succeed, that is a legal issue reviewable on the correctness standard: *Penner* at para. 16.

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III.7.4(f) *An Overview of the Doctrine of Laches*

329 The doctrine of laches is entirely a creature of equity. It is an equitable doctrine somewhat akin to the limitation periods enacted by statute. It can be relied upon where equitable relief is sought but no statutory limitation periods (yet) apply. As explained by John McGhee, Q.C., ed., *Snell's Equity*, 31st ed. (London: Thomson Reuters (Legal) Limited, 2005) (at p. 99):

> In the words of Lord Camden L.C., a court of equity "has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive, and does nothing." Delay which is sufficient to prevent a party from obtaining an equitable remedy is technically called "laches."

330 The authors observe that "[l]aches essentially consists of a substantial lapse of time coupled with the existence of circumstances which make it inequitable to enforce the claim" (at p. 101). As Mew explains in *The Law*

of Limitations (at p. 38):

> As a general principle, a plaintiff seeking to enforce an equitable remedy must come to the court quickly if the remedy is not to be lost. Laches is delay that is inconsistent with good faith on the part of a party claiming equitable relief. However, temporal considerations alone will not necessarily determine the matter. Closely allied to laches, which is the inordinate delay itself, is acquiescence, which is the assent to an infringement of rights, either express or implied, by which the right to equitable relief may also be lost. Prejudice or the "balance of justice or injustice" may also be a factor.

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331 The leading Canadian case on the doctrine of laches is the decision of the Supreme Court of Canada in *M.(K.) v. M.(H.).* La Forest J. wrote on behalf of himself and three other members of the court. However, his reasons with respect to the doctrine of laches were adopted by all members of the court, making the decision unanimous on this point. Therein, the Supreme Court adopted (at pp. 76-77) the statement of the doctrine set forth in *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221 at 239-40, which emphasized the role of the length of the delay and the nature of the acts done during the interval. It also adopted (at p. 77) the statement by Lord Blackburn in *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218 (U.K.H.L.) at 1279-80 that the application of the doctrine of laches depends on "whether the balance of justice or injustice is in favour of granting the remedy or withholding it." The Supreme Court quoted with approval from R. P. Meagher, W. M. C. Gummow & J. R. F. Lehane, *Equity, Doctrines and Remedies*, 2nd ed. (Sydney: Butterworths, 1984) at 755, and summarized the law as follows (at pp. 77-78):

> It is a defence which requires that a defendant can successfully resist an equitable (although not a legal) claim made against him if he can demonstrate that the plaintiff, by delaying the institution or prosecution of his case, has either (a) acquiesced in the defendant's conduct or (b) caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb….
>
> Thus there are two distinct branches to the laches doctrine, and either will suffice as a defence to a claim in equity. What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.

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332 This formulation of the doctrine was approved by the court in the more recent decision of *Wewaykum*.

333 With respect to the first branch of the laches doctrine, the Supreme Court commented on the nature of acquiescence in *M.(K.) v. M.(H.)* (at pp. 78-79):

> Acquiesence [*sic*] is a fluid term, susceptible to various meanings depending upon the context in which it is used. Meagher, Gummow and Lehane, *supra*, at pp. 765-66, identify three different senses, the first being a synonym for estoppel, wherein the plaintiff stands by and watches the deprivation of her rights and yet does nothing. This has been referred to as the primary meaning of acquiescence. Its secondary sense is as an element of laches – after the deprivation of her rights and in the full knowledge of their existence, the plaintiff delays. This leads to an inference that her rights have been waived. This, of course, is the meaning of acquiescence relevant to this appeal. The final usage is a confusing one, as it is sometimes associated with the second branch of the laches rule in the context of an alteration of the defendant's position in reliance on the plaintiff's inaction.

> As the primary and secondary definitions of acquiescence suggest, an important aspect of the concept is the plaintiff's knowledge of her rights. It is not enough that the plaintiff knows of the facts that support a claim in equity; she must also know that the facts give rise to that claim: *Re Howlett*, [1949] Ch. 767. However, this Court has held that knowledge of one's claim is to be measured by an objective standard; see *Taylor v. Wallbridge* (1879), 2 S.C.R. 616, at p. 670. In other words, the question is whether it is reasonable for a plaintiff to be ignorant of her legal rights given her knowledge of the underlying facts relevant to a possible legal claim.

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334 The court compared the operation of the doctrine of laches with the discoverability principle that has developed at common law with respect to statutory limitation periods, stating (at pp. 79-80):

> As is now apparent, the considerations outlined in detail under the common law discoverability doctrine must also be considered under the rubric of acquiesence [*sic*]. However, I would not wish to be taken as suggesting that an inquiry under the common law will reach the same result as in equity in every case. Rather, there is an important distinction between the two that has not yet been considered. As I have stated, both doctrines share the common requirement of knowledge on the part of the plaintiff. However, a consequence of that knowledge is that the reasonable discoverability inquiry is at an end, and the statutory limitations period begins to run. In equity, however, there is a residual inquiry: in light of the plaintiff's knowledge, can it reasonably be inferred that the plaintiff has acquiesced in the defendant's conduct? …

335 This court had the opportunity to address the doctrine of laches in the case of *Rivergate Properties Inc. v. West St. Paul (Rural Municipality)*, 2006 MBCA 76, 205 Man.R. (2d) 230. After reviewing the Supreme Court's decision in *M.(K.) v. M.(H.)*, Hamilton J.A., for the court, wrote (at para. 53):

> Thus, the Supreme Court has made it clear that the defence of laches entails the notion of delay combined with either (a) evidence of conduct

> revealing that the plaintiff acquiesced in the alleged wrongful act in a way that leads reasonably to the inference that the plaintiff waived its right to a remedy, or (b) evidence that, in reliance on the status quo, the defendant altered its position in a way that constitutes prejudice, or evidence that through its delay, the plaintiff permitted circumstances to arise that it would be unjust to disturb. Therefore, delay will not afford an effective defence until the defendant is able to establish prejudice or other evidence of potential injustice.

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336 As noted above, Canada and Manitoba argue that both of these branches of the doctrine of laches are applicable to the case at bar and operate to bar the appellants' claims.

III.7.4(g) *The Application of Laches to Claims Seeking Declaratory Relief*

337 As stated by the Supreme Court in *Wewaykum*, the "[e]nforcement of equitable duties by equitable remedies is subject to the usual equitable defences, including laches and acquiescence" (at para. 86). As the court went on to explain (at paras. 107-8):

> One of the features of equitable remedies is that they not only operate "on the conscience" of the wrongdoer, but require equitable conduct on the part of the claimant. They are not available as of right. Equitable remedies are always subject to the discretion of the court: [citations omitted].
>
> Equity has developed a number of defences that are available to a defendant facing an equitable claim such as a claim for breach of fiduciary duty. One of them, the doctrine of laches and acquiescence, is particularly applicable here. This equitable doctrine applies even if a claim is not barred by statute. …

338 Thus, a preliminary question to be addressed in the circumstances of this case is whether or not a declaration is an equitable remedy subject to the

doctrine of laches.

339 As Sarna notes, "There has been some disagreement as to whether the declaratory judgment is an equitable or common law remedy, or *sui generis*" (at p. 17). As the declaratory judgment originated in courts of equity, on this basis it might be said to be an equitable remedy. In Sarna's opinion (at p. 18):

> Although declaratory recourse has been categorized as merely procedural rather than substantive, the remedy is undeniably equitable in origin, and is therefore subject to the consequences of its equitable origins.
>
> The remedy is at the discretion of the court; and attracts equitable defences including laches and acquiescence.

340 The Supreme Court of Canada addressed the issue of the proper characterization of declaratory relief in the case of *Hongkong Bank*. In that case, Sopinka J., writing for the court, held that "even if the remedy is seen to be *sui generis*, equitable principles such as clean hands can play a role in the exercise of the court's discretion whether or not to grant the remedy" (at p. 191). He concluded that (at p. 192):

> While it may be that certain equitable restrictions such as the requirement that legal remedies be insufficient and that there be a probability of irreparable or at least very serious damage should not be applied to declaratory remedies, I would conclude that in the exercise of the discretion whether or not to grant a declaration, the court may take into account certain equitable principles such as the conduct of the party seeking the relief. …

341 The Supreme Court's ruling in *Hongkong Bank* has been applied by this court in *Dumont v. Manitoba Métis Federation Inc. et al.*, 2004 MBCA

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149, 190 Man.R. (2d) 113 at para. 50.

342 Thus, the doctrine of laches, which is based on the conduct of the party seeking relief, may be applied to claims seeking declaratory relief whether declaratory judgments are viewed as equitable in nature or *sui generis*.

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III.7.4(h) *The Application of Laches to Constitutional Claims*

343 As the doctrine of laches may be applied to claims seeking declaratory relief, the next question to be addressed in the context of this case is whether or not the doctrine of laches can operate to bar constitutional claims.

344 While the availability of laches in respect of *Charter* claims may be uncertain, the Supreme Court has clearly stated that the doctrine does not apply to cases involving the constitutional division of powers. In the early case of *In re McEwen*, [1941] S.C.R. 542, the majority of the court questioned whether "an objection based on delay, laches, or estoppel, could be held to deprive the courts of the power to inquire into" (at p. 558) matters involving the constitutional jurisdiction of the Parliament of Canada. In *Amax Potash Ltd. et al. v. Saskatchewan*, [1977] 2 S.C.R. 576, the court stated that it was the duty of the courts to ensure that the legislative branch did not "transgress the limits of their constitutional mandate" (at p. 590):

> A state, it is said, is sovereign and it is not for the Courts to pass upon the policy or wisdom of legislative will. As a broad statement of principle that is undoubtedly correct, but the general principle must yield to the requisites of the constitution in a federal state. By it the bounds of sovereignty are defined and supremacy circumscribed. The Courts will not question the wisdom of enactments which, by the terms of the Canadian Constitution are within the competence of the

> Legislatures, but it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power. …

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345 The Supreme Court of Canada definitively addressed the issue of the application of laches to division of powers claims in the case of *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327. In his concurring reasons, Lamer C.J.C. opined that, "[t]here is no doctrine of laches in constitutional division of powers doctrine; one level of government's failure to exercise its jurisdiction, or failure to intervene when another level of government exercises that jurisdiction, cannot be determinative of the constitutional analysis" (at p. 357). The majority made a similar comment at p. 347.

346 This statement of the law was recently applied by the Alberta Court of Appeal in the case of *Taylor et al. v. Registrar of South Alberta Land Registration District et al.*, 2005 ABCA 200, 367 A.R. 73. As explained by the majority of the court, "[i]n the present case we are concerned with application of the doctrine of laches in the context of a case where the court's decision and the appropriate relief are dependant on the constitutional division of powers" (at para. 65). The majority went on to adopt Lamer C.J.C.'s opinion in *Ontario Hydro*, confirming that "the doctrine of laches does not apply in a constitutional division of powers case" (*ibid.*).

347 Thus, I am of the view that the doctrine of laches does not apply to claims involving the constitutional division of powers. As the appellants'

constitutional claims against Manitoba all pertain to the division of powers, the doctrine of laches cannot be applied to bar those claims. Consequently, to the extent that the trial judge found their division of powers claims to be barred by the doctrine of laches, he erred in law.

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348 However, I am inclined to the view that the rule prohibiting the application of laches to division of powers cases does not extend to the type of constitutional claims the appellants advance against Canada. In essence, the appellants argue that Canada misinterpreted its constitutional obligations and its executive action failed to comply with the appellants' interpretation of ss. 31 and 32 of the *Act*. The appellants have not pursued the argument that Canada committed any *ultra vires* acts, besides the two Canada conceded (as described in para. 352). Instead, they primarily seek a declaratory ruling regarding the interpretation of certain constitutional provisions. The case law surrounding division of powers and *Charter* claims is not likely applicable to this unique scenario, which involves a much greater focus on the facts and events in the distant past than on the language of any legislative provisions.

349 While it may well be that the considerations animating the rule prohibiting the application of laches to constitutional division of powers cases would not apply to cases involving constitutional interpretation, given my findings with respect to mootness it is unnecessary to address this issue further in this case.

III.7.5 Mootness

350 As the constitutional issue raised by the appellants does not appear to

be subject to any statutory limitation periods or barred by the doctrine of laches, I must determine whether or not it is moot.

III.7.5(a) *The Trial Judge's Findings*

351 From the reasons of the trial judge, it does not appear that the doctrine of mootness figured prominently in the arguments of the parties at trial. While the trial judge identified several mootness arguments advanced by Canada, he does not appear to have placed any reliance on them in reaching the conclusions that he did.

352 It should be noted that Canada did concede that two of its enactments were *ultra vires*. As described by the trial judge (at paras. 854-55):

> But for two enactments, Canada asserts that the purpose and effect of each of the challenged enactments was to implement rather than alter ss. 31 and 32. The two enactments in question are:
>
> (1) **Order in Council April 25, 1871**
> Canada acknowledges that this Order in Council was *ultra vires* the **Act** but only to the extent that it allowed heads of family to participate in the grant of the 1,400,000 acres.
>
> That error was corrected by Order in Council April 3, 1873, and for greater certainty, by S.C. 1873, c. 38 (**An Act to remove doubts as to the construction of s. 31 of the Act 33 Victoria, chapter 3, and to amend s. 108 of the Dominion Lands Act**). This latter statute was deemed necessary because the **Dominion Lands Act**, S.C. 1872, c. 23 had, by s. 108, confirmed "all proceedings properly taken under Order in Council dated April 25, 1871".
>
> (2) S.C. 1874, c. 20 (**An Act respecting the appropriation of certain Dominion Lands in Manitoba**)
> Canada agrees this statute was *ultra vires* the **Act** but only to the extent that it required claimants under subs. 32(4) to show they were in possession of their lands by March 8, 1869 instead of July 15, 1870.
>
> That error was corrected by S.C. 1875, c. 52 (**An Act to amend "An Act respecting the appropriation of certain Lands in Manitoba"**),

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> which reinstated July 15, 1870 as the operative date. The plaintiffs do not impugn this statute insofar as it changed the date for claims under subs. 32(3) to July 15, 1870 from March 8, 1869.
>
> While acknowledging that both of these enactments were *ultra vires* the **Act**, Canada asserts that both inconsistencies were subsequently remedied, as indicated, and that declaratory relief as sought by the plaintiffs is therefore inappropriate on the ground of mootness.

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353 As these two errors were remedied within a very short period of time, I am of the view that these admittedly *ultra vires* enactments are neither deserving of special consideration nor do they trigger a different analysis or outcome. As such, there is no need to differentiate them from the other constitutional claims advanced by the appellants.

III.7.5(b) *Positions of the Parties*

354 On appeal, Manitoba was the only party to pursue the mootness issue in the written materials filed with the court. It argued that, "all this legislation has been repealed [in 1969] and it has no continuing effect on any person or transaction," and therefore "a determination of the constitutionality of its repealed and spent statutes is academic" and that "this is not a case where this court should exercise its discretion to hear the appeal." As expressed in its factum (at para. 195):

> Manitoba submits that in the case at bar, there are no legal reasons to rule on the constitutionality of legislation that has been repealed for decades. The role of the courts is to adjudicate real disputes. The courts should not be co-opted to fulfil a political agenda.

III.7.5(c) *Governing Legal Principles*

355 As a general rule, courts will not decide moot cases. As Sharpe in *Charter Litigation* at 327*ff* "Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide" said (at pp. 329, 332):

> The value or principle perhaps most frequently offered to justify not deciding such cases is the institutional role of courts and the need to legitimize judicial review. The role of the courts is to decide actual disputes. Judicial pronouncements upon the constitutional validity of laws or practices may be seen as merely incidental to the task of deciding concrete cases. Courts are not entitled to pronounce upon constitutional issues at large or at will. From this perspective, judge-made-law (particularly when overruling the legislature) is only legitimate when it is the product of the adjudication of an actual dispute. If the dispute has become moot and has evaporated or if it is not yet ripe for decision, there is no need for adjudication, and hence no justification for a judicial pronouncement. …
>
> … While our constitution does not explicitly limit the courts to actual cases or controversies, an important element of our judicial tradition and legal culture does, and judges become instinctively uneasy when asked to decide a case solely to satisfy the desire of a party to have a legal issue clarified or resolved.

356 However, courts may exercise their discretion to decide moot cases in certain circumstances.

357 The leading authority on the mootness doctrine in Canada is the Supreme Court's decision in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. Writing for the court, Sopinka J. explained the underpinnings of the mootness doctrine as follows (at p. 353):

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when

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> the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. … The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. …

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358 As to the proper application of the doctrine, Sopinka J. went on to say (*ibid.*):

> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. … I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

359 Finding that the appeal before him was moot, Sopinka J. went on to consider whether the court should exercise its discretion to decide the case in any event. In terms of the factors to be considered at this second stage, Sopinka J. was cautious about formulating a rigid framework or set of criteria. As he explained (at p. 358):

> Since the discretion which is exercised relates to the enforcement of a policy or practice of the Court, it is not surprising that a neat set of criteria does not emerge from an examination of the cases. … I would add that more than a cogent generalization is probably undesirable because an exhaustive list would unduly fetter the court's discretion in future cases. It is, however, a discretion to be judicially exercised with due regard for established principles.

360 In general, as the Ontario Court of Appeal held in *Payne v. Wilson et al.* (2002), 162 O.A.C. 48, "a court may exercise its discretion in favour of

hearing a moot appeal where the purposes underlying the general rule are outweighed by the interests served by a determination of the merits of the appeal" (at para. 18).

361 The first rationale Sopinka J. identified in *Borowski* as animating the mootness doctrine is the requirement of an adversarial context. The second rationale he identified was based on a concern for judicial economy. As he explained, "The concern for judicial economy as a factor in the decision not to hear moot cases will be answered if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it" (at p. 360). However, he noted that an expenditure of judicial resources was justified in cases of a recurring nature but brief duration; that is, cases evasive of review. He observed that, "There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law" (at p. 361). The third rationale identified by Sopinka J. as underlying the mootness doctrine was "the need for the Court to demonstrate a measure of awareness of its proper law-making function" (at p. 362). As he explained (at pp. 362-63):

> … The Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch. …
>
> . . . . .
>
> … In considering the exercise of its discretion to hear a moot case, the Court should be sensitive to the extent that it may be departing from its traditional role.

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362 With respect to the interaction between these three rationales, Sopinka J. stated (at p. 363):

> In exercising its discretion in an appeal which is moot, the Court should consider the extent to which each of the three basic rationalia for enforcement of the mootness doctrine is present. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third, and vice versa.

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363 While the necessary adversarial context continued to exist in the case before him, Sopinka J. concluded that the court should not exercise its discretion to decide the case on its merits, placing particular reliance on the third factor outlined above. As he stated, "What the appellant seeks is to turn this appeal into a private reference" (at p. 365). As a result, the appeal was dismissed on the grounds that it was moot and that Mr. Borowski lacked standing to continue it.

364 The Supreme Court of Canada has also made it clear that unnecessary constitutional pronouncements should be avoided: *Tremblay v. Daigle*, [1989] 2 S.C.R. 530 at 571. Similarly, in *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, Sopinka J., for the majority, stated that (at para. 6):

> This Court has said on numerous occasions that it should not decide issues of law that are not necessary to a resolution of an appeal. This is particularly true with respect to constitutional issues and the principle applies with even greater emphasis in circumstances in which the foundation upon which the proceedings were launched has ceased to exist.

365 As this court held in *Woods v. Canada (Attorney General) et al.*, 2005 MBCA 24, 192 Man.R. (2d) 117, "When the issue between the parties is moot, the onus rests on the party seeking a determination on the merits to demonstrate why the court should depart from its usual practice of refusing to hear moot appeals" (at para. 23). See also *Payne* at para. 18.

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366 On several occasions, this court has declined to exercise its discretion to decide moot appeals where the mootness resulted from the repeal of the impugned legislation. See, for example, *Kennett Estate v. Manitoba (Attorney General)* (1998), 129 Man. R. (2d) 244, and *Pestrak v. Denoon*, 2000 MBCA 79, 148 Man.R. (2d) 153. Other courts have also declined to decide moot appeals on such grounds. See, for example, *Human Rights Commission (Sask.) et al. v. Saskatoon Public Library Board et al.*, 2008 SKQB 312, 325 Sask.R. 224; *C.P.L., Re* (1993), 112 Nfld. & P.E.I.R. 148 (Nfld.S.C.App.Div.); *Payne; McKenzie v. British Columbia (Minister of Public Safety and Solicitor General) et al.*, 2007 BCCA 507, 247 B.C.A.C. 221.

367 As explained in Mahmud Jamal & Matthew Taylor, *The Charter of Rights in Litigation*, looseleaf (Aurora: The Cartwright Group Ltd., 2009) (at para. 4:09[2]):

> It is unnecessary and undesirable to decide the appeal on a basis that has disappeared. The Court should not decide issues that are not necessary to the resolution of an appeal. This is particularly true where constitutional issues are involved, especially where the foundation upon which the proceedings were launched has ceased to exist. Unnecessary constitutional pronouncements may prejudice future cases, the implications of which have not been foreseen. Even though an appeal may be fully argued, that reason alone is not sufficient to warrant

> deciding difficult Charter issues and laying down guidelines … simply because to do so might be "helpful."

III.7.5(d) *Conclusion Re Mootness*

368 Applying the foregoing principles to the case at bar, I have concluded that the case is moot and that this court should not exercise its discretion to decide the moot constitutional issues raised by the appellants. In my opinion, the appellants are essentially seeking a private reference regarding the constitutionality of certain spent, repealed provisions.

369 There appears to be little doubt that the constitutional issues raised in this case are moot, given that the impugned legislation was repealed many years ago and does not continue to have any legal or practical effect on the parties. No live legal controversy or concrete dispute has existed between these parties with respect to the validity of Manitoba's statutes for decades. I agree with Manitoba that, as the last patent was issued in 1901, any dispute between these parties would have crystallized, at the latest, by the early twentieth century.

370 As a result, following the process outlined in *Borowski*, the court must decide whether to exercise its discretion to pass judgment on these matters, in spite of their mootness. As set out above, the onus is on the appellants to persuade the court that it should exercise its discretion to decide the moot issues in the case at bar. The appellants have not succeeded in doing so.

371 There is no issue in this case as to the first rationale, that is, the necessary adversarial context. The case was argued here and below as fully

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as it would have been had it not been moot.

372 Turning to the second rationale (which relates to judicial economy), from the appellants' perspective the case raises issues of great public importance. Furthermore, extensive judicial resources have already been expended in connection with this matter. However, if this court were to exercise its discretion to decide these moot constitutional issues, it could open up other spent or repealed constitutional statutes to judicial review. This could result in the type of legal uncertainty contemplated by Sopinka J. in *Borowski*.

373 Finally, with regard to the third rationale identified by Sopinka J. in *Borowski*, this court must be aware of its proper role within Canada's governmental structure. While the constitutional issues raised in the case at bar were held to be justiciable in *Dumont*, it is clear that the issue of mootness was not before the court at that juncture. In my opinion, the fact that the only relief sought is a declaration in aid of extra-judicial political relief weighs in favour of this court declining to exercise its jurisdiction to decide these moot matters.

374 In this case, the determinative factor is that the impugned statutes are all spent or repealed. As noted above, courts rarely exercise their discretion to decide moot cases where the mootness arises as a result of the impugned legislation being repealed.

375 For these reasons, I would decline to exercise my discretion to decide the moot constitutional issues raised by the case at bar.

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III.7.6 The Métis are Aboriginal

376 Notwithstanding the fact that these proceedings are barred by virtue of the combined operation of the limitations legislation, laches and mootness, it is highly desirable that the issues surrounding s. 31 (and s. 32 as well) be considered in these reasons. The appellants' arguments concerning ss. 31 and 32 form the centerpiece of their appeal. They are of great importance and extensive submissions were made at trial, and before this court. In my opinion, it is in the interests of justice that this court, to the extent that we are able to do so, provide our opinion with respect to these issues.

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377 The appellants argue that, because they are Aboriginal, the Crown owes them a duty based on the concept of honour of the Crown, or a Crown-Aboriginal fiduciary relationship. In order to consider these questions, the threshold issue is whether or not the Métis are Aboriginal.

378 The Métis are one of the "aboriginal peoples of Canada" as defined in s. 35(2) of the *Constitution Act, 1982*, a definition that applies for the purpose of that *Act.* While neither s. 35(1) nor s. 35(2), which enshrines the rights held by the Métis as one of Canada's Aboriginal peoples, applies in this case, the Métis are also considered, in my opinion, Aboriginal people at common law. Lamer C.J.C. wrote in *Delgamuukw*, at para. 133, that s. 35 did not create rights, but rather accorded constitutional status to rights that already existed. In this way, the Métis' status as an Aboriginal people was recognized, not created, by s. 35. The Métis are Aboriginal not only because of "their direct relationship to this country's original inhabitants" (*R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207 at para. 29), but also because, as acknowledged in the *Report of the Royal Commission on Aboriginal*

Peoples: Perspectives and Realities, vol. 4 at p. 199, "[m]odern Canada is the product of a historical partnership between Aboriginal and non-Aboriginal people, and Métis people were integral to that partnership."

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379 While the s. 35(2) definition does not apply in this case, s. 35 cases remain instructive insofar as they reflect why the Métis are also considered Aboriginal at common law. The Supreme Court of Canada described the Métis in *Powley* as "… 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" (at para. 10). They were recognized in *Powley* as having "full status as distinctive rights-bearing peoples" (at para. 38). The Métis therefore share this common Aboriginal characteristic with the Indian and Inuit peoples whose rights are also protected by s. 35(1), but have their own unique traditions and historical experience unmatched by other Aboriginal groups or by the Europeans who settled in Canada. As the Supreme Court explained at para. 38 of *Powley*, Métis rights do not necessarily flow from the pre-European contact practices of the Métis' Aboriginal ancestors. Métis rights are not merely derivative rights flowing from their partial Indian ancestry. Rather, they are distinctive rights deserving of protection on an independent basis, in light of the Métis' special status as post-contact Aboriginal peoples. This court implicitly recognized the Métis as Aboriginal peoples in *Blais*, an Aboriginal rights case in which s. 35 was not at issue. *Blais* was appealed to the Supreme Court of Canada, which upheld this court's decision.

380 Furthermore, neither respondent contested the fact that the Métis are one of Canada's Aboriginal peoples. The appellants' arguments simply

proceed on the basis that the Métis fall within this category. While Canada argued that it is anachronistic for this court to consider the Métis in the Red River Settlement in the 1870s to be Aboriginal, what is relevant is the present-day common law and not how the Métis were viewed in the past, when it is arguable that the laws and culture of the time only allowed individuals to identify as either white/European or Indian. As Prime Minister John A. Macdonald observed in his speech in the House of Commons on July 6, 1885, "… the half-breeds did not allow themselves to be Indians. If they are Indians, they go with the tribe; if they are half-breeds they are whites, and they stand in exactly the same relation to the Hudson Bay Company and Canada as if they were altogether white."

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381 Concerns about applying the law of today, and the modern values and ideas that it reflects, to conduct that occurred in a long-past and much different time are best left to the law of limitations, laches and mootness.

382 While the trial judge found that the Métis were not Indians, the more relevant question is whether or not they are Aboriginal, and nothing in his judgment questions their status as an Aboriginal people. In fact, in his judgment he made several references that indicate that he correctly assumed that the Métis are Aboriginal (see, for example, paras. 485, 1170).

383 Some commentators have argued against the Métis having status as an Aboriginal people. For example, Thomas Flanagan, Canada's expert witness in the trial of this matter, argued in "The Case Against Métis Aboriginal Rights" (1983) 9 Cdn. Pub. Policy 314-25 that Métis people should not be considered to be Aboriginal. However, his and others'

arguments to this effect do not reflect how the law has developed in Canada.

384 While both the Métis and Indians are Aboriginal peoples, as explained by the trial judge, there are differences in their experiences and histories. The facts of any given case will reflect these differences to the extent that they are relevant in the circumstances. As a result, the law sometimes develops differently with respect to different Aboriginal groups, as it has with the interpretation of s. 35. The differences between the Métis and Indians are reflected in their experiences as they emerge in the evidence in each case, and through the application of the same law to the unique fact situations in each case.

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III.7.7 Honour of the Crown

III.7.7(a) *The Trial Judgment*

385 In *R. v. Badger*, [1996] 1 S.C.R. 771, the Supreme Court dealt with the concept of the honour of the Crown as follows (at para. 41):

> … the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned.

386 The trial judge dealt with the applicability of the doctrine of the honour of the Crown with respect to s. 31 in two ways; first, as an interpretive principle, and second, as a stand-alone topic alongside issues such as fiduciary duty and Aboriginal title.

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387 The trial judge recognized that the Supreme Court's comments in *Badger* applied to statutory provisions "and so would apply to such provisions of the [*Act*] as would have an impact upon the aboriginal rights of the Métis to the extent such aboriginal rights existed or were impacted." He concluded his analysis by stating that there was no allegation in this case that the Crown had engaged in sharp dealing.

388 In dealing with the role of the honour of the Crown in this case as an independent issue with respect to s. 31, the trial judge gave three reasons for finding that it did not apply.

389 His first reason for rejecting its applicability was that the Crown had neither asserted sovereignty over the Métis in their capacity as Métis people, nor had it taken over land formerly controlled by the Métis. The appellants could therefore not bring themselves within the language of *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, in which the root of the doctrine of the honour of the Crown was described as arising from the Crown's assertion of sovereignty over Aboriginal people "in the face of prior Aboriginal occupation" (*Taku River* at para. 24), and its control over resources formerly controlled by them.

390 The trial judge's second reason for rejecting the application of the doctrine of the honour of the Crown was that the Métis were not a vulnerable or unsophisticated people at the time of the discussions leading to the passage of the *Act* or thereafter.

391 His third reason was that while the doctrine of the honour of the Crown obliges the Crown to meaningfully consult with Aboriginal people or their representatives, in this case the delegates represented the interests of all the residents of the Red River Settlement, and not simply the Métis. The trial judge found that the *Act* was not "an instrument that dealt specifically with or in respect of the rights or interests of the Métis" (at para. 643).

392 The trial judge also rejected the appellants' argument that the honour of the Crown was engaged with respect to s. 32 of the *Act*, writing as follows (at para. 1170):

> The provisions of section 32 did not apply to the Métis as Métis, but it applied to all settlers. Its purpose had nothing to do with the aboriginality of the Métis, but was simply to quiet titles and assure the retention of lands by all residents of Red River who had held such land prior to transfer.

III.7.7(b) *The Appellants' Position*

393 The trial judge summarized the appellants' position on the honour of the Crown as follows (at para. 634):

> … They assert that the honour of the Crown must be observed in all of its dealings with aboriginal peoples, that it precedes and is the foundation of the Crown's fiduciary duty, and that it is a source of independent obligation which continues throughout all dealings between the Crown and aboriginal people whether or not a fiduciary duty arises.

394 The appellants put forward the same argument on appeal, namely, that the honour of the Crown was at stake in the negotiation of the terms and

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conditions under which Manitoba entered Confederation and in the implementation of the *Act*. This is because, they say, the discussions with the delegates were dealings by the Crown with Aboriginal people insofar as they concerned s. 31 (since it applied only to the Métis). The honour of the Crown having been engaged, it would not be in keeping with it to ignore what happened in the negotiations with the delegates, a process that they argue resulted in Manitoba's peaceful entry into Canada. Relying on *Taku River*, they submit that the Crown's honour cannot be interpreted narrowly or technically.

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395 The appellants also say that the trial judge erred in his analysis with respect to whether the Métis were a vulnerable people, stating in their factum that "… the existence of the honour of the Crown does not depend in any given instance on vulnerability. It applies to all the Crown's dealings with Aboriginal peoples: *Haida Nation*, para. 17" (at para. 82).

396 The appellants also say that the trial judge overlooked the fact that s. 31 dealt specifically with the rights or interests of the Métis.

397 The honour of the Crown, the appellants argue, goes beyond the duty to consult with Aboriginal people and "… may give rise to a fiduciary obligation." They emphasize that whatever the obligation may be, the honour of the Crown is always at stake.

398 The appellants also claim that the honour of the Crown is engaged with respect to s. 32. They state in their factum that "Canada was required by the honour of the Crown and in accordance with a proper construction of section 32, to pursue a liberal policy, rather than a restrictive one" (at para.

419). The appellants seem to rely upon the honour of the Crown, at least as it relates to s. 32, as an alternative independent basis of Crown liability should their fiduciary duty claim fail (at para. 424):

> The persons with rights under section 32, the great majority of whom were Métis, were vulnerable in respect of their land holdings. Canada assumed a complete discretion with respect to fulfilling the promises that had been made to those settlers in return for their agreement to join Confederation. This gave rise to a fiduciary duty. It then failed to keep its promises, thus breaching its fiduciary duty. The Appellants submit that, in any event, it most certainly engages the honour of the Crown. It cannot be that assurances given for the express purpose of bringing Manitoba, Rupert's Land and the North-west Territories into Confederation are of no legal significance and could be abandoned at the mere discretion of the Crown: *Ross River Dena Council Band v. Canada* [2002 SCC 54, [2002] 2 S.C.R. 816] at para. 65.
>
> [emphasis added]

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399 In oral argument, the appellants submitted that in the circumstances surrounding the drafting of s. 32, namely, most of the settlers were Métis, that there was a territory with a provisional government in a state of armed resistance and that war was averted because of assurances given to the settlers, the honour of the Crown was engaged. Though no cases were relied upon for this contention, the appellants argued that there is a concept of the honour of the Crown outside the Aboriginal framework and beyond a public law duty that is engaged because the Crown made promises to the settlers, and on that basis the country was formed.

III.7.7(c) *Canada's Position*

400 The trial judge described Canada's position on the honour of the Crown as arising from "… the Crown's historic relationship with Indians

who are vulnerable, uneducated people unfamiliar with European ways and the technical nature of language, and who in their dealings with the Crown were required to deal in a foreign language with representatives who are better educated and far more skilled" (at para. 635). He summarized Canada's argument as asserting "… that the doctrine is one looked to or relied upon for the purpose of trying to balance the inequities between aboriginals and the Crown in their dealings" (*ibid.*).

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401 Canada's argument before this court is somewhat different than that described above. Canada submits that "the application of the honour of the Crown urged by the Plaintiffs falls outside the situations thus far recognized by the law" (at para. 198) and that "[t]o the extent the Plaintiffs seek to impose duties, just by way of example, to give the land in family blocks, to issue patent within a particular time period, or to prevent sales before the age of majority or before patent issued, no case law has used the concept to write such substantive terms into a statutory scheme of benefits" (at para. 199). No emphasis was placed by Canada on vulnerability or inequity.

402 Canada points out in its factum that although the Supreme Court of Canada stated broadly in *Haida Nation* that the honour of the Crown is always at stake in its dealings with Aboriginal peoples, lower courts have "been circumspect in their application of the principle" (at para. 204) and have held that it does not constrain the conduct of litigation or curtail prosecutorial discretion. For example, see *Polchies v. Canada*, 2007 FC 493, [2007] 3 C.N.L.R. 242 at para. 74, *Stoney Band v. Canada*, 2005 FCA 15, 249 D.L.R. (4th) 274 at para. 63, and *Labrador Métis Nation v. Canada (Attorney General)*, 2006 FCA 393, 277 D.L.R. (4th) 60 at para. 4.

403 With respect to s. 32, Canada submits that the delegates "… represented the entire settlement, not the Métis exclusively. Consistent with the role of the delegates, s. 32 of the *Act* applied to all 'old settlers.' Not being Métis-specific, there is no basis to argue for the application of special aboriginal law concepts, such as fiduciary principles and the honour of the Crown, in the administration of the section" (at para. 189).

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III.7.7(d) *The Honour of the Crown and Sections 31 and 32 of the Act*

404 The honour of the Crown is both an ancient and emerging doctrine. In recent years, it has been given a new breath of life in Canadian law through its recognition as the root of the Crown's duty to consult with Aboriginal peoples.

405 For the reasons that follow, I am of the opinion that the honour of the Crown was at stake with respect to s. 31 of the *Act*. But while the honour of the Crown is not in itself an independent basis for the relief sought by the appellants (see *Polchies* at para. 74), it can in some instances give rise to enforceable fiduciary duties. As discussed shortly, whether a fiduciary duty exists is to be determined with reference to the approach established by the Supreme Court of Canada in fiduciary duty cases such as *Guerin* and *Wewaykum*. The question of which specific obligations have to be fulfilled to meet any fiduciary duty that exists is to be determined within the fiduciary jurisprudence.

406 McLachlin C.J.C. wrote at para. 16 of *Haida Nation* that "[t]he honour of the Crown is always at stake in its dealings with Aboriginal peoples …." Section 31 applied exclusively to Métis people, referred to as

"half-breeds" in that section. While (as the trial judge noted in para. 643) the *Act* is not generally an instrument dealing with the Métis, s. 31 is clearly Métis-specific.

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407 Section 32, however, was a provision of general application. Even though many of those affected by s. 32 were Métis people, that fact alone is not sufficient to engage the honour of the Crown. Just as not all interactions between the Crown and Aboriginal peoples engage the fiduciary relationship that has been recognized between the two, as will be discussed later, there must be something more than the fact that a person is Aboriginal to engage the honour of the Crown in dealing with that person. As explained in *Ochapowace First Nation (Indian Band No. 71) v. Canada (Attorney General)*, 2009 FCA 124, [2009] 3 C.N.L.R. 242 at para. 37, leave to appeal refused, [2009] S.C.C.A. No. 262 (QL), the framework in which s. 32 operated "… does not overlap the framework within which Canada seeks to achieve a just and equitable resolution of the claims of its Aboriginal peoples."

408 David M. Arnot explained the origins of the doctrine in "The Honour of the Crown" (1996), 60 Sask.L.Rev. 339 (at p. 340):

> … This is a very ancient convention with roots in Pre-Norman England, a time when every yeoman swore personal allegiance to his chieftain or king – whether he be Celt or Saxon. Anyone who was charged with speaking or acting on behalf of the King bore an absolute personal responsibility to lend credit to his master's good name. Should he fail in this responsibility or cause embarrassment, he was required to answer personally to the King with his life and fortune. The Crown was not an abstract or imaginary essence in those days but a real person whose power and prestige was directly dependant on the conduct of his advisers, captains, and messengers. These small societies were

> conscious of their heritage and kinship, and a single act of irresponsibility could blemish a family's name for generations.

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409 The honour of the Crown predates Canadian Aboriginal law: see reference to *The Case of The Churchwardens of St. Saviour in Southwark* (1613), 10 Co. Rep. 66b, 77 E.R. 1025, in *R. v. Marshall*, [1999] 3 S.C.R. 456 at para. 43. There are few examples from the current Canadian jurisprudence where the honour of the Crown has been applied in the non-Aboriginal context: see, for example, *Lieding v. Ontario* (1991), 2 O.R. (3d) 206 at para. 24 (C.A.); *British Columbia (Attorney General) v. Davies*, 2009 BCCA 337, 272 B.C.A.C. 118 at para. 114. The relationship between the honour of the Crown as applied in non-Aboriginal law cases and in the Aboriginal law context is not clear. Significantly, the Supreme Court of Canada's descriptions of the honour of the Crown place great emphasis on the Crown-Aboriginal relationship. It appears to be a very specific manifestation of the Crown's honour. Thus, the traditional doctrine of the honour of the Crown does little to inform our understanding of the application of the Aboriginal law doctrine in the present case. In any event, the appellants have made no link between the doctrine as it exists outside the Aboriginal context and the present case.

410 Turning to the relevant Aboriginal law jurisprudence, in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, the court described the role that the honour of the Crown plays in determining whether an infringement of an Aboriginal or treaty right protected by s. 35(1) of the *Constitution Act, 1982* can be justified as follows (at p. 1114):

> If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from *Taylor and Williams* [(1981), 34 O.R. (2d) 360 (C.A.)] and *Guerin*, *supra*. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.
>
> [emphasis added]

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411 But as Rothstein J.A., as he then was, observed in *Stoney Band* (at para. 15):

> Because the Indians did not have the opportunity to create their own written record, the assumption is that the Crown's approach to treaty-making was honourable and therefore the courts interpret treaties flexibly. However, generous rules of interpretation are not intended to be after-the-fact largesse. Rather, their purpose is to look for the common intention between the parties as a way to reconcile the interests of the Indians and the Crown [citation to *Mitchell* omitted].

412 Another comment on the nature of the honour of the Crown is found in *Wewaykum*, a fiduciary duty case, in which Binnie J. wrote that "[s]omewhat associated with the ethical standards required of a fiduciary in the context of the Crown and Aboriginal peoples is the need to uphold the 'honour of the Crown'" (at para. 80). See also *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360 (C.A.), *Marshall* and *Van der Peet*.

413 The doctrine of the honour of the Crown has been given new life in recent years in the form of the duty-to-consult with Aboriginal peoples. In *Haida Nation*, the honour of the Crown was found to give rise, in the circumstances, to an independent duty on the part of the Crown to consult

with the Haida about actions that may affect Aboriginal rights or title, even though no Aboriginal right or title had yet been proven. McLachlin C.J.C. explained the role and nature of the honour of the Crown in Aboriginal law as follows (at paras. 16-18):

> The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.
>
> The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, *supra*, at para. 186, quoting *Van der Peet*, *supra*, at para. 31.
>
> The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, at para. 79. The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfilment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake. …
>
> [emphasis added]

414 The Supreme Court of Canada decided in *Haida Nation* that a Crown duty to consult existed under the circumstances and found that it was not fulfilled. In contrast, in the companion case of *Taku River*, while a duty to

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consult was found, the requirements of that duty were met by the Crown. McLachlin C.J.C. also wrote for the court in *Taku River* and expanded somewhat upon the meaning of the honour of the Crown (at para. 24):

> The Province's submissions present an impoverished vision of the honour of the Crown and all that it implies. As discussed in the companion case of *Haida*, *supra*, the principle of the honour of the Crown grounds the Crown's duty to consult and if indicated accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title. <u>The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation.</u> It has been enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. <u>In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question.</u> The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).
>
> [emphasis added]

415 Thus, development of the honour of the Crown as informing the Canadian approach to Aboriginal law began before 1982. The language used in recent Supreme Court of Canada duty to consult cases is also consistent with the honour of the Crown doctrine existing prior to, and outside, s. 35.

416 As is evident from the descriptions of the parties' positions and the trial judgment, the role of this doctrine in the circumstances has been interpreted in a number of different ways. This is unsurprising for a doctrine that is both rooted in centuries-old traditions and that has shown significant growth in recent years.

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417 The honour of the Crown is a unique legal doctrine, the content or effect of which may differ depending on the circumstances. As McLachlin C.J.C. wrote at para. 16 of *Haida Nation*, it is "… a core precept that finds its application in concrete practices." As explained above, the concrete practice that the honour of the Crown mandated in *Haida Nation*, *Taku River* and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69, [2005] 3 S.C.R. 388, was the duty to consult.

418 The doctrine also requires that, when it has been determined that an Aboriginal right has been infringed, the honour of the Crown must be considered in determining whether the infringement is justified (*Sparrow* at p. 1114).

419 Furthermore, as the trial judge adverted to at para. 520 of his reasons, the honour of the Crown also functions as an interpretive principle in approaching treaties and statutory provisions that have an impact upon treaty or Aboriginal rights. See *Badger* at para. 41.

420 In other cases, the honour of the Crown has been identified as the source of specific legal obligations owed by the Crown to Aboriginal peoples. The obligations identified thus far include the duty to consult and fiduciary obligations: *Haida Nation* at paras. 16, 18 respectively. McLachlin C.J.C. explained at para. 54 of *Haida Nation* that "… while the Crown's fiduciary obligations and its duty to consult and accommodate share roots in the principle that the Crown's honour is engaged in its relationship with Aboriginal peoples, <u>the duty to consult is distinct from the fiduciary duty that is owed in relation to particular cognizable Aboriginal</u>

interests" (emphasis added).

421 Rothstein J.A., as he then was, noted in *Stoney Band* 274 at para. 18, that the list of ways in which the honour of the Crown may manifest itself may not yet be exhausted. Any further manifestations will, however, have to be developed on an incremental and principled basis.

422 As has already been emphasized, "[t]he honour of the Crown gives rise to different duties in different circumstances" (*Haida Nation* at para. 18). But it has not been recognized by the Supreme Court of Canada as an independent cause of action. While the appellants characterize it as such in the present case, they have not shown that that approach falls within any principled extension of the existing honour of the Crown jurisprudence.

423 Where the honour of the Crown resonates in this case is through its role in undergirding the fiduciary obligation claimed by the appellants. McLachlin C.J.C. wrote at para. 18 of *Haida Nation*, as we have seen, that "[w]here the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, at para. 79." In other words, while the honour of the Crown underlies any potential fiduciary duties that may be present in this instance, the existence of such duties are still to be determined with reference to Crown-Aboriginal fiduciary jurisprudence.

424 The formulation of the relationship between the honour of the Crown and fiduciary obligations found in *Haida Nation* differs from that articulated

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earlier by Lamer C.J.C., writing for the majority in *Van der Peet*. In the course of setting out the general principles that apply to the legal relationship between the Crown and Aboriginal peoples, he wrote that "[t]he Crown has a fiduciary obligation to aboriginal peoples with the result that in dealings between the government and aboriginals the honour of the Crown is at stake" (at para. 24). The roles therefore appear to have been reversed since the *Van der Peet* formulation (which is also how this court had described the relationship in *Blais* at para. 33), with fiduciary obligations now arising from the honour of the Crown.

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425 McLachlin C.J.C.'s explanation of the relationship between Crown fiduciary obligations to Aboriginal peoples and the honour of the Crown in *Haida Nation* makes understandable the absence of any analytical role for the honour of the Crown in the Supreme Court of Canada's fiduciary cases, such as *Guerin*, *Blueberry River*, and *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222. The honour of the Crown underlies the Crown's fiduciary relationship with Aboriginal peoples; it is not derived from them.

426 As noted earlier, in *Wewaykum* at para. 80, Binnie J. referred to the honour of the Crown as being "[s]omewhat associated with" the measurement of the Crown's conduct with respect to established fiduciary obligations, which is different than that articulated later in *Haida Nation.* Further, even in *Wewaykum* itself, the honour of the Crown was not explicitly relied upon as part of the standard of conduct expected of a fiduciary. Still, the fiduciary standard of conduct would not in any case be expected to tolerate dishonourable conduct.

427 While the honour of the Crown therefore plays a role here in informing any fiduciary obligations that may be owed to the appellants, it is ultimately the analytical framework created in the Supreme Court of Canada's jurisprudence that determines whether fiduciary obligations were owed and whether they were breached. The appellants are not entitled to any relief arising out of a stand-alone application of the honour of the Crown doctrine.

428 In summary, it would appear that the approach of the Supreme Court has evolved such that the Crown must act honourably in all its dealings with Aboriginal peoples, not just where there is a Crown assertion of sovereignty and *de facto* control of land and resources. However, as discussed here, the content of the doctrine of honour of the Crown will vary significantly depending on the context. So, for example, the doctrine of the honour of the Crown as an independent basis of liability presently exists only in relation to the duty to consult. In our case, however, its relevance is to flavour the nature and extent of any fiduciary duty. It does not give rise to a freestanding fiduciary obligation.

III.7.8 Fiduciary Relationship

429 The relationship between the Crown and the Aboriginal peoples of Canada has been recognized as being fiduciary in nature, but not every aspect of the relationship gives rise to a fiduciary duty. See *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159. Iacobucci J. wrote for the court as follows (at p. 183):

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> It is now well settled that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada: *Guerin v. The Queen*, [1984] 2 S.C.R. 335. Nonetheless, it must be remembered that not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574. The nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed. …
>
> [emphasis added]

430 Similarly, in *Wewaykum* Binnie J. wrote (at para. 83):

> … I think it desirable for the Court to affirm the principle, already mentioned, that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature (*Lac Minerals*, *supra*, at p. 597), and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.
>
> [emphasis added]

431 The concept of a fiduciary relationship is therefore distinct from that of a fiduciary obligation (which is also called a fiduciary duty), although the nature of the relationship informs the determination of which types of obligations that arise within it are of a fiduciary character.

432 The trial judge found that there was no fiduciary relationship between the Métis and Canada, but he did so without considering that the relationship between the Crown and Aboriginal peoples has been consistently recognized as a fiduciary one. He also erred by using the factors upon which fiduciary obligations have been found to arise in previous decisions as a test for determining whether a fiduciary relationship existed in the present case. Instead of recognizing that there is an ongoing Crown-Aboriginal fiduciary

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relationship and asking if the Métis are part of that relationship, the trial judge looked at facts surrounding the administration of the *Act* and case law addressing the existence of specific fiduciary obligations. Many of the facts he relied upon are undoubtedly relevant to the matter of determining whether a fiduciary obligation existed in the circumstances. However, the fiduciary relationship between the Crown and the Aboriginal peoples of Canada, which exists even when no specific fiduciary duty is in play, has not been limited to cases in which the factors listed in para. 629 of the judgment are present. For example, in *Wewaykum* (to be discussed more thoroughly later), a fiduciary relationship (and fiduciary obligations) existed even though the plaintiff bands had no Aboriginal title or beneficial interest in the lands at issue.

433 Because "… not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature …" (*Wewaykum* at para. 83), the question of whether the Métis are part of the fiduciary relationship between the Crown and the Aboriginal peoples of Canada is not determinative of whether an enforceable fiduciary obligation arose in the administration of the *Act*. While each case must be examined on its own facts, the Supreme Court of Canada has established an approach to determine whether enforceable fiduciary obligations exist in the context of the Crown-Aboriginal relationship. The Métis' inclusion in that relationship dictates that the same approach be applied to the unique facts of this case. For the reasons that follow, I find that the Métis are beneficiaries of the fiduciary relationship that exists between the Crown and the Aboriginal peoples of Canada.

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434 As noted above, the rights held by the Métis as one of Canada's Aboriginal peoples are enshrined in s. 35(1) of the *Constitution Act, 1982*. While that provision does not apply to this appeal, the fiduciary relationship between Aboriginal peoples and the Crown that is at the heart of the appellants' case is a general guiding principle in connection with s. 35(1). In *R. v. Sparrow*, Dickson C.J.C. and La Forest J. wrote as follows for the court (at p. 1108):

> … In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

435 The court's reliance upon *Guerin*, a case in which s. 35 was not at issue, demonstrates that there is a single fiduciary relationship between the Crown and Aboriginal peoples, which resonates whether or not s. 35 is at issue. See also *Wewaykum* at para. 78, where Binnie J. recognized that "[t]he *Guerin* concept of a *sui generis* fiduciary duty was expanded in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, to include protection of the aboriginal people's pre-existing and still existing aboriginal and treaty rights within s. 35 of the *Constitution Act, 1982*." While s. 35(2) of the *Constitution Act, 1982*, which includes the Métis in the definition of "aboriginal peoples of Canada," also does not apply in this case, the Métis are an Aboriginal peoples at common law, and therefore beneficiaries of the fiduciary relationship that has been recognized between the Crown and Aboriginal peoples.

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436 In *Wewaykum*, Binnie J. wrote the following with respect to the origins of the fiduciary relationship between the Crown and Aboriginal peoples (at para. 79):

> The "historic powers and responsibility assumed by the Crown" in relation to Indian rights, although spoken of in *Sparrow*, at p. 1108, as a "general guiding principle for s. 35(1)", is of broader importance. All members of the Court accepted in *Ross River* that potential relief by way of fiduciary remedies is not limited to the s. 35 rights (*Sparrow*) or existing reserves (*Guerin*). The fiduciary duty, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples. As Professor Slattery commented:
>
>> The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a "weaker" or "primitive" people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help.
>
> (B. Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 753)

437 In the present case, the distinctive history and circumstances of the Métis community in the Red River Settlement must be taken into consideration in determining both whether a fiduciary obligation existed under the circumstances, and whether it was breached.

438 It is true that the Métis of the Red River Settlement in the 1870s enjoyed rights, such as those of property ownership and enfranchisement, not accorded to the local Indians of that era. In that sense, they were in a different relationship with the Crown than were their Indian counterparts.

439 At the same time, there is no doubt that the Métis also fit into the

concept of the Crown-Aboriginal fiduciary relationship described by Professor Slattery. The facts of this case make that clear. The Métis of the Red River Settlement were a powerful political and military force in the 1870s. Led by Louis Riel, they were the driving force behind the provisional government.

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440 The Métis have also been recognized in s. 35 jurisprudence as beneficiaries within the Crown-Aboriginal fiduciary relationship. In *Powley*, the s. 35(1) Aboriginal rights test was applied to a Métis claimant, modified to accommodate the reality that the Métis are different from previous Indian-Aboriginal claimants. But the modification that was made, which adopted a post-contact but a pre-control test, pertained only to the time period at which the claimant had to prove that the right existed. The modification was made, the court explained, to "reflect the distinctive history and post-contact ethnogenesis of the Métis, and the resulting differences between Indian claims and Métis claims" (at para. 14). Not dealt with were the other elements of the test, as applied in Indian-Aboriginal rights cases, namely, inalienability, communal or collective holding, and exclusive continuous occupation.

441 No modification was made, however, to the justification part of the test for Aboriginal rights. The justification aspect of the test, first set out in *Sparrow*, is applied once an Aboriginal right has been established and has been found to have been infringed upon by the Crown. The first part of the justification test requires the Crown to demonstrate that it was acting pursuant to a valid legislative objective (*Sparrow* at p. 1113). The second part of the test was explained by Lamer C.J.C. in *R. v. Gladstone*, [1996] 2

S.C.R. 723 at para. 54 as dictating that "… the government must demonstrate that its actions are consistent with the fiduciary duty of the government towards aboriginal peoples." As is almost always the case, context is critical. As noted in *Sparrow*: "Given the generality of the text of the constitutional provision [s. 35], and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case" (at p. 1111).

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442 When the court in *Powley* applied the justification test, it found that the infringement of the established Aboriginal right was not justified. By applying the *Sparrow* justification test unmodified to the Métis Aboriginal rights-holders in *Powley*, the Supreme Court of Canada recognized that the Métis are one of the beneficiaries within the Crown-Aboriginal fiduciary relationship.

443 I conclude that both precedent and principle demonstrate that the Métis are part of the *sui generis* fiduciary relationship between the Crown and the Aboriginal peoples of Canada. That relationship being established, it is next necessary to consider whether Canada owed any fiduciary obligations to the Métis in the administration of the *Act.*

III.7.9 Fiduciary Duty

III.7.9(a) *The Trial Judgment*

444 In the trial decision, Aboriginal title was a central part of the fiduciary analysis. After reviewing the facts and case law, the trial judge concluded that "the Métis did not come within any of the three criteria or dimensions

enunciated in **Delgamuukw**, and as modified by **Powley**, which are necessary for enjoyment of aboriginal title" (at para. 593). He then considered whether the Métis people of Manitoba were Indians and concluded that they were not.

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445 The fiduciary duty analysis engaged in by the trial judge was therefore based on the Métis not having Aboriginal title and not being Indians. He emphasized that the fact that the appellants are Métis, and not Indians, must be considered in determining how precedents dealing with Indians might apply. He wrote (at para. 620):

> To my knowledge, all of the decided cases which deal with aboriginal title to land and the creation of a fiduciary duty or obligation owing from the Crown to aboriginals in that context have been cases involving Indians where either aboriginal title was found to exist or its existence was not in dispute.

446 The trial judge held (at paras. 629-31):

> From **Guerin** and those cases which have followed it, I conclude that there are three fundamental criteria for the creation of a fiduciary relationship as between aboriginals and the Crown in respect of aboriginal title to land:
>
> (1) the existence of Indian or aboriginal title;
>
> (2) the fact that the Indian or aboriginal interest in the land is inalienable except upon surrender to the Crown;
>
> (3) the resulting responsibility of the Crown to the aboriginals flowing from the surrender requirement.
>
> In the present case, the plaintiffs argue that a fiduciary relationship existed between Canada and the Métis and that a fiduciary duty arose with respect to the s. 31 land grants "out of the extinguishment (by statute, not by surrender …) of the Métis Aboriginal title". The plaintiffs assert that "where a people exchange their Aboriginal rights

> for a statutory affirmation of certain rights to be held in lieu thereof, the same principles apply."
>
> That may be so where the facts warrant such a finding. But it is not the case here. As I have already decided that the Métis did not hold aboriginal title, there was nothing to surrender or cede. In the result, no responsibility existed in the Crown relative to the land in question. Hence, no relationship of a fiduciary nature, nor fiduciary duty, existed between Canada and the Métis in respect of the subject land.

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447 The trial judge also considered, and rejected, the appellants' argument that a fiduciary relationship existed as a result of the fact that the s. 31 beneficiaries were children (at para. 632):

> The plaintiffs also argue the existence of a fiduciary relationship in respect of the s. 31 grant by reason of the fact that the grant was to children. In my view, there is no merit to that assertion. "Children" does not in the language of s. 31 mean infants or minors. Rather, it is a description of lineage so that even if there were merit in the argument that such a relationship existed because the recipients were infants, it surely would not apply to those who fall within the description but were adults. Furthermore, however, in my view, the Government did not stand in a fiduciary relationship to those entitled under s. 31 but who in fact were infants. Their parents or guardians may well be fiduciaries to their children, but not the Government by reason only of the fact of their infancy.

448 The trial judge ultimately concluded that the Crown could not be faulted for its application of s. 31 (at paras. 943-44):

> In my view, so long as Canada, in implementing the s. 31 grant complied with the language of the **Act** by giving the land for division amongst the children of the half-breed heads of families and did not act in bad faith in so doing, its conduct cannot be successfully challenged. Mistakes, even negligence, on the part of those responsible for implementation of the grant are not sufficient to successfully attack Canada's exercise of discretion in its implementation of the grant.

> A complaint that the administration or implementation of the grant or its outcome is unsatisfactory is not a justiciable complaint so long as what was done or not done was pursuant to the language of the **Act** and the *bona fide* exercise of discretion within the terms of the **Act**.

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449 Because of his conclusion that no fiduciary relationship or duty existed, the trial judge did not specifically address the question of whether that duty was breached.

III.7.9(b) *The Appellants' Position*

450 The appellants rely heavily on the language of s. 31 of the *Act* in advancing their claim that the Crown owed the Métis a fiduciary duty with respect to that section. In their factum, they explain how they interpret s. 31 (at para. 135):

> The terms of section 31 imposed the fiduciary duty, that is:
>
> a. the grant was for the purpose of the extinguishment of the Métis children's Aboriginal title;
>
> b. it was for the benefit of the Métis families;
>
> c. the land was to go to the children of the Métis families;
>
> d. the children were to receive the grants as the culmination of the process of appropriation, selection, division and granting of land; and
>
> e. the whole scheme was to be carried out "under regulations to be from time to time made by the Governor General in Council."

451 The appellants emphasize that while the delegates had attempted to have the distribution of land to the Métis children administered by Manitoba, Canada did not allow this to happen. The result, they say in their factum, is

that "… complete discretion as to the selection, allotment and granting of the land lay with the Crown, and it was the children of the Métis who were vulnerable. This falls within the classic definition of fiduciary obligation" (at para. 137). They go on at para. 138 of their factum to quote from *Blueberry River* (at para. 38):

> Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person: see *Frame v. Smith*, [1987] 2 S.C.R. 99; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party.
> …
>
> [emphasis added by appellants]

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452 They say that even if the Métis beneficiaries of s. 31 had not been Aboriginal, "[t]he very words of s. 31 standing alone would give rise to an inference of fiduciary obligation: See *Frame v. Smith* [1987] 2 S.C.R. 99 (SCC) … per Wilson J."

453 Relying on *Guerin*, the appellants assert that the Métis had Aboriginal title as evidenced by "… the extinguishment of an interest in Indian title and, arising therefrom, a setting aside of 1.4 million acres for the 7,000 Aboriginal children" (at para. 140). They emphasize that the Métis beneficiaries of s. 31 were in a legally vulnerable position, that they placed their trust in the Crown, and that the Crown had unilateral discretion over their interests.

454 The vulnerability that fiduciary duty concerns itself with is legal vulnerability, say the appellants, and therefore the trial judge's finding

(made with respect to the honour of the Crown) that the Métis were not a vulnerable people generally is not relevant to the fiduciary duty analysis.

455 The appellants quote several speeches in the House of Commons and the Senate and state that "[t]here can be no doubt that the Crown – even through changes of government - acknowledged that it had this grave responsibility."

456 The appellants argue that the fiduciary duty the Crown had to the Métis was a constitutional obligation as a result of the *Constitution Act, 1871*. Their argument appears to rest on two main points. First, "… the discretion conferred on the Crown by section 31 was limited by the fiduciary obligation - a constitutional obligation - it owed to the Métis children under that section" (at para. 163 of the appellants' factum, emphasis in original) because all executive powers must conform with constitutional imperatives. Second, because s. 31 became part of Canada's Constitution in 1871, after that time the Crown's fiduciary duty could only be "… discharged by performance or by a constitutional amendment enacted by the United Kingdom."

III.7.9(c) *Canada's Position*

457 Canada argues that no errors were made by the trial judge with respect to the findings that the appellants did not have Aboriginal title and that no fiduciary obligations arose.

458 Canada states that it is only in special circumstances that dealings between the Crown and Aboriginal peoples give rise to enforceable fiduciary obligations. Canada explained the test for determining whether a fiduciary

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duty exists as requiring the identification of a cognizable Indian interest, and an undertaking of discretionary control over that interest by the Crown in a way that invokes responsibility in the nature of a private law duty.

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459 Aboriginal ancestry, Canada argued, is insufficient to invoke fiduciary principles. It said that the *Act* was a benefits scheme that attracted only public law duties, and that there was no assumption of discretionary control over land management, but rather a mechanism for conveyance to individuals. Further, Canada argued there was no duty, fiduciary or otherwise, owed to the Métis children as children.

460 The trial judge therefore correctly found that there was no "cognizable Indian interest" (*per* Binnie J. in *Wewaykum* at para. 85) sufficient to establish a fiduciary obligation in the administration of the *Act*.

III.7.9(d) *The Two-Part Test for Finding a Fiduciary Obligation Within the Crown-Aboriginal Fiduciary Relationship*

461 Having already found that there is a fiduciary relationship between the Métis and the Crown, the question arises whether the appellants have established that an enforceable fiduciary duty arose in the administration of the *Act*. As Sopinka J., whose reasons on this point were adopted by Binnie J. in *Wewaykum* at para. 83, wrote in *Lac Minerals* at p. 597, "… not all obligations existing between the parties to a well-recognized fiduciary relationship will be fiduciary in nature."

462 The law pertaining to fiduciary duties has caused some frustration to those who seek to understand it. As expressed by Professor Leonard I.

Rotman in *Fiduciary Law* (Toronto: Thomson Canada Limited, 2005) at 1-2:

> The fiduciary concept is wonderfully enigmatic. A variety of terms have been used to describe this peculiar creature of English Equity: "aberrant," "amorphous," "elusive," "ill-defined," "indefinite," "vague," "peripatetic," and "trust-like" are but a few. The fiduciary concept has also been characterized as "a concept in search of a principle" and "equity's blunt tool." The consequences of its application have been referred to as "draconian." Still more adjectives could easily be added to the mix: intriguing, confusing, complex, abstract, flexible, wide-ranging and vexing.

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463 On a similar note, Twaddle J.A., writing for this court in *Ross & Associates v. Palmer*, 2001 MBCA 17, 153 Man.R. (2d) 147 at para. 28, wrote that "[n]o precise definition of a fiduciary exists and, although some academic writers have attempted such a definition, the attempts do little more than list the factors to be considered." As we shall see, however, in recent years, a two-pronged test to determine whether fiduciary duties are owed by the Crown to Aboriginal peoples has emerged in the Supreme Court of Canada jurisprudence.

464 In *Guerin*, Dickson J., as he then was, stated (at p. 384):

> I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.

465 The Supreme Court of Canada's decision in *Guerin* was the first to give effect to enforceable fiduciary obligations owed by the Crown towards an Aboriginal group, in the context of a surrender of Indian reserve land to

the Crown. As Dickson J. pointed out (at p. 385):

> It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function. The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. As was pointed out earlier, the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary.

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466 Wilson J., in a concurring opinion, made similar comments (at p. 352):

> It seems to me that the "political trust" line of authorities is clearly distinguishable from the present case because Indian title has an existence apart altogether from s. 18(1) of the *Indian Act.* It would fly in the face of the clear wording of the section to treat that interest as terminable at will by the Crown without recourse by the Band.

467 Most recently, the test for determining whether a given obligation is fiduciary in nature in the Crown-Aboriginal context was described at para. 83 of *Wewaykum* as depending "… on identification of a cognizable Indian interest, and the Crown's undertaking of discretionary control in relation thereto in a way that invokes responsibility 'in the nature of a private law duty'...." See as well para. 18 of *Haida Nation* where McLachlin C.J.C.

wrote that "[w]here the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, at para. 79."

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468 The test for determining whether a fiduciary obligation exists within the Crown-Aboriginal relationship is therefore composed of two main parts: first, a specific or cognizable Aboriginal interest and second, an undertaking of discretionary control over that interest by the Crown in the nature of a private law duty. While the test was described in *Wewaykum*, a case involving an Indian band, as pertaining to Indian interests, in *Haida Nation*, where McLachlin C.J.C. was describing the fiduciary duties in general terms in a case where no fiduciary obligations were at issue, she wrote of specific Aboriginal interests.

469 The trial judge wrote that there are "… three fundamental criteria for the creation of a fiduciary relationship as between aboriginals and the Crown in respect of aboriginal title to land" being (at para. 629):

> (1) the existence of Indian or aboriginal title;
>
> (2) the fact that the Indian or aboriginal interest in the land is inalienable except upon surrender to the Crown;
>
> (3) the resulting responsibility of the Crown to the aboriginals flowing from the surrender requirement.

470 While those factors reflect aspects of fiduciary duty cases pertaining to surrenders of land, such as *Guerin* and *Blueberry River*, they do not comprise the test for fiduciary obligations in the Crown-Aboriginal

relationship. The test is as articulated in *Wewaykum* and *Haida Nation* above; findings of fiduciary duties within the Crown-Aboriginal relationship have not been limited to claims with the elements set out in para. 629 of the trial judgment. The trial judge referred to *Wewaykum* in his decision, but only with respect to limitations, laches and the honour of the Crown, and not in the fiduciary duty portion of the decision.

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471 While the appellants focus on the language of s. 31 in seeking to establish a fiduciary obligation, there is no magic to the words "for the benefit" found in that section. Wilson J. found at pp. 348-49 of *Guerin* that s. 18 of the *Indian Act*, which mandates that "… reserves shall be held by Her Majesty for the use and benefit of the respective bands …" does not "… *per se* create a fiduciary obligation in the Crown with respect to Indian reserves …" but rather "… recognizes the existence of such an obligation." See also *Ermineskin*, where Rothstein J. examined the language of Treaty 6 and the relevant circumstances, concluding that a fiduciary duty did not arise (at paras. 49-50):

> The bands say that Treaty No. 6 imposed on the Crown the duties of a common law trustee. In my view, Treaty No. 6 did not express such an intention. For example, the treaty states that the Plain and Wood Cree Tribes of Indians relinquished "all their rights, titles and privileges whatsoever, to the lands [within the specified territory]". The Treaty further states that reserves would be set aside and that the Crown would be entitled to sell or dispose of the reserve lands "for the use and benefit of the said Indians entitled thereto, with their consent". However, the Crown also retained the right to appropriate reserve land for any public purpose with payment of due compensation.
>
> This language does not support an intention to impose on the Crown the duties of a common law trustee. All rights were relinquished to the Crown, and the Crown then agreed to set aside certain lands for use by the Indian signatories. The language and circumstances point to a

> conditional transfer of the land, rather than the establishment of a common law trust.

472 To conclude, in order to establish a fiduciary obligation within the Crown-Aboriginal relationship, there must be a specific or cognizable Aboriginal interest and an undertaking of discretionary control over that interest by the Crown. I will now consider whether both aspects of that test are met in the present case.

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III.7.9(e) *Part I of the Fiduciary Duty Test: Cognizable or Special Aboriginal Interest*

473 While a cognizable Aboriginal interest is required in order to establish a fiduciary obligation within the Crown-Aboriginal relationship, precisely what that means is not entirely clear. A particular complication is that this is a case of first impression with respect to what qualifies as a cognizable Métis Aboriginal interest. All previous cases addressing fiduciary obligations outside the s. 35 context deal with Indian Bands, often with reserve land. There is little guidance on what constitutes a cognizable Aboriginal interest in the cases dealing with Indians. This makes the task of determining what is required for a cognizable Métis interest even more difficult.

474 The appellants' fiduciary claim was ultimately rejected based upon the trial judge's finding that the appellants had not proven Aboriginal title. He wrote that since the "… Métis did not hold aboriginal title, there was nothing to surrender or cede" (at para. 631). The appellants could not, therefore, meet any part of the test he had set out at para. 629. The

appellants argued before this court that the trial judge was not permitted to come to this conclusion because the language of s. 31 indicated that the land grant was given "… towards the extinguishment of the Indian Title to the lands in the Province …." Given my view that Aboriginal title is not a mandatory prerequisite to find a fiduciary obligation, and that any fiduciary obligation that may have existed was not breached in any case, I do not find it necessary to decide whether the Métis had Aboriginal title. Nor do I find it necessary to comment further on the manner in which the test for Métis Aboriginal title was formulated in the trial judgment.

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475 The evidence indicates that during the events surrounding the enactment of s. 31, there was uncertainty on everyone's part regarding the nature and extent of the Métis interests that s. 31 purported to extinguish (see para. 649 of the trial judgment). The fact that there was an element of political expediency to s. 31 is to be expected in the course of creating a new province where many competing views and interests are engaged. Evidently, however, there was enough of a sense that the Métis arguably had rights that were not held by others living in what was to become Manitoba to lead to the phrase in s. 31 that the land grant was being made "towards the extinguishment of" any such potential rights.

III.7.9(e)(i) *Is Aboriginal Title an Essential Component of a Cognizable Aboriginal Interest?*

Guerin v. Canada

476 The type of Aboriginal interest that gave rise to a fiduciary duty in *Guerin* was described by Dickson J., as he then was, in the course of

distinguishing the case before him from cases where there was an unenforceable political trust. He wrote that in the political trust cases, "… the party claiming to be beneficiary under a trust depended entirely on statute, ordinance or treaty as the basis for its claim to an interest in the funds in question" (at p. 379). In contrast, he wrote that "[t]he situation of the Indians is entirely different. Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act,* or by any other executive order or legislative provision" (*ibid.*). Dickson J. wrote that it was "… the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land …" (at p. 376) that imposed a fiduciary duty on the Crown in dealing with those lands.

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477 On their face, these statements appear to require that a beneficiary claiming a fiduciary duty on the basis of *Guerin* would have to have Aboriginal title. However, while Dickson J. found it to be "worth noting" that the reserve was located in "the ancient tribal territory of the Musqueam Band" (at p. 379), whether or not the band had Aboriginal title over that territory was never established in *Guerin*. It did not matter whether the band had Aboriginal title because their interest was said to be the same in either case. Dickson J. wrote (*ibid.*):

> It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases: see *Attorney-General for Quebec v. Attorney-General for Canada*, [1921] 1 A.C. 401, at pp. 410-11 (the *Star Chrome* case). It is worth noting, however, that the reserve in question here was created out of the ancient tribal territory of the

> Musqueam Band by the unilateral action of the Colony of British Columbia, prior to Confederation.

478 A close reading of language used elsewhere in *Guerin* provides support for my conclusion that Dickson J. was deliberate in simultaneously relying on Aboriginal title as the basis for the fiduciary duty and in not requiring that the band prove Aboriginal title in the specific lands at issue.

479 This analysis indicates that Aboriginal title gives Aboriginal peoples a sufficient interest in land that, for the purpose of establishing a fiduciary duty, need not necessarily be limited to particular parcels over which the group has Aboriginal title. This approach does not bar fiduciary duty claims regarding land where there is no Aboriginal title, but still leaves to be determined whether an interest in land short of Aboriginal title is a sufficient basis for a cognizable Aboriginal interest therein.

Roberts v. Canada

480 *Roberts v. Canada*, [1989] 1 S.C.R. 322, is a decision stemming from a motion to dismiss the *Wewaykum* claim based on the Federal Court of Canada's lack of jurisdiction. The motion was dismissed by the Federal Court ([1987] 1 F.C. 155), and that decision was upheld by the Federal Court of Appeal ([1987] 2 F.C. 535), and the Supreme Court of Canada, although their reasons for doing so were not the same.

481 In the course of making the decision as to the Federal Court's jurisdiction over the matter, Wilson J. made statements about the nature of the Crown-Aboriginal fiduciary duty which revealed that it is based on the common law of Aboriginal title, even in a case where the plaintiff band did not claim to have Aboriginal title.

482 The relationship between Aboriginal title and fiduciary duty was an essential aspect of the decision, and Wilson J. acknowledged that it was "the common law of aboriginal title which underlies the fiduciary obligations of the Crown to both Bands" (at p. 340).

483 What made this link between Aboriginal title and the Crown-Aboriginal fiduciary duty particularly significant is that "… the Plaintiff Band conceded that its claim was not based

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upon aboriginal title, but contended that such title would be relevant to the determination of the right to occupation of the reserve" (at p. 337).

484 Wilson J. accepted that one of the sources of law that is to be looked to in order to resolve the dispute is "... the common law relating to aboriginal title which underlies the fiduciary nature of the Crown's obligations" (at p. 337).

485 When Wilson J. wrote that "[t]he right to the use and occupancy of reserve lands flows from the *sui generis* nature of Indian title" (at p. 337), a connection was made between Aboriginal title and Indian reserves.

486 Thus, the Crown-Aboriginal fiduciary duty with respect to land was not limited to the lands over which a given band can prove they have Aboriginal title. Still, the land at issue was land that was to be part of a reserve. This is not a factor found in the present appeal.

Wewaykum Indian Band v. Canada

487 *Wewaykum* contains broad cautionary statements about limiting the application of the Crown's fiduciary duty towards Aboriginal peoples, but it seems to apply a low threshold in finding that a fiduciary duty existed. In *Wewaykum*, each band's fiduciary claim focussed upon lands that it had never occupied and in which it held no beneficial interest, although each band did occupy reserves in the same general area.

488 Given their recent entry into the area, the bands did not claim they had Aboriginal title or any other s. 35(1) right (at para. 3).

489 The fiduciary claim being made by each band was based on their rights to the other's reserve, as gleaned from rather technical interpretations of departmental schedules. Binnie J. wrote that the bands had been "… held

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to lack any beneficial interest in the other band's reserve" (at para. 86). Yet they still had a property interest sufficient to establish a fiduciary duty in the process of reserve creation (see para. 89).

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490 Exactly how these property interests translated into the basis for fiduciary obligations is not readily apparent. Binnie J. concluded that with respect to reserve creation, "the nature of the appellant bands' interest in these lands and the Crown's intervention as the exclusive intermediary to deal with others (including the province) on their behalf, imposed on the Crown a fiduciary duty" (at para. 97).

491 Professor David W. Elliott made the following comment in his article "Much Ado About Dittos: *Wewaykum* and the Fiduciary Obligation of the Crown" (2003), 29 Queen's L.J. 1 (at p. 6):

> Because the source of the independence of the interest was aboriginal title, it was important to know what kind of connection was needed between this title and the interest of the claimants. The Court said merely that, in this case, the two interests are "the same" for the purposes of the duty. <u>This suggests that perhaps only a loose connection was needed</u>. …
>
> [emphasis added]

492 The court concluded that the fiduciary duty also existed after the reserves were created.

493 In addressing what type of "cognizable Indian interest" was required, Binnie J. began by describing the impact of *Guerin* on Crown-Aboriginal fiduciary relations. He wrote that the "quasi-proprietary interest" in reserve land could not be put on the same footing as a government benefits program,

which "… will generally give rise to public law remedies only" (at para. 74).

494 *Guerin* was distinguished on the basis that (at para. 91):

> The situation here, unlike *Guerin*, does not involve the Crown interposing itself between an Indian band and non-Indians with respect to an existing Indian interest in lands. Nor does it involve the Crown as "faithless fiduciary" failing to carry out a mandate conferred by a band with respect to disposition of a band asset. The federal Crown in this case was carrying out various functions imposed by statute or undertaken pursuant to federal-provincial agreements. Its mandate was not the *disposition* of an existing Indian interest in the subject lands, but the *creation* of an altogether new interest in lands to which the Indians made no prior claim by way of treaty or aboriginal right.
> [emphasis added]

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495 *Guerin* was not, however, confined to its "unique facts." Binnie J. wrote (at para. 98):

> … In *Guerin*, Dickson J. said the fiduciary "interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown" (p. 382). These dicta should not be read too narrowly. Dickson J. spoke of surrender because those were the facts of the *Guerin* case. As this Court recently held, expropriation of an existing reserve equally gives rise to a fiduciary duty: *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746, 2001 SCC 85. See also *Kruger v. The Queen*, [1986] 1 F.C. 3 (C.A.).

496 The claimants in *Guerin* and *Wewaykum* had one important factor in common: the claimed interest was in land. As Binnie J. explained (at para. 81):

> … The appellants seemed at times to invoke the "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty

> imposed on the Crown does not exist at large but in relation to specific Indian interests. In this case we are dealing with land, which has generally played a central role in aboriginal economies and cultures. ...
> [emphasis added]

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497 But there are limits; as the court emphasized (at para. 83):

> … not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature (*Lac Minerals*, *supra*, at p. 597), and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.
> [emphasis added]

498 While the nature of the particular interest in question in each case must be considered, the fact that the cognizable Aboriginal interest at issue pertains to land stands out as a critical factor in *Wewaykum*. The key factors that gave rise to the cognizable Aboriginal interest in *Wewaykum* are the bands' occupation of those general areas that ultimately became their reserves, and the fact that the Aboriginal interest at issue was land.

III.7.9(e)(ii) *Conclusion Re Aboriginal Title and Cognizable Interest*

499 A clear explanation of the Aboriginal interest in land required in order to ground a fiduciary duty remains elusive, but it is conceptually linked to Aboriginal title. The fiduciary duty analysis found in the trial judgment is primarily based upon *Guerin*, and cases citing or explaining it. *Guerin*, as we have seen, is a complex case, particularly on the issue of the nature of the

interest required for a fiduciary duty, and quite susceptible when read on its own to the interpretation placed upon it in the trial judgment. While there was no finding in *Guerin* that the plaintiff band had Aboriginal title, its analysis relies heavily on the general existence of Aboriginal title. Yet a close reading of *Guerin* demonstrates its consistency with the finding of a fiduciary duty under much different circumstances in *Wewaykum*, and reveals how the very existence of Aboriginal title in Canada gives rise to cognizable Aboriginal interests beyond the specific locations over which a given group can prove that they hold such title. This view is bolstered by the judgment of Wilson J. in *Roberts* who found that the common law of Aboriginal title underlies the Crown's fiduciary obligations to the plaintiff band, even though its fiduciary claim was not based on Aboriginal title.

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500 The fact that no legal interest in a specific land at issue is required in order to ground a fiduciary duty in the Crown-Aboriginal relationship was noted by Kent McNeil in "Culturally Modified Trees, Indian Reserves and the Crown's Fiduciary Obligations" (2003), 21 S.C.L.R. (2d) 105, where he wrote (at p. 135):

> Given that in both *Ross River* and *Wewaykum* the Court found that fiduciary obligations arose prior to the bands acquiring any legal interest in the lands in question, it is obvious that the "cognizable Indian interest" referred to by Binnie J. in this passage does not have to be a legal interest. In the *sui generis* context of the Crown's relationship with the Aboriginal peoples, interests that are not legal can give rise to duties that are of a private law nature if the Crown exercises discretionary power over those interests.

501 This analysis is consistent with an understanding that there is a

general Aboriginal interest in land of a strength and nature that is not dependent upon whether or not any particular group ever had, or can prove that it had, title to a specific parcel of land.

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502 If this analysis is correct, it is not necessary for a given Aboriginal group to have Aboriginal title in order to be owed a fiduciary obligation with respect to land. Notwithstanding, it is difficult to extrapolate from the decided cases whether the Métis interest in the s. 31 land grant is sufficient to constitute a cognizable Aboriginal interest.

503 The factual differences between the appeal before us and *Guerin* and *Wewaykum* are very significant. While those cases dealt with Indians and interests relating to reserves and the creation of reserves, here we are addressing a land grant to the Métis that purported to extinguish their "Indian title." Reserves are held communally by a band, but the s. 31 grants were distributed to individuals, consistent with existing landholdings within the Settlement where a free market economy prevailed. The decided Supreme Court of Canada cases in which fiduciary obligations have been found with respect to the Crown-Aboriginal relationship in land all involve the creation, surrender or appropriation of reserve land.

504 But there are some similarities between the cases. The Métis are Aboriginal people, some of whom were being allocated land in a process that was at the discretion of the Crown. As we have seen, there is no requirement that there has been any pre-existing beneficial interest in the land on the part of the appellants to bring themselves within *Wewaykum*. The interest held by the Métis in the *Act* lands is arguably comparable to that

of the bands in *Wewaykum*, in that (leaving aside s. 32 lands) they had occupied lands in Assiniboia for decades but made no formal claim.

505 In addition, what the Métis have that the *Wewaykum* bands lacked is the statement in s. 31 of the *Act* that it was enacted "towards the extinguishment of the Indian Title to the lands in the Province …." Some significance might be accorded to the fact that that section purports to give the Métis children land grants in return for the extinguishment of Indian title. It is far from clear what interest the Métis of Red River actually had prior to s. 31 being enacted, if any, but their ability to claim Aboriginal title was lost (or at least seriously impeded) through its enactment. The Métis of Red River had an interest of some kind sufficient to be recognized, at least for political purposes, as having been extinguished through the *Act*.

506 Nor should it be forgotten that the *Act* was enacted in the process of nation-building, and evolved from negotiations between Canada and the delegates. The quote attributed to Professor Slattery at para. 79 of *Wewaykum*, which links Canada's obligations to the "necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help," resonates on the facts of this case.

507 My conclusion is that while Aboriginal title is an important part of the underlying rationale for fiduciary obligations found in many Crown-Aboriginal fiduciary cases, *Guerin* being the most prominent example, it is not mandatory. I conclude that Aboriginal peoples' independent, pre-existing interest in land provides the basis for enforceable fiduciary duties even when the Aboriginal group has no title in the land (*Wewaykum*), or where title may be present but has not been proven (*Guerin*). This means that it is possible that the Métis could have an interest in land sufficient to meet this particular requirement towards establishing a fiduciary duty.

508 The facts in this case have some significant similarities to those in

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Wewaykum. However, the differences are great, and can primarily be attributed to the fact that the manner in which the Crown and the Métis dealt with one another is so very different than the relationship between Indians and the Crown. Reserves are at the centre of the fiduciary duty cases dealing with land in the Crown-Aboriginal context, but the decided cases pertain to Indians, not the Métis. It is to be expected that the approach to a cognizable Métis interest could well differ from that with respect to Indians. The Supreme Court of Canada in *Powley* modified the pre-contact Aboriginal rights test in a manner that made it possible for the Métis, as a people with post-contact origins, to assert rights protected by s. 35 of the *Constitution Act, 1982*. Modification of the other components of the Aboriginal rights test was not addressed, but would surely have to be in the circumstances before this court. For example, the test for a cognizable Métis interest, if there is one, by definition would certainly not require that a reserve be involved.

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509 The question of exactly what does constitute a cognizable Métis interest, and whether one exists in this truly unique case I leave for another day. Since, as we will shortly see, the appellants have not proven that there was any breach of the fiduciary standard of conduct in the administration of s. 31 of the *Act,* it is neither necessary nor desirable to determine whether they had a cognizable Aboriginal interest sufficient to ground a fiduciary duty; all the more so since focussed argument on whether or not this critical component of a fiduciary obligation existed has not taken place.

III.7.9(f) *Part II of the Fiduciary Duty Test: Crown Discretion*

510 The second part of the test for determining if a fiduciary obligation existed is whether "… the Crown has assumed discretionary control …" (*Haida* at para. 18) over the interest in question. I find that the Crown did assume discretionary control over the administration of s. 31 of the *Act* and that this aspect of the test is therefore met.

511 According to the existing jurisprudence, this component of the fiduciary duty test includes both the nature and extent of the Crown's discretion. As described by Binnie J. in *Wewaykum* (at para. 85):

> I do not suggest that the existence of a public law duty necessarily excludes the creation of a fiduciary relationship. The latter, however, depends on identification of a cognizable Indian interest, and the Crown's undertaking of discretionary control in relation thereto in a way that invokes responsibility "in the nature of a private law duty"….

512 When considering the extent of the discretion, a court must bear in mind the beneficiaries' vulnerability to its exercise. In terms of the nature of the discretion, we have seen that a Crown fiduciary obligation should be "in the nature of a private law duty."

513 A review of the facts, therefore, demonstrates that the Crown exercised complete control over the s. 31 grants, from the selection of townships and individual allotments to timing and the process by which grants were made. The Crown retained control over the entire process, declining to permit significant participation by the local authorities and giving the Governor General in Council complete discretion in respect of such matters.

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514 During oral argument both Canada and Manitoba submitted that implementation of the provisions of s. 31 of the *Act* was purely a public duty which, unlike obligations in the private law context, could not give rise to a fiduciary duty. See *Polchies* at para. 74.

515 Canada argued that in carrying out its obligations under the *Act*, it was simply engaged in the classic governmental public duty in balancing various interests while providing benefits to a designated group. See *Fairford First Nation v. Canada (Attorney General)*, [1999] 2 F.C. 48 (T.D.) at paras. 61-63.

516 In a more extensive submission, Manitoba asserted that when the Crown through Parliament legislates in its executive function, no fiduciary relationship can exist in the exercise of any administrative details that are necessary to carry out its statutory mandate. See *Ermineskin* at para. 49 where Rothstein J., for the court, made it clear that the words of a legislative enactment can take precedence over any common law fiduciary duty. Private law concepts are not applicable to public law undertakings. If, as here, government is simply following the directives of the legislation in carrying out the distribution of the lands, then the Crown is acting in a purely administrative capacity, and any common law fiduciary duty that might have existed is overridden.

517 In a public law context, Manitoba says, executive discretion can only be successfully challenged if there is a finding of bad faith. See *A.G. of Canada v. Inuit Tapirisat of Canada et al.,* [1980] 2 S.C.R. 735.

518 The appellants agreed that any common law fiduciary duty can be

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truncated by statute. But here the discretion stems from the broad and general language of s. 31 itself, and Canada had total control over all aspects of the s. 31 grants. This is not simply a case of following the dictates of a general statute enacted in the public interest.

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519 Considerable assistance comes from two decisions, both of which, by coincidence, were written by Rothstein J. In *Fairford First Nation*, Rothstein J., after referring to *Guerin* at p. 385 (at para. 61) for the important distinction, for fiduciary duty purposes, between private law and public law duties, noted (at para. 63):

> … duties that arise from legislative or executive action are public law duties. Such duties, as Dickson J. has said, typically do not give rise to a fiduciary relationship. …

520 But Rothstein J. was careful to note (*ibid.*):

> There is no indication they [the *Indian Act* and the *Department of Citizenship and Immigration Act*] would be in the nature of private law duties such as when Indian land is surrendered. Nor is there any suggestion the Crown was exercising a discretion or power for or on behalf of the Indians.

521 In *Ermineskin*, Rothstein J., writing for the court, dealt with the relationship between legislation and a common law fiduciary duty.

522 At para. 75, he wrote that, “legislation may limit the discretion and actions of a fiduciary, whether that fiduciary is the Crown or anyone else.” However, he also noted (at para. 71) the corollary that a fiduciary duty can be created by statute: see *Guerin* at p. 384. After referring to *Guerin* and

Authorson, he concluded that while "Parliament may legislate in ways that constrain or eliminate the Crown's fiduciary duties," the Crown's obligation is nonetheless "to act in a way that is consistent with its fiduciary duties as constrained by valid legislation." Finally he quoted *Guerin* at p. 387 where Dickson J., as he then was, wrote (at para. 76):

> … A fiduciary obligation will not, of course, be eliminated by the imposition of conditions that have the effect of restricting the fiduciary's discretion. A failure to adhere to the imposed conditions will simply itself be a *prima facie* breach of the obligation.

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523 On the facts before us, I fail to see how it can be said, as Canada and Manitoba have argued, that because Canada was following the dictates of a constitutional statute cast in broad and unspecific terms there could be no exercise of discretion of the kind that can result in a fiduciary obligation. Section 31 imposes an obligation on the Lieutenant Governor to select the 1.4 million acres of land subject to the imprimatur of the Governor General in Council. By its very terms, the Lieutenant Governor is given, subject to approval of the Governor General in Council, virtually total discretion with respect to its implementation.

524 This included, for example, the designation and choice of lands eligible for s. 31 grants, the use of a lottery for selection of land, the timing of the various stages of the allotment, together with the insistence that surveys first be completed, and generally the entire process including the issuance of scrip after Canada "ran out of land" for s. 31 land grants, reliance upon the Machar/Ryan report as the basis for the third and final allotment, the decision to post legal descriptions with the allotments – which

the appellants say greatly facilitated sales – and finally, the patent itself. In contrast to s. 32 (see para. 736 below), s. 31 necessarily leads to "that extra degree of obligation or special relationship" sufficient to create a fiduciary duty.

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525 I do not accept the respondents' submission that because Canada was carrying out an executive function pursuant to legislative authority, there could be no fiduciary obligation "in the nature of a private law duty" to the beneficiaries under s. 31 of the *Act*.

526 In my opinion, the words of s. 31 alone are insufficient to give rise to a fiduciary duty. Any fiduciary obligation that arose was reflected in, but not created by, s. 31 (as argued by the appellants). See pp. 348-49 of *Guerin*. Contrary to the arguments advanced by Manitoba, finding that a fiduciary duty existed in the administration of the *Act* does not require reading new terms into the statute. The test is whether there is a cognizable Aboriginal interest combined with Crown discretion in the nature of a private law duty. The obligations that follow are determined with reference to the fiduciary standard of conduct and the content of the fiduciary duty. However, while s. 31 did not create the fiduciary duty, its wording is doubtless an important factor to consider when assessing the scope and content of any duty.

527 It is clear that the beneficiaries of s. 31 were subject to the Crown's discretion in the process of selecting and distributing grants, just as the bands in *Wewaykum* were found to be "… entirely dependent on the Crown to see the reserve-creation process through to completion" (at para. 89). See

also *Laroza Estate v. Ontario*, [2005] O.T.C. 727 at para. 19 (S.C.J.), and *Drady v. Canada (Minister of Health)* (2007), 159 A.C.W.S. (3d) 177 at para. 28 (Ont. S.C.J.). Binnie J. explained further (*Wewaykum* at para. 91):

> … The federal Crown in this case was carrying out various functions imposed by statute or undertaken pursuant to federal-provincial agreements. Its mandate was not the *disposition* of an existing Indian interest in the subject lands, but the *creation* of an altogether new interest in lands to which the Indians made no prior claim by way of treaty or aboriginal right.

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528 While the circumstances surrounding s. 31 do not precisely parallel those described above in *Wewaykum*, a similar amount of Crown discretion and control was involved in the tasks, which in both cases included a lengthy process of designating lands for Aboriginal peoples.

529 As noted above, vulnerability is relevant to the discretionary aspect of a fiduciary duty. The vulnerability that is relevant is not, however, that generally experienced by the parties outside their relationship, but rather the vulnerability that arises from the aspect of the relationship that is said to give rise to a fiduciary duty. As Cromwell J. explained in *Galambos* (at para. 68):

> … fiduciary law is more concerned with the position of the parties that *results from* the relationship which gives rise to the fiduciary duty than with the respective positions of the parties *before* they enter into the relationship. La Forest J. in *Hodgkinson*, at p. 406, made this clear by approving these words of Professor Ernest J. Weinrib: "It cannot be the *sine qua non* of a fiduciary obligation that the parties have disparate bargaining strength. . . . In contrast to notions of conscionability, the fiduciary relation looks to the relative position of the parties that results from the agreement rather than the relative position that precedes the agreement" ("The Fiduciary Obligation" (1975), 25 *U.T.L.J.* 1, at p. 6). Thus, while vulnerability in the broad sense resulting from factors

> external to the relationship is a relevant consideration, a more important one is the extent to which vulnerability arises from the relationship: *Hodgkinson*, at p. 406.

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530 The relationship that the Manitoba Métis entered into with the federal Crown during the creation of the province of Manitoba meant that, although they were a strong force in the Settlement and had shown their willingness to take military action to assert what they considered to be their rights, they ultimately accepted and endorsed Manitoba's entry into Canada as a province. While the trial judge found that "… the Métis were not a vulnerable or unsophisticated people insofar as the representation or advancement of their interests were concerned" (at para. 641), in the context of this fiduciary duty analysis their vulnerability arose from the complete control that Canada retained over land in the new province, and specifically with respect to all aspects of the s. 31 grants, which it insisted on retaining despite requests for local control. The Crown undertook, through "the exercise of statutory powers" (*Galambos* at para. 77), to distribute lands to the Métis.

531 In *Wewaykum*, Binnie J. equated the vulnerability of the bands in the reserve creation period to that of the settlers in the area, writing that "[t]he Indians were 'vulnerable' to the adverse exercise of the government's discretion, but so too were the settlers, and each looked to the Crown for a fair resolution of their dispute" (at para. 96). The Métis in the new province of Manitoba were similarly vulnerable.

532 In *Blueberry River*, McLachlin J., as she then was, wrote (at para. 38):

> … A person cedes (or more often finds himself in the situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power trusts the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.
>
> [emphasis added]

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533 The Métis were not only vulnerable in the sense described, but they trusted Canada to act in their best interests. The July 1, 1870 version of the *New Nation* reported on the special session of the Legislative Assembly of Assiniboia held on June 24, 1870, at which the Assembly adopted the *Act* and decided to join Confederation. While the Assembly was not comprised solely of Métis, it was through the Assembly that the *Act*, including the promise made in s. 31, was adopted locally. Ritchot addressed the Assembly as follows:

> … As to the result of the mission of your delegates generally, I have only to say that as the Canadian Government seem really serious, they have to be believed and we can trust them (cheers). My own conviction is that both the Canadians and English Government are anxious to do what they can to treat us well (cheers). I found that our future Lieut. Governor is looked upon as a real gentleman and one who will do justice to everybody (cheers). As to the troops, I never said a word for or against their coming. But the intentions of the Government in this respect, appear fair enough. They mean well in the premises (cheers).
>
> [emphasis added]

534 The Assembly voted to cede power to Canada, trusting them to treat them fairly. Ultimately, Canada was granted complete discretion over the interests of the beneficiaries of s. 31.

III.7.9(g) *Standard of Conduct and Content of the Fiduciary Duty*

535 One of the issues before the court in this appeal is whether the appellants have proven that Canada breached any fiduciary obligations in the course of its administration of s. 31 of the *Act*. While the standard of conduct required of a fiduciary is well settled and constant, the content of individual fiduciary duties depends on the surrounding context. As La Forest J. observed in *M.(K.) v. M.(H.)*, "the nature of the obligation will vary depending on the factual context of the relationship in which it arises" (at p. 66).

536 In these reasons the "standard of conduct" refers to a general description of how a fiduciary is obligated to act. The "content" of a fiduciary duty encompasses the specific acts that are expected of the fiduciary as a result of the application of the standard of conduct to the relevant facts. Additional fiduciary duty content may also be generated by representations made by the fiduciary.

III.7.9(g)(i) *Standard of Conduct*

537 The general standard of conduct required of a fiduciary is that of a person of ordinary prudence handling his own affairs (*Ermineskin* at para. 131). A fiduciary is also required to act with reference to the beneficiary's best interests in fulfilling its fiduciary obligations (*Haida Nation* at para. 18, *Ermineskin* at para. 129). See also *Blueberry River* at paras. 16-17, 22, 104, 115-16.

538 As Professor Leonard I. Rotman wrote in "Aboriginal Rights: Crown-

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Native Relations as Fiduciary: Reflections Almost Twenty Years After *Guerin*" (2003), 22 Windsor Y.B. Access Just. 363 at p. 17 (QL): "The fulfilment of fiduciary duties generally requires that fiduciaries act honourably, with honesty, integrity, selflessness, and the utmost good faith (*uberrima fides*) towards the best interests of their beneficiaries." In this case, no bad faith on Canada's part is alleged, but bad faith is not necessary in order to prove that a fiduciary obligation has been breached.

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III.7.9(g)(ii) *Role of the Best Interests of the Child*

539 The appellants argued that the "best interests of the child" was the fiduciary standard of conduct by which the Crown's actions should be measured. They wrote in their factum that s. 31 "… was treated as a grant to the 7,000 Métis who were under 21 as of July 15, 1870" (at para. 168) and that "[t]hese 7,000 children were (to use the language of *Haida Nation*), the 'Aboriginal group' whose best interests were to be observed in the administration of section 31." They added (at para. 204):

> The Crown, to use the language of McLachlin C.J. in *Haida Nation,* had "to act with reference to the Aboriginal group's best interest." The Crown could not claim that it had simply to adjudicate among competing interests. All along the Crown's obligation to protect the best interests of the children continued. …

540 The appellants therefore relied upon the fact that the s. 31 recipients were <u>primarily minors</u> when the *Act* was enacted, combined with the "best interests" standard referred to in *Haida Nation*, to formulate the "best interests of the child" standard they propounded. The trial judge concluded that the word "children" in s. 31 referred to lineage and did not mean infants

or minors, which the appellants challenge. It is not necessary to determine which perspective is correct as there is no doubt that the vast number of "children," however defined, were under the age of 21. There is no authority upon which they rely that says that the "best interests" standard becomes "best interests of the child" when the beneficiaries are children. There is also no indication of how this would modify the content of the standard, if at all.

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541 In its factum, Canada wrote (at para. 188):

> … there is no over-arching fiduciary responsibility on the part of government to act in the best interests of children: *E.D.G. v. Hammer*, [2003] 2 S.C.R. 459, 2003 SCC 52 at paras. 22-27 …. The only responsibility is to avoid harmful conduct stemming from disloyalty, self-interest or abuse of power, and rests in this case with the parents or guardians of the Métis children and, in the appropriate case, with the courts.

542 As the trial judge concluded that there was no fiduciary relationship between the parties, he did not address the standard of conduct required of a fiduciary.

543 McLachlin C.J.C., writing for the majority in *Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, found that s. 43 of the *Criminal Code*, which provides a limited defence for parents and teachers charged with assaulting a child, did not violate any principle of fundamental justice so as to offend s. 7 of the *Charter*. While she found that the "best interests of the child" (at para. 7) was not a principle of fundamental justice, she recognized at para. 9 the

significance and pervasiveness of the “best interests of the child” as a legal principle “consistent with international instruments to which Canada is a signatory” (*per* McLachlin C.J.C., *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181 at para. 93).

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544 I need not consider the appellants’ argument that a fiduciary obligation was owed to the beneficiaries of s. 31 as children. While the best interests of the beneficiary is part of the standard of conduct in Canadian fiduciary jurisprudence generally, the “best interests of the child” has been rejected by the Supreme Court of Canada as describing the obligations owed in situations analogous to the parent-child fiduciary relationship: *E.D.G. v. Hammer*, 2003 SCC 52, [2003] 2 S.C.R. 459, and *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403. In rejecting the best interests of the child as a general fiduciary obligation to children in *K.L.B.,* the majority explicitly rejected comparisons to the Crown-Aboriginal fiduciary relationship and noted the Crown’s positive duties within that relationship. As will be seen, I find that the Crown did not breach its obligations in the Crown-Aboriginal sphere in this case. Therefore, reviewing their actions from the perspective of a fiduciary duty owed to children (if a duty of that sort existed) would not produce a different result.

III.7.9(g)(iii) *It is the Conduct Itself that is to be Measured, Not the Result, and Not in Hindsight*

545 Whether or not a fiduciary obligation has been breached is measured not by the end result of the fiduciary’s actions, but rather by whether its conduct has fallen below the applicable standard. As McLachlin C.J.C.

wrote in *E.D.G. v. Hammer* (at para. 24):

> … Fiduciary obligations are not obligations to guarantee a certain outcome for the vulnerable party, regardless of fault. They do not hold the fiduciary to a certain type of outcome, exposing the fiduciary to liability whenever the vulnerable party is harmed by one of the fiduciary's employees. Rather, they hold the fiduciary to a certain type of conduct. As Ryan J.A. held in *A.(C.) v. C.(J.W.)* (1998), 60 B.C.L.R. (3d) 92 (C.A.), at para. 154, "A fiduciary is not a guarantor." A fiduciary "does not breach his or her duties by simply failing to obtain the best result for the beneficiary".

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546 Similarly, Rothstein J. wrote in *Ermineskin* that "[t]here is no duty of a trustee at common law to guarantee against risk of loss to the trust corpus or that the corpus would increase" (at para. 57). He went on to write that "[t]he Crown's conduct cannot be measured in hindsight" (at para. 139).

547 In assessing whether the Crown had breached its fiduciary obligations in *Wewaykum*, Binnie J. wrote that the "assessment of the Crown's discharge of its fiduciary obligations … must have regard to the context of the times" (at para. 97).

548 Therefore, in assessing whether Canada breached its fiduciary obligations in this case, regard must be had only to whether Canada breached the standard by virtue of its actual conduct. This assessment must not be made in hindsight, but with reference to what was known and understood at the time.

III.7.9(g)(iv) *Role of Representations Made by the Fiduciary*

549 As noted above, the content of a fiduciary duty is largely determined by applying the standard of conduct to a given fact-situation. The content of the fiduciary duty can also be informed by representations made by the fiduciary, where those representations were relied upon by the beneficiary: *Guerin*, at paras. 110-112.

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550 The appellants submit that speeches made by various politicians in the House of Commons regarding the Métis land situation in Manitoba constitute binding representations, which give rise to corresponding fiduciary duties to fulfill such promises. While, like the trial judge, I question whether these types of political speeches could give rise to enforceable fiduciary obligations, it is clear that the appellants can point to no findings of fact by the trial judge to demonstrate reliance on any such representations. Whether or not there were any representations capable of giving rise to fiduciary obligations on the part of the Crown, this lack of reliance upon them is determinative. Without proof of reliance, these alleged representations cannot expand the content of the Crown's fiduciary duty in the circumstances.

551 The terms of an agreement between the fiduciary and the beneficiary may also be relevant to this analysis. For instance, the language of a treaty between the band and the Crown was found in *Whitefish* to assist in establishing the content of the fiduciary duty at issue in that case. However, the resolution of the case at bar does not turn solely upon the interpretation of s. 31. Instead, the common law fiduciary obligation test must be applied.

Thus, interpretive principles applicable to Aboriginal rights and treaties, such as those relied upon by the trial judge, are not as relevant to this analysis as they would be, for instance, to a decision regarding Aboriginal title.

III.7.9(g)(v) *Role of Métis Hardship*

552 The determination of whether Canada has breached its fiduciary obligations therefore has a specific and narrow focus. The question is not whether the Métis people of Red River met with hardship in the decades following Manitoba's entry into Confederation, although they undeniably did. The question is also not whether any such hardship resulted from actions taken by the federal Crown with respect to its fiduciary obligations to the Métis. Rather, the question involves assessing the Crown's conduct with respect to the applicable standard.

III.7.9(g)(vi) *Recognizing the Crown's Unique Role as a Fiduciary*

553 Furthermore, the task of assessing whether the Crown has breached its fiduciary obligations attracts special considerations given its unique role. As Rothstein J. wrote in *Ermineskin* (at para. 130):

> As Binnie J. stated in *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 96, "[t]he Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting". In the present case, the Crown must consider not only the interests of the bands but also the interests of other Canadians when it sets the interest rate paid to the bands.

554 McLachlin C.J.C. wrote of the Crown's special role as a fiduciary in

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Haida Nation, explaining that "[t]he content of the fiduciary duty may vary to take into account the Crown's other, broader obligations" (at para. 18). See also *Osoyoos Indian Band v. Oliver (Town),* 2001 SCC 85, [2001] 3 S.C.R. 746 at paras. 51-53. When assessing the Crown's conduct as a fiduciary, it is not only other beneficiaries of fiduciary obligations, but also others to whom the Crown owes regular public law duties whose needs must be balanced against those to whom fiduciary duties are owed.

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555 The Crown, being obliged to consider the needs of Canadians in general, and of the nation itself, is therefore permitted to act upon those obligations without breaching its fiduciary duties. This is not to say that the Crown may "merely by invoking competing interests, shirk its fiduciary duty" (*Wewaykum* at para. 104). However, the Crown's actions as a fiduciary must be assessed in light of the many competing interests it must balance. To put it another way, there is a single standard of conduct, the application of which produces differing fiduciary duty content depending on the circumstances, including consideration of the Crown's entitlement to consider the needs of others to whom it owes competing duties.

III.7.9(g)(vii) *Summary of Guiding Principles*

556 In sum, the fiduciary standard of conduct, which mandates that the fiduciary act with reference to the best interests of the beneficiary and as a reasonable person would in handling his own affairs, is a high one. But the Crown is no ordinary fiduciary, and while it may not shirk its fiduciary obligations by simply citing the competing interests that it serves, it is entitled to consider those competing interests even in actions that affect

those to whom it owes fiduciary obligations. The question of whether the standard has been breached must also be considered with reference to the conduct itself, and not the end result, mindful of the context of the times, and not in hindsight.

557 In this particular case, much time has passed since the events in question and as a result there has been a significant reduction in the availability of evidence (as noted by the trial judge at para. 428 of his reasons). Had more evidence been available, it may have assisted in the presentation of the case. As we have seen, the burden is on the appellants to show that Canada breached its fiduciary obligations. The appellants must therefore prove that, even after taking into account any other legitimate interests that Canada was entitled to consider, Canada acted below the standard of conduct expected of it vis-à-vis its fiduciary beneficiaries. Given the gaps in the available evidence and the challenges that Canada was faced with in expanding the country, the appellants' task, as we have seen, is a difficult one indeed.

III.7.9(g)(viii) *Inadvertence or Ineptitude*

558 The appellants submit that government ineptitude is sufficient to breach the fiduciary standard. In their factum, the appellants wrote (at para. 158):

> In *Wewaykum* Binnie J. held at para. 80 that the law of fiduciary obligation, as it applies to Aboriginal peoples, is intended to protect them as "Aboriginal peoples vulnerable to the risks of governmental misconduct or ineptitude." See also McLachlin J. in *Blueberry*, at p. 27, indicating, at para. 104 that inadvertence is sufficient.

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559 In *Blueberry River*, the standard of conduct applied was the reasonable person and best interests tests. However, the type of conduct that breached that standard was described as "inadvertence" (see paras. 18, 28, 94). The breach was found not because a fiduciary standard of "advertence" was applied, but because a reasonable person in the circumstances would not have transferred the mineral rights at issue in that case inadvertently.

560 In *Wewaykum*, the term "ineptitude" was used in the course of a discussion about the rationale for the general fiduciary relationship between the Crown and Aboriginal peoples, and not as an instance where a specific fiduciary duty arose within that relationship. It is clear from a reading of *Wewaykum* as a whole (and specifically para. 86) that the content of fiduciary obligations vary with the context, and that this reference to ineptitude was not a general statement dictating the standard that a fiduciary must meet.

561 Therefore, inadvertent or inept actions have the potential to constitute a breach of fiduciary duty, but only if such actions are below the standard of conduct required of the fiduciary in the circumstances.

III.7.9(g)(ix) *Was the Standard Breached?*

562 Given the standard of conduct and the other relevant considerations outlined above, it must be determined whether Canada breached its fiduciary obligations to the Métis in its administration of the *Act*.

563 The appellants argue that Canada failed to act in the best interests of the s. 31 recipients in the following five ways:

- All Métis children were to have received grants, but Canada failed to grant land to 993 children.
- The grants should have been received as soon as possible, but Canada delayed the process of allotting and granting the s. 31 lands.
- The grants should have been selected and divided for the benefit of the families according to the usages and customs of the country, but Canada proceeded by way of lottery.
- No sales of s. 31 interests should have been permitted before grant, but such sales were in fact permitted.
- No sales of s. 31 interests should have been permitted before the age of majority, but such sales were nevertheless permitted.

III.7.9(g)(x) *Trial Judge's Findings*

564 The trial judge made critical findings with respect to the appellants' five allegations of breaches of fiduciary duty. I highlight these findings now, followed by the appellants' and respondents' submissions.

Selection of Land

565 Given Canada's other responsibilities in the new province, such as under s. 32 of the *Act*, building a national railway to the benefit of all Canadians, and Canada's need to balance its various obligations, the trial

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judge concluded that granting the Métis first choice of s. 31 land was impossible, though they were given significant input into the selection of their land, largely as a result of Archibald's endeavours.

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566 The trial judge held that the Order in Council of May 26, 1871, which allowed immigrants to occupy unsurveyed land, while clearly a source of divisiveness and unrest, had only a minimal and temporary effect on the s. 31 grants. Nor was there any significant loss to the Métis land interests from the fact that their selections were not wholly accepted.

567 The appellants' arguments that the comparative maps highlight the Crown's failure to discharge its obligations to the Métis children were not accepted. While the trial judge did not agree with Dr. Ens' assertion that most parishes requested more land than warranted relative to the overall grant, he found that the differences were not significant.

568 Overall, the trial judge wrote, the evidence demonstrated a willingness on Canada's part to try to accommodate the wishes of the parishes, though not a perfect match. Indeed, there was little, if any, evidence of a complaint from people at the time, nor facts to support a claim of bad faith on the part of Canada.

The Allotment of the Land, the Lottery, and the Providing of Scrip

569 The trial judge rejected the appellants' assertion that the use of a random lottery was contrary to the agreement reached between the delegates and Cartier for selection of land in family blocks on the basis that there was no such agreement. There certainly was not unanimity between the French

Métis and the English Métis with respect to the selection of land.

570 While the lottery was indeed random, it was not random throughout the entire province, as allotments were done on a parish-by-parish basis.

571 The trial judge was of the view that it was difficult to see "how the grant could have been administered other than by a random lottery without creating unfairness and significant divisiveness within each parish" (at para. 1006). The random lottery gave each child in the parish an equal chance. There were few, if any, complaints.

572 Practically speaking, given the size of the individual grants (240 acres) and that of the average family (four to five children), it was difficult, the trial judge wrote, to see how the children's grants could be contiguous to their families' existing holdings.

573 Concerning the issuance of 993 supplementary scrips in lieu of land, Codd was clearly wrong in his opinion letter, which underestimated the number of eligible Métis children by close to one thousand. But that letter "evidences, but for hindsight, a reasoned consideration of the problem and a reasoned explanation for the number at which he arrived" (at para. 1018). Codd's recommendation was "thorough and reasoned" (at para. 874). The trial judge concluded that the exercise of discretion by Codd and Dennis permitted error in the absence of evidence of bad faith or sharp conduct, of which there was none.

574 Concerning the particular situations of the 993 recipients, there was evidence pertaining to only three persons who received supplementary scrip,

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rather than a 240-acre land grant. The trial judge was obviously troubled by the lack of specific evidence about the particular situation of the claimants. This gave rise to evidentiary concerns as to what weight could be attached to the fact that 993 supplementary scrips were issued (see para. 1028). There were few, if any, complaints.

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Sales Before Patent or Majority

575 While there was no obligation under the *Act* for Canada to hold the lands in trust for the children or to be their guardians, the trial judge held that "in fact the evidence in my view discloses that to the extent it could, Canada did just that" (at para. 1037). For example, Canada insisted on issuing s. 31 patents only to the actual allottees.

576 In response to the appellants' argument that Canada's duty was to ensure there was absolutely no speculation, the trial judge held that it would have been impossible to do so.

577 There was no doubt that sales occurred prior to patent, some with speculators for improvident prices (and some grossly so). There were undoubted abuses. But according to Flanagan, the trial judge wrote, the many judicial sales pursuant to Manitoba's legislation made up less than ten percent of all children's allotments. As we shall see, the trial judge's reference to judicial sales constituting less than ten percent of all sales of children's allotments was a mistake.

578 As well, there were sales at market prices; all sales were not made to, or as a result of pressure by, speculators.

Delay

579 The trial judge described this quite correctly as the appellants' "overarching complaint" (at para. 1052). It was difficult to understand, he wrote, why there were so many delays and why it took so long for the selection and allotment to be completed (see para. 1053). As an example, the final allotments started in October 1876 and were not completed until 1880.

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580 On the other hand, it is necessary, the trial judge noted, to take into account the difficulties on the ground in Manitoba, which included that a fledgling province had just been born which was remote from Ottawa, the Lieutenant Governor and the Manitoba Legislature had competing interests to address, many of the Métis lived a somewhat nomadic life, and errors did occur or issues arose which justified changes in the size of the land grant.

581 Section 31 lands were largely concentrated around the settlement belt and were not issued "all over Manitoba" (at para. 1057) as the appellants asserted. While the evidence disclosed that many Métis sold their land – some for modest amounts and some at market value – many others kept their land and acquired more. While there were certainly sales at improvident prices, there was considerable evidence of other sales at market value.

582 The trial judge expressed a serious concern in assessing the delay that occurred between 1870 and 1885 "through 2007 glasses. It is an extremely difficult thing to do reliably" he said (at para. 1056), given the uncertainties about what was being sold and whether the price was a fair one. His conclusion ultimately was "the Métis who were full citizens of Manitoba at

the time made individual choices and there is, in my view, no basis in law, in the circumstances here, for any finding of liability on the part of Canada respecting the section 31 lands" (at para. 1058).

583 In his concluding remarks, the trial judge summarized, "[the plaintiffs seek] relief that is in essence of a collective nature, but is underpinned by a factual reality that is individual" (at para. 1197).

III.7.9(g)(xi) *Appellants' Position*

Lottery

584 Lotteries were not mentioned in the Order in Council of April 25, 1871, which simply provided for allocation by a random draw. The appellants argue it was assumed by the delegates (at least up until the evening of May 2, 1870) that the Manitoba Legislature or a committee of local men would distribute the land. But this did not happen and grants ended up being scattered at "great and unworkable distance from one another" (at para. 224 of the appellants' factum). The trial judge erred when he concluded that the lottery was the only fair way to divide the land since it worked against the children acquiring lots in family groupings. The trial judge's conclusion ignores the fact that Ritchot reminded Cartier and Macdonald well after May 9, 1870, that they had promised to appoint a local committee, which they failed to do.

585 There was no evidence adduced that the scheme as envisaged by the Métis was impractical, nor that Canada believed it to be so. The fact there were few complaints is irrelevant.

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586 The trial judge's interpretation of the postscript to Cartier's letter of May 23, 1870, was wrong, the appellants say, as he overlooked the phrase "of a nature to meet the wishes of the half-breed residents."

Delay

a) Selection of the Lands

587 The Order in Council of May 26, 1871, the appellants argue, preferred new settlers over s. 31 grantees, and the instructions to Archibald to wait for surveys to be completed before selections could be commenced, was contrary to the April 25, 1871 Order in Council which, unlike homesteading and preemption rights, said nothing about surveys concerning s. 31 lands. This gave new settlers arriving in Manitoba an unfair advantage. It was not until April 15, 1872, that an Order in Council confirmed that surveys were sufficiently far advanced to enable selection to begin. Selection only began on February 22, 1873, despite the joint address from Manitoba on February 8, 1872, which called for a prompt distribution of the land.

b) Allotment

588 The retraction of the initial allotment approved by the April 3, 1873 Order in Council was caused by the necessary removal of adults from the s. 31 grants. Riel, Ritchot and others took the position from the beginning that it was wrong to include the adults. The appellants say this resulted in delay, and an enlargement of the grants to 190 acres from 140, assuming there to be approximately 7,000 eligible Métis children.

589 In the meantime, Manitoba had enacted legislation on March 8, 1873,

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which permitted a vendor to repudiate sales of allotments. Canada did not disallow the Act, which came into force in 1874.

590 The second allotment started August 16, 1873, limited to the 7,000 children. It was completed by 1876, and following the Machar/Ryan report patents were to issue "forthwith," according to the April 26, 1875 Order in Council.

591 Then Canada decided, the appellants emphasize, there was a need to recalculate the numbers. Codd's recommendation, following the report of the Machar/Ryan Commission, to reduce the estimated number of eligible children to 5,833 was accepted despite the fact there was no satisfactory explanation for the significant discrepancies with the 1870 census. This decision resulted in the cancellation of the second allotment and an increase in the size of the individual grants to 240 acres. The third allotment did not start until October 30, 1876.

592 Even after the delay caused by Codd's error which necessitated the third allotment process, there was a further long delay in the issuance of the patents beyond this initial seven years. None of this could possibly be in the best interests of the Métis children, argue the appellants.

593 Understandably, the appellants do not take issue with the trial judge's findings that the selection, allotment and ultimate grant of patents was not done in a timely manner. But they say the trial judge erred in ignoring the evidence of what could have been done because of his concern about assessing historical evidence "through 2007 glasses" (at para. 1056). The trial judge relied instead on his personal knowledge of current difficulties

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with land development, which was either improper, or judicial speculation.

594 The trial judge held that the s. 31 land grant was simply a recognition of the Métis' contribution to the Settlement and intended to give the families, through their children, a head start. Even if this view is accepted, there was no head start, the appellants argue, until a decade after Manitoba became a province.

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993 Children Received Scrip and Not Land

595 Canada underestimated the number of allottees contrary to its own best information based on the 1870 census. The appellants assert that the trial judge erred in his conclusion that Codd's major mistake in underestimating the number of eligible Métis children was a "reasoned consideration of the problem" (at para. 1018). They say it was not in the best interests of 993 children to give them scrip, with its inherent dangers, instead of the land to which they were entitled. It was clearly wrong for the trial judge to base his analysis on only three out of 993 cases. His concerns about having only three of 993 "histories" before him was both speculative and irrelevant.

596 Section 33 of the *Act*, used by the judge as a "make weight," only relates to grants of land and did not authorize the granting of scrip.

Sales Before Grant and Before Attaining the Age of Majority

597 Archibald was wrong in his December 27, 1870 letter in recommending that all Métis, including heads of families, should participate in the s. 31 grants. He further erred in recommending against a "clog"

(inalienability) on transfers, which he knew full well was against the wishes of the French Métis. Canada had a competing perspective that locking up the land would be detrimental to the new province. This was a breach of fiduciary duty, the appellants argue, as it was not in the best interests of the Métis children. (See *Wewaykum* at para. 104.)

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598 It is suggested that Archibald, in his report of December 27, 1870, proceeded on the assumption that the land would be held in trust for the children until they reached the age of majority.

599 The crucial April 25, 1871 Order in Council, though not expressly prohibiting alienation of s. 31 lands (as it did for homestead and preemption lands), should be taken as implying that there could be no dealings with the s. 31 lands until after the grant (which is interpreted by the appellants as not occurring until after patent). Canada's policy of settlement not sale could only succeed if the children actually received the grants.

600 The trial judge was wrong in failing to accept the appellants' argument that Parliament's intention to act as guardians of the land for the children could only be accomplished by prohibiting all sales before they reached the age of majority.

601 The appellants say that when the facts of the lottery, the failure to provide all children with grants, and the delays are looked at collectively, this amounts not merely to benign neglect but deliberate ineptitude of such seriousness as to constitute unconscionable behaviour. Had Canada proceeded with its intention in 1872 to redo the 1870 census, it is arguable, the appellants assert, that this dilemma could have been avoided.

602 With respect to the trial judge's findings, no fault is found with the trial judge's conclusion that there was "no doubt that some sales were made to speculators and for improvident prices" (at para. 1046), but the appellants say he erred in minimizing the number of sales. Flanagan got it wrong when he concluded there were only a small number of sales by children by way of judicial sales. His estimate that less than ten percent of children's allotments suffered this fate related only to sales by children under 18, whereas the evidence from the inquiry involving Chief Justice Wood and other members of the court dealt with sales by children both under and over 18.

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603 Reliance is placed on Dr. Ens' thesis, "Métis Lands in Manitoba" (Man. Historical Society, No. 5, 1983), where he concluded that the delays with respect to the s. 31 grants, if not deliberate, were caused by "irresponsible neglect."

604 The trial judge asked himself the wrong question, namely, whether the Métis were different from Indians, which of course they are, being of mixed blood. The real question, for purposes relating to the "extinguishment of Indian title," was whether they were considered to be "Indians" under s. 91(24) of the *Constitution Act, 1867*. In other words, were the Métis considered to be Indians in the particular context of s. 31? To this question, the appellants say, there could only be one answer.

605 There was no evidence to establish that if the Crown had acted in a timely way the Métis-owned lands grouped according to family would not have been possible, or more generally, that the scheme as envisaged by the Métis was impractical. It was not up to the appellants to show that their

concept of s. 31 would have worked. See *Hodgkinson* and *Whitefish*.

606 The appellants argue that the trial judge was wrong in failing to draw an adverse inference from the long, unexplained delay in implementing the provisions of s. 31, and equally wrong to conclude that Canada did not take control of the land as a result of s. 31.

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607 The trial judge was also wrong when he found that the two parallel provincial Acts of February 1878, *i.e. The Infants Act* and *The Lands of Half-breed Children Act*, were necessary to protect the Métis. In fact, they reduced the Métis' common law protection and benefitted purchasers and speculators.

Canada Allowed Manitoba to Enact Unconstitutional Legislation

608 Until the lands were granted, any dealing with s. 31 lands was exclusively within federal jurisdiction. The trial judge erred in accepting Manitoba's argument that the purpose of the Order in Council of March 23, 1876 – which stated that Canada would not recognize assignments – was to avoid the need for Canada to set up the necessary administrative machinery for the land titles records. The evidence is overwhelming that the effect of Manitoba's legislation was to enable sales before patent, including by minors, to aid speculators. Canada is responsible, the appellants say, for allowing sales before patent, and Manitoba had no authority to enact legislation with respect to s. 31 lands.

609 Finally, the trial judge was wrong to conclude that there was serious evidentiary incompleteness and gaps in the documentary records. Neither of

Canada's two experts testified that there were gaps. The trial judge did find that "while there are nonetheless gaps in the documentary record, generally speaking, that which the plaintiffs assert as regards the documentary record is correct" (at para. 458). Having found that the allotment and grant process was not done on a timely basis, he was wrong to decide that in order to understand the social context, culture and background to the legislation that oral evidence was "if not essential, extremely helpful" (at para. 428), when considering the constitutionality of legislation. Central to the appellants' argument is that the documentary record itself is more than sufficient to demonstrate Canada's unconscionable neglect and delay.

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III.7.9(g)(xii) *Canada's Position With Respect to the "Breach" Issues*

Section 31 Selections

610 Canada's first point is that the Crown is no ordinary fiduciary and must balance other legitimate competing interests even when dealing with those to whom they owe fiduciary obligations.

611 Canada argues that with respect to the modest delay in commencing the allotment process, it was practical to await the completion of surveys to properly identify the selected tracts and to be able to publish precisely the legal descriptions.

612 The Order in Council of May 26, 1871, which allowed immigrants to occupy unsurveyed lands, was necessary since new settlers were already on their way; it ceased to operate with respect to lands selected for the s. 31

grants by virtue of the Order in Council of April 15, 1872. The application of the May 26th Order in Council was therefore short lived.

Allotment of Section 31 Lands to Individuals

613 A critical finding made by the trial judge was that there would have been feasibility issues in trying to manage the grant on the basis of family blocks. For example, trying to put numerous 240-acre allotments contiguous to the existing narrow river lots would simply not have worked.

614 Codd provided a rationale for the numbers which caused the cancellation of the April 26, 1875 Order in Council (requiring patents to issue "forthwith".) While Codd's estimate was clearly wrong, the trial judge correctly concluded that it was "reasonable" in the circumstances, and not made in bad faith.

615 While the trial judge agreed it was difficult to explain why the allotment process took so long, he was entirely right in not viewing the situation "through 2007 glasses."

Patents of Section 31 Lands

616 Three arguments made by the appellants are dealt with collectively by Canada: firstly, it took too long; secondly, children were permitted to sell prior to patent and prior to the age of majority; and lastly, that 993 children were left out.

617 Relatively little delay was experienced by some parishes; pre-patent occupation was entirely consistent with petitions from the provincial

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Legislature.

618 With respect to the 993 cases of scrip, the appellants had the evidentiary burden and simply failed to make out their case. There was little or no opposition at the time to the granting of scrip. The fact that the trial judge only had three examples to deal with before him is explained by the fact that that was all the appellants chose to present.

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619 The appellants' argument that the s. 31 grants should have been distributed on the basis of the 1870 census is simply wrong. The census was generally recognized as not being a reliable source for allotment purposes and this was the reason for the Machar/Ryan Commission in 1875-76.

620 In conclusion, Canada argues that "the practical effect of the plaintiffs' argument is that Canada took too long but in the end gave too much." The Métis children received not only 1.44 million acres, but scrip in the amount of $240 was also issued to 993 grantees.

III.7.9(g)(xiii) *No Breaches of Fiduciary Duty Were Proven*

621 The trial judge found that no fiduciary obligation was owed to the appellants. Therefore, he did not consider whether the Crown breached the fiduciary standard of conduct. He did, however, make extensive findings of fact both generally and with respect to s. 31 itself. Those findings are also relevant to the fiduciary standard of conduct. In the absence of palpable and overriding error, the trial judge's findings, to the extent they are relevant, must be incorporated into the analysis of whether any fiduciary duty that may have existed was breached.

Lottery

622 The trial judge found that the use of a random lottery was not unreasonable. There is ample support in the evidence for this conclusion. Firstly, there was no agreement – as the trial judge clearly found – that the allotments would be made in family groupings, nor any suggestion that the Métis desired a land base in the future. Secondly, there was no consensus between the French Métis and the English Métis with respect to the attachment of conditions to the grants. Thirdly, a critical finding made by the trial judge, supported by Flanagan, is that there were serious physical limitations in endeavouring to manage the grant on the basis of family blocks (see Flanagan "Historical Evidence" at p. 9). Trying to put 240-acre allotments contiguous to narrow river lots would have been very difficult at best. Furthermore, with the average quantity of land allocated under s. 31 for each family being about one thousand acres, resettling as a group was a virtual impossibility. Lastly, there is only one proposal in evidence inconsistent with the lottery system, which came from the provincial Legislature on April 28, 1871, which, as we have seen (para. 88), urged that the location of the s. 31 lands be optional to the grantees; this was an impractical suggestion at best. The trial judge also found that Archibald attempted to accommodate the Métis' wishes as best he could.

623 As the trial judge explained, the lottery was random on a parish-by-parish basis, not at large. His conclusion that it would have been difficult to utilize another method of selection "without creating unfairness and significant divisiveness within each parish" (at para. 1006) is consistent with the trial record.

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624 As for Cartier's letter of May 23, 1870, the meaning put on it by the trial judge was arguably not the only one available to him. The appellants state that the postscript amounts to nothing less than a virtual guarantee that the Métis would be able to pick the lands as they wished. But what I take to be the trial judge's interpretation, namely, that it was directed to the essential fairness of the process for all recipients, is a reasonable one and I see no justification for overturning his finding.

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Scrip and Land

625 The trial judge concluded that s. 33 of the *Act* enabled Canada to provide scrip instead of land. With respect, I cannot agree with that conclusion. The plain wording of the section, which refers to "settle and appoint the mode and form of Grants of Land from the Crown, and any Order in Council for that purpose" cannot provide the authority to substitute scrip for land.

626 But this is not what Canada did. In fact, what occurred was that Canada provided in 993 instances scrip in the amount of $240 in addition to the 1.4 million acres granted to other s. 31 grantees.

627 Was this a breach of fiduciary duty? Was there a duty on Canada's part to provide each child eligible for a s. 31 grant with their precise mathematical share of the 1.4 million acres? I do not think that such an onerous responsibility can be read into s. 31, which in essence provides for a grant of 1.4 million acres "for the benefit of the families of the half-breed residents" to be divided among their children. Clearly, if there had been a shortfall, that is to say had something less than 1.4 million acres been

granted, there would have been cause to complain. But the Métis children as a whole did receive 1.4 million acres – in fact, slightly in excess of that amount.

628 This allegation of breach of fiduciary obligation is centred on a certain result which is not in dispute, namely, that 993 children received scrip instead of land. Yet the question whether a fiduciary obligation has been breached is not determined by its result, but by whether the fiduciary's conduct breached the applicable standard. See *E.D.G.* at para. 24. It was the adoption of Codd's recommendation that led to these beneficiaries not receiving land. Although it was erroneous, the trial judge, as we have seen, considered Codd's decision to be reasonable and thorough, with a "reasoned explanation for the number" (at para. 1018). These findings indicate there was no breach of the fiduciary standard. The position taken by the appellants, that the 1870 census was reliable and accurate, is not supported by the weight of evidence notwithstanding Macdonald's comments to the contrary in his 1885 speech in Parliament. While in hindsight a different number should have been chosen, that is not the criterion to measure the Crown's conduct as a fiduciary. *Ermineskin* at para. 139.

629 The appellants are making a collective claim for alleged breaches relating to the rights of individuals. As a collective, the Métis children got more than they were owed through s. 31 grants plus an additional 993 beneficiaries who did not receive land, but received scrip.

630 In all of the circumstances, I conclude that Canada did not breach its fiduciary obligations when it provided 993 eligible beneficiaries under s. 31

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of the *Act* with scrip. The appellants (in oral argument) characterized Codd's miscalculation as the most egregious example of error leading to delay. But the trial judge's conclusion that there was no bad faith or sharp conduct on the part of Codd or Dennis, neither of whom he found were motivated by mischief or malice, is amply supported by the facts before him. The evidence falls far short of justifying the conclusion that Canada was in breach of a fiduciary obligation to the s. 31 beneficiaries, or a finding of unconscionable behaviour, as urged by the appellants.

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Sales Before Grant and Before Age of Majority

631 As for sales before grant and sales before attaining the age of majority, it is difficult to quarrel with the trial judge's sense that, practically speaking, next to nothing could have been done to prevent sales of and speculation in s. 31 lands in the absence of an absolute prohibition against sales of any kind. Would it have been in the "best interests" of the Métis to impose such a prohibition?

632 The facts are that there was no unanimity between the French and English Métis regarding what was in the best interests of their families and communities with respect to the s. 31 land grants. The English Métis were generally more interested in dealing with the land as they saw fit. The French-speaking Métis, or at least their religious leaders, were more interested in preserving the linguistic and religious traditions of that community. In any event, the trial judge made a finding well supported by the evidence that the Métis generally did not want the land encompassed within the s. 31 grants to be inalienable or to have their rights to buy and sell

their land restricted. As we have seen, the Métis of the Red River Settlement in 1870 considered themselves to be individuals entitled to all rights enjoyed by all non-Indian inhabitants of the Settlement, including the right to buy and sell their own property.

633 Furthermore, from a practical sense, 1.4 million acres of land was an enormous quantity of land, with the average Métis family receiving approximately a thousand acres. The fact of the matter is that we know next to nothing with respect to the financial needs of the beneficiaries of the s. 31 grants or their families. It is likely that the size of the grant (on a family basis) was well in excess of the requirements of most Métis families, and it should not be forgotten that even as late as the early 1870s many Métis were away in what we now refer to as Saskatchewan and Alberta for the buffalo hunt.

634 It must be kept in mind that the Crown, unique among fiduciaries, was entitled to take into account its other public responsibilities, not the least of which was to establish sovereignty in the new and growing province.

635 While some French-speaking Catholic Métis wished that the s. 31 land should be "tied up" for a period of time, the interests of the broader community also needed to be taken into account. It was recognized that there would be a rapid influx of settlers.

636 In his letter of December 27, 1870, Archibald considered at length whether s. 31 lands should be locked up. He recommended strongly against this on the basis that doing so would exclude such land "from the improvements going on in localities where land is unfettered" and on the

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basis that "the whole tendency of Modern Legislation" was to abolish "Estates Tail." Obviously, Canada accepted Archibald's recommendation. The appellants counter that Archibald, in any event, assumed that the children's grants would be held to the age of majority. This view is not consistent with the evidence accepted by the trial judge. It cannot be said that there was not a fair balancing of the competing future interests.

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637 Echoing the concerns expressed by the trial judge about making assessments of what he called the facts "on the ground" through "2007 glasses," how is it possible to say, given the state of the evidence and the trial judge's findings of fact, that it was in the "best interests of the Métis children" to prevent alienation of the land or otherwise prohibit sales before the age of majority? The weight of evidence does not justify the conclusion that it was in the best interests of the Métis children for sales before age of majority to be absolutely prohibited or that the land be made inalienable.

638 Acting in the best interests of the Métis did not necessarily mean keeping decision-making out of their hands. It is true that many of the Métis left Manitoba as the 1870s wore on and that the influx of new settlers meant that over time, they became a minority. But there is no doubt that prior to the enactment of the *Act*, the Métis were enfranchised citizens who were full participants in the economic and political life of Assiniboia. It cannot be assumed that totally restricting the options of individual Métis with respect to selling their s. 31 grants, for example by creating a Métis land base, would necessarily have been in their best interests.

639 At trial and before this court, the appellants placed great reliance on

an article written by Dr. Ens in 1982, when he was a Masters student, entitled "Métis Lands in Manitoba." In it, as we have seen, he castigated Manitoba's legislative intentions and Canada's "dispossession of the Métis land" which he characterized as – if not an act of conscious design – "irresponsible neglect." The trial judge obviously gave no weight to this report, and in my opinion rightly so since Dr. Ens in his testimony at trial disavowed the report as it was based on earlier and discredited research prepared for the appellants.

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640 The appellants are critical of the implementation of the foundational Order in Council of April 25, 1871. It is argued that since the Order in Council referred only to the requirement for surveys for preemption and homestead rights, but not s. 31 grants, Canada was not justified in holding up the allotments until the s. 31 sectional surveys were completed. In my opinion, this argument defies common sense; simply stated, the evidence makes it clear that selection of the 1.4 million acres, all of which Canada was obliged to grant, would have been unworkable in the absence of a survey.

641 Section 7 of the Order in Council provides that recorded claims where the claimant died before the age of 18 were deemed to be real estate. This should lead to the conclusion, the appellants say, that all other claims and interests in land were not real estate. This cannot be correct. Its purpose, just as the Order in Council says, was to enable such claims to be treated as real estate – as opposed to personalty – for inheritance purposes only.

642 Finally, reference is made to s. 3, which reads as follows:

> No conditions of settlement shall be imposed in grants made to half-breeds in pursuance of the provisions of the Act referred to, and there shall be no other restrictions as to their power of dealing with their lands when granted than those which the laws of Manitoba may prescribe.
>
> [emphasis added]

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643 The appellants argue that as a result of the wording of s. 3 of the April 25, 1871 Order in Council, Manitoba had no jurisdiction with respect to s. 31 lands until after the grants were issued, nor were the Métis children able to dispose of the land. In oral argument, it was stated that a grant, being the act of conveying property, could take place only after receipt of the patent and its recording in the Dominion Lands Office.

644 The word "grants" appears frequently in ss. 31 and 32 of the *Act*, in much of the relevant provincial legislation, as well as in many Orders in Council.

645 For example, in s. 32 of the *Act* reference is made to "grants" from the HBC in subss. (1) and (2). But there is no suggestion that a patent was ever received. Similarly, in the Order in Council of January 27, 1873, the statement is made that Canada "has sole power … to regulate the distribution of the grant to the Half-breeds individually and the issue of Patents therefor" (emphasis added). This is an indication that the issuance of the patent did not precede the grant.

646 It is also clear from the evidence that Canada at no time raised any

objection to Manitoba's legislation nor does counsel for Canada now argue that Manitoba's legislation was *ultra vires*.

647 Jeffrey S. Murray, in his 2007 article "Land Grants," Library and Archives Canada, describes a patent as the instrument used to convey title to granted land. A land patent from the Crown was the instrument used to convey title to the land. Land grant on the other hand is a "general term referring to the Crown's transfer of public lands to a subordinate government, a corporation or an individual."

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648 In my opinion, the word "grant" in s. 3 of the April 25, 1871 Order in Council, and indeed in most other instances, was not used in the sense of a formal legal instrument, such as a transfer of property by deed or other document that conveyed title – this was the role of the patent. Rather, the word "grant" was used in its more common sense, namely, to bestow or transfer the interest in land to the s. 31 beneficiary.

649 Finally, it should not be overlooked that s. 3 prohibits "restrictions as to their power of dealing with their lands when granted [other] than those which the laws of Manitoba may prescribe" [emphasis added]. Facilitating or enabling transactions, as all of Manitoba's legislation did except for the *1873 Act*, can hardly be described as a restriction.

650 For all of these reasons I do not accept the appellants' interpretation of s. 3 of the April 25, 1871 Order in Council.

651 Given the complexity and breadth of the precedent-setting issues in this case, the trial judge made a few mistakes. Two should be mentioned.

Firstly, in support of his conclusion that the Métis were not Indians, he interpreted the Supreme Court's decision in *Blais* as authority for the proposition that for all purposes our highest court had so found. This is not correct. The court in *Blais* was very careful to restrict its conclusions to the narrow issue before it, namely, whether the Métis were Indians as that term was used in the *Natural Resources Transfer Agreement* of 1930. The Supreme Court left the broader question to be determined another day. In the end, this was not a significant error as the point is not a determinative one for our purposes, and the trial judge came to the same conclusion based on his analysis of the evidence before him.

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652 The other obvious mistake made by the trial judge was to conclude from Flanagan's evidence that sales by children under the age of 21 through the judicial process accounted for less than ten percent of all sales. In fact, Flanagan's testimony referred only to sales by children under 18. In cross-examination, Flanagan appears to have accepted that the combined total of sales by children under 21 could be as high as 35 to 40 percent of all sales. However, the trial judge's error, in my opinion, does not affect his overall conclusion that it would have been practically impossible to bar alienation before patents, and that while there were undoubted abuses, there was evidence of sales which occurred at market prices and "clear evidence" (at para. 1048) that not all sales were to speculators. In any event, one should not be surprised that there were a goodly number of sales pursuant to the *Lands of Half-breed Children Act* by 18- to 21-year-olds, given the fact that they were legally entitled to receive the patent from Canada upon attaining 18 years of age, and that a court process was in place to permit sales of s. 31

lands provided the court was satisfied that the disposition was voluntary.

653 As well, it would appear that the trial judge was mistaken when he found there was no discussion about the children's grant at the meeting Cartier arranged with the Governor General on May 19, 1870. But even if "palpable," this error hardly constitutes "overriding" error.

Delay

654 With respect to delay, there was great delay – much of it unexplained. But determining whether a fiduciary's conduct did not meet the content of their obligation in the particular circumstances before us is an intensely fact-driven exercise. As the Ontario Court of Appeal noted in *Powley* ((2001), 53 O.R. (3d) 35 at para. 75):

> … At such an early stage of development in this area, a provincial appellate court must approach its task with due regard to the importance and complexity of aboriginal rights. It is impossible to define the rights of an entire people within the confines of one case. … [c]laims of aboriginal rights are intensely fact specific, and involve a close, careful and detailed scrutiny of events long past. … A full articulation of the shape and subtle contours of constitutionally protected Métis rights will undoubtedly unfold over time in the usual incremental fashion of the common law. …

655 It cannot be presumed that the reason for the delay, however extensive, was a breach of fiduciary obligation. The onus was on the appellants throughout to prove a breach on the civil burden of proof.

656 With respect to those known events that contributed to the delay (prominent among them the cancellation of the first two allotments, the slow

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pace of the allotment process in the third and final round, the erroneous inclusion of adults as beneficiaries for the s. 31 grants, and the long delays in the issuance of patents), mistakes were made and it is difficult to avoid the inference that inattention or carelessness may have been a contributing factor. But there is no convincing evidence that Canada's conduct overall constituted "deliberate ineptitude" or "unconscionable conduct" as asserted by the appellants. In my opinion, delay, even long delay, in and of itself is insufficient, in this instance, to lead to the conclusion that a fiduciary obligation, if present, was breached.

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657 One recurring theme in the trial judge's extensive reasons for decision concerns the complete absence of non-documentary evidence to explain the context and understandings for the many events that form the historical background of this lawsuit. The trial judge's first discussion of this difficulty occurs in the trial judgment (see paras. 427-29), when the trial judge was considering the limitation issue. In reviewing the "mass of material, most of it archival" (at para. 427), he rejected the appellants' argument that the documentary evidence was sufficient – as being tantamount to having the people involved appearing in the courtroom as witnesses – to enable the court to confidently make all necessary findings. He considered oral testimony, "if not essential, extremely helpful" (at para. 428) in ascertaining what actually occurred with respect to the negotiations leading up to, and the implementation of the *Act*, and the conduct of the various players. Surely this is correct, given the significant gaps in the record.

658 As we have seen, the trial judge returned to this refrain when he considered the appellants' argument that the issuance of scrip in lieu of a s.

31 grant constituted legal error. At para. 1028, in commenting on the fact that the circumstances of only three of the 993 scrip recipients were before him (and then only by way of documentation), he posed a series of critical questions about the individual situations of the 993 people, for which the record did not provide an answer. In the result, he expressed an evidentiary concern about the weight he should give to the fact that 993 supplementary scrips were issued. And as Canada correctly pointed out, the fact that there were only three examples before the court is entirely the responsibility of the appellants.

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659 Similarly with respect to delay, the trial judge again highlighted the difficulty of assessing circumstances which occurred "between 1870 and 1885 approximately, through 2007 glasses" (at para. 1056). The trial judge's concern is entirely consistent with the observation made by Binnie J. in *Wewaykum* (at para. 121):

> … Witnesses are no longer available, historical documents are lost and difficult to contextualize, and expectations of fair practices change. Evolving standards of conduct and new standards of liability eventually make it unfair to judge actions of the past by the standards of today. …

660 In the result, it was difficult to reliably assess the vagaries of what was being sold and its market value. His conclusion was that the Métis, as "full citizens," made their own choices.

661 With respect to the fallibility of the documentary record, it is helpful to recall the trial judge's observation near the beginning of his judgment that "even the plaintiffs acknowledge that while documents record information,

there is contextual uncertainty as to the degree of reliability of the documents" (at para. 23). It is also noteworthy that when it serves their purpose, the appellants themselves are not above limiting the scope of documents. As the trial judge said (at para. 429):

> Indeed, despite their argument that the archival and other documents are tantamount to having the authors appear as witnesses, the plaintiffs, as I have already stated, argued that the land documents filed with the Land Titles Office, while doubtless of a high degree of accuracy, could be relied upon only for what the documents said but could not be taken to establish that what the documents said actually occurred.

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662 The trial judge's concern about contextual uncertainty, which led him to conclude that the appellants had not proven the factual foundation of their claim, surely applies with great force to the areas specifically highlighted by him, namely, limitations, the granting of scrip, and delay.

663 With respect to many other issues, the trial judge did the best he could with the documents available, but in the end was not persuaded that the appellants had proven their allegations on a balance of probabilities. In my opinion, the trial judge's conclusions, be they findings of fact or mixed findings of fact and law, were reasonable and supported by the evidence before him.

Ultra Vires Legislation

664 The fifth and last asserted breach of Canada's fiduciary obligation is that Canada stood by and knowingly allowed Manitoba to pass *ultra vires* legislation that facilitated sales before grant and before the age of 21.

665 The first step in the analysis of this allegation is to determine whether Manitoba's legislation was *ultra vires*. As I have already concluded that this issue is moot, it is not strictly necessary to consider this matter further. Nonetheless, since much time and effort was spent by all counsel on the issue of the constitutionality of Manitoba's legislative initiatives, I simply state that, based on the authorities placed before this court, and the submissions of counsel, I am far from persuaded that Manitoba's impugned legislation was constitutionally invalid.

666 Secondly, there is the complex question as to what duty, if any, Canada owed to the Métis if Manitoba's legislation was *ultra vires*.

667 Canada's good faith is not in issue; indeed, there is no suggestion that Canada, before these proceedings, considered the validity of Manitoba's legislation to be in dispute. One recourse potentially available to Canada would have been to disallow Manitoba's legislation, as they did on one occasion in 1876 (para. 129). There are two problems with this. The first is that disallowance is a quintessentially political act that has been consistently held not to be justiciable. Secondly, if it can be said that Canada's failure to disallow could ever constitute a breach of fiduciary duty, which I doubt, Canada's choice not to do so could well have been a reasonable exercise of its discretion to consider competing interests in the new and growing province of Manitoba. This latter point applies with equal force to any suggestion that Canada should have sought a declaration in court given the complete absence of anything resembling the modern day concept of fiduciary obligations to Aboriginals, and the appellants' candid admission that if the Métis had sought timely judicial relief, they likely would not have

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been successful.

668 The trial judge did not commit palpable and overriding error when he rejected the appellants' assertions that Canada had breached any duty that might have been owed to the Métis. The appellants' appeal with respect to the issues surrounding s. 31 of the *Act* therefore cannot succeed.

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PART IV
SECTION 32

669 The appellants argue that fiduciary obligations attached to the administration of s. 32 of the *Act*. They make this argument on two bases: first, that the fiduciary relationship between the Crown and Aboriginal peoples is engaged by s. 32 (from which a fiduciary duty arose) and second, that in any case a fiduciary duty was owed based on the Ontario Court of Appeal's 2002 decision in *Authorson* (hereinafter "*Authorson 2002*"), reported at (2002), 58 O.R. (3d) 417. In addition, the appellants say the honour of the Crown was engaged.

670 Section 32 of the *Act* reads:

> For the quieting of titles, and assuring to the settlers in the Province the peaceable possession of the lands now held by them, it is enacted as follows:
>
> (1) All grants of land in freehold made by the Hudson's Bay Company up to the eighth day of March, in the year 1869, shall, if required by the owner, be confirmed by grant from the Crown.
>
> (2) All grants of estates less than freehold in land made by the Hudson's Bay Company up to the eighth day of March aforesaid, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.

> (3) All titles by occupancy with the sanction and under the license and authority of the Hudson's Bay Company up to the eighth day of March aforesaid, of land in that part of the Province in which the Indian Title has been extinguished, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.
>
> (4) All persons in peaceable possession of tracts of land at the time of the transfer to Canada, in those parts of the Province in which the Indian Title has not been extinguished, shall have the right of pre-emption of the same, on such terms and conditions as may be determined by the Governor in Council.
>
> (5) The Lieutenant-Governor is hereby authorized, under regulations to be made from time to time by the Governor General in Council, to make all such provisions for ascertaining and adjusting, on fair and equitable terms, the rights of Common, and rights of cutting Hay held and enjoyed by the settlers in the Province, and for the commutation of the same by grants of land from the Crown.
>
> [emphasis added]

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671 The trial judge found that there was no fiduciary duty owed to the appellants with respect to s. 32 of the *Act* (at paras. 682-83, 685):

> … Firstly, there is no evidence that Parliament intended by s. 32 to create a fiduciary relationship between Canada and the residents who fell within s. 32 and particularly subss. 32(3), (4) and (5).
>
> Secondly, there is not, in my view, any basis for the creation of a fiduciary responsibility between Canada and those residents. None of those residents held aboriginal title to the land in question. None held any interest or any claim to interest independent of the Crown or through it the governing authority of the territory. This was particularly so under subss. (3) and (4) being squatters whose occupation was by tacit approval only and under subs. (5), whose interest was as to the use of land but only with the approval of and subject to the conditions imposed by the Crown or governing authority within the territory.
>
> In short, the persons entitled under s. 32 had no interest in the land independent of the Crown and furthermore enjoyed whatever interest they had by sufferance of the Crown.

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672 I find that the appellants' argument fails on the first two grounds. The fiduciary relationship between the Crown and Aboriginal peoples is not engaged by s. 32, and the appellants cannot bring themselves within *Authorson 2002*. As we have already seen, the honour of the Crown is not engaged with respect to s. 32. Furthermore, as already concluded (see para. 293), the claim is statute-barred.

673 A review of the early history of lands within the settlement belt and the OTM makes it clear that the purpose of s. 32 was to recognize and confirm the different categories of landholdings in existence shortly before or at the creation of the new province.

674 Collectively subss. (1) to (4) address the various types of land tenure which existed and were recognized within Assiniboia. These were freehold grants from the HBC (subs. (1)), estates less than freehold grants from the HBC (subs. (2)), occupancy within the settlement belt with the express or tacit sanction of the HBC (*i.e.* squatters) (subs. (3)), and finally peaceable possession by squatters of land outside the settlement belt where Indian title had not been extinguished (subs. (4)).

675 This appeal concerns only subss. (3) and (4). Except for the issue of delay, which is common to subss. (1) to (4), no complaint is made with respect to the grants of land from the HBC, or lands occupied within the settlement belt with the permission of the HBC, referred to in subss. (1) and (2).

676 Subsections 32(3) and (4) dealt with circumstances where an interest

in land had not been formally conferred by the HBC. With respect to the latter – being outside the settlement belt – the HBC had no authority to authorize or permit such occupancy. In either instance, whatever landholding the settler may have had was unlikely to be confirmed by documentation.

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677 Subsection 32(5) concerned rights in common and haying in the Settlement. Most, if not all, of these rights were exercised outside the settlement belt. While a source of considerable controversy during its implementation, and very much a live issue at trial, this issue was not pursued by the appellants on appeal. There will therefore be little discussion about it in this decision.

678 Statements concerning the importance of preserving the existing interests in land held by residents of the Red River Settlement were made by Macdonald and Donald A. Smith (Chief Agent of the HBC) well before the passage of the *Act* on May 12, 1870. As well, subs. 32(4) was referred to explicitly in the letter from Cartier to Ritchot of May 23, 1870, wherein Cartier undertook that those entitled to claims under that section would not be required to pay for their land.

679 It is significant that all four lists of rights prepared by the representatives of the Red River Settlement before the delegates left for Ottawa on March 24, 1870, contained provisions designed to ensure that the existing landholding interests were protected.

680 One potential difficulty with respect to subs. 32(4) and subs. 32(5), referring as they did to rights in the OTM, was eliminated once Indian title

over the territory had been extinguished by treaties in 1871. Subsequently, Canada's Order in Council of November 11, 1872, provided that claimants under subs. 32(4) of the *Act* would be dealt with on the same terms as those under subs. (3).

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681 Controversy soon arose between Canada and the local residents as to the necessity of showing occupation or possession under either subs. 32(3) or subs. 32(4). One particularly difficult problem occurred with respect to "staked claims." Staked claims referred to the practice of planting stakes, ploughed furrows, or the like, at the corners of a parcel of land as evidence of entitlement. It was said to be in accordance with the common understanding and practice of the Settlement that ownership could thereby occur without occupation or any obvious signs of possession. Especially contentious were the large number of claims "staked" a month or two before July 15, 1870.

682 On May 26, 1874, Canada passed legislation which effectively combined subss. 32(3) and 32(4) of the *Act* to provide that persons who "established undisturbed occupancy" and were "in actual and peaceable possession thereof," would be entitled to obtain letters patent for the land. The relevant date for "actual and peaceable possession" was changed in subs. (3) on April 8, 1875, to July 15, 1870, to coincide with subs. (4). Prior to this alteration, the relevant date for subs. (3), like subss. (1) and (2), was March 8, 1869.

683 It was not until March 19, 1875, that an Order in Council was passed authorizing the first s. 32 patents. In April 1875, a commission was

established to settle claims between settlers but not between settlers and the Crown. But the position taken by Canada that s. 32 required undisturbed occupancy and actual peaceable possession continued to be a troubling one, especially with respect to staked claims.

684 The appellants' strong criticism of Canada's insistence on this policy was not accepted by the trial judge who found that, "[t]he Council of Assiniboia recognized occupation as a requirement in order to give recognition to one's claim in land outside the Settlement Belt, or surveyed area" (at para. 288).

685 Eventually the Order in Council of April 20, 1876, recognized claims based on constant occupation, or where ownership was recognized in the Settlement. The Order in Council also stated that lands that were not surveyed or occupied prior to July 15, 1870, but merely staked, were not entitled to consideration.

686 By the fall of 1876, 2,604 applications for letters patent had been received (of which it was estimated one-quarter were "staked claims"); it was estimated there were at least 400 additional claims. Controversy continued with respect to the requirements to establish occupation or ownership.

687 Debate continued in the Senate in the spring of 1878 about staked claims and the process for resolving conflicting claims; it was suggested that it was not lawful to insist on actual occupancy when subs. 32(4) referred only to peaceable possession. Finally, in May 1879, Macdonald stated in Parliament that the government intended to recognize "such staked claims as

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have been followed by possession and improvement."

688 On February 14, 1880, the Legislative Assembly of Manitoba complained to the Governor General about the lack of attention being paid to the staked claims, claiming that "nearly all the staked claims are now occupied and improved."

689 In 1881, Ritchot intervened, arguing that Macdonald and Cartier must have understood in the negotiations of April/May 1870 that "peaceable possession," as incorporated into subs. 32(4), was to be understood in accordance with the usages of the country at the time.

690 A further Order in Council dated February 25, 1881, provided clarification of the April 20, 1876 Order in Council by classifying claims staked out by claimants before July 15, 1870, into three categories. Where property had changed hands and the purchasers were in possession and living on the lands, they were entitled to accept a homestead entry for 160 acres, and to acquire the balance at one dollar per acre. For unimproved lands there was a lesser entitlement. Claims to lands staked for "speculative purposes" were to be dealt with by a commission.

691 Contested claims were eventually passed to the Dominion Lands Board in 1883, which soon established formal rules for the three categories of lands.

692 In the end, only first class staked claims, occupied by the claimants in 1881, were entitled to a free grant of 160 acres.

693 *The Manitoba Land Claims Act, 1884*, S.C. 1884 (47 Vict.), c. 26,

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extended the time for making claims under subss. 32(3) and (4) until May 1, 1886. Further amendments were made extending the grace period for many years thereafter. There was no evidence that any applicant was dispossessed of their land because of the delay in issuing the s. 32 patents.

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IV.1 The Trial Judgment

694 The trial judge explained that the essence of s. 32 was contained in the opening phrase of the section. Furthermore, there was a "clear and broad discretion" given to the Governor General in Council with respect to the administration of subs. (4). The difference between subss. (3) and (4) related to the status of the land at the time of transfer. No doubt representations and assurances were given during the April/May 1870 negotiations, but no agreement was reached.

695 Canada was entitled, the trial judge concluded, to require some degree of occupation for the existence of peaceable possession and cannot be challenged at this late date given its good faith. In any event, the appellants' argument that Canada misapprehended the usages of the country respecting the mode of taking possession under subs. 32(4) is without merit given Canada's broad discretion.

696 There was a critical absence of *viva voce* evidence. While all available historical documents were before the court, they did not tell the complete story. It was therefore "risky to reach a conclusion on the issue of delay without receiving evidence which might explain the delay" (at para. 1187). It was, the trial judge wrote, simply "not appropriate to pass

judgment on this issue in 2007 [the year of the trial] in respect of matters that occurred 125 years ago" (*ibid.*); "at the very least, it is not something which, in my view, should give rise to declaratory relief" (at para. 1188).

IV.2 The Appellants' Position

697 In 1870, 85 percent of the population of Manitoba was Métis. Both within and outside the settlement belt, possession of lands prior to July 15, 1870, had been taken up in a very gradual and informal basis without necessarily constructing buildings or making any improvements to the lands.

698 Under subss. 32(3) and (4), the appellants argue, "really valuable improvements" were not required and settlers were to receive their lands free of charge with no arbitrary maximum size. If ownership was acknowledged in the Settlement (the usage of the country had been to permit occupation by staking), the holders had a "title by occupancy" and should have received a free grant; improvements were neither required by s. 32 nor part of the agreement reached by the delegates.

699 As characterized in the appellants' factum (at para. 401):

> … Despite the assurances given to the people, for almost a decade and a half after 1870 Canada insisted on a high level of improvements and occupation before it would grant title to lands that were claimed under subsections 32(3) and (4), and only after extraordinary delay and the departure of many of the original claimants did Canada finally adopt a test that accorded with what had been the usages of the country.

700 Reference is made by the appellants to Ritchot's lengthy letter to Macdonald of January 15, 1881, in which he questioned Canada's good faith

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with respect to staked claims. A liberal interpretation of the *Act* would have led to virtually all of the settlement belt remaining in the hands of the old settlers; the trial judge erred in failing to find this did not happen due to Canada's unacceptable technical position with respect to "possession" and "occupation."

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701 Reliance is placed on Flanagan's statement that having to prove "undisturbed occupancy" as well as "peaceable possession" was a hardship for those who had staked out claims and not settled on them.

702 It was not until May 1883, some 13 years after the *Act* was passed, that a more liberal interpretation of "occupancy" and "peaceable possession" was adopted on the recommendation of Deputy Minister Burgess. In the result, between 800 and 1,200 of approximately 3,000 s. 32 claims were not patented until sometime after 1882.

703 With respect to staked claims, the appellants argue that the trial judge did not make a specific finding with respect to whether staking actually took place before or after July 15, 1870. In any event, since the only relevant date is July 15, 1870, events that occurred prior to that date are irrelevant.

704 As for Canada's "egregious" delay, the evidence is clear that it was caused by the imposition of an illiberal and technical policy, as well as general inattention. Given that Canada had complete discretion and failed to keep its promises, this constitutes a breach of fiduciary duty.

705 The appellants assert that the trial judge was entirely wrong at para. 1187 of the judgment, having found the delay "difficult to understand," in

concluding that it was not appropriate in the circumstances to rely only on the documents. It is simple, the appellants say: Canada made promises and then broke them.

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IV.3 <u>Canada's Position</u>

706 By virtue of subs. 32(3), squatters inside the settlement belt could apply for freehold title based on occupation even though there was no registration of their land interest under the HBC survey. For subs. 32(4), "peaceable possession" was required. The difference in the language of subss. (3) and (4), Canada says, reflected the different legal status of the land inside and outside the settlement belt. The trial judge was correct in concluding that the difference in language between subss. 32(3) and (4), "title by occupancy" and "peaceable possession" respectively, did not indicate that a different test should be applied.

707 The common law concept of occupancy applied to both subss. 32(3) and (4). Accordingly, it was not unreasonable to insist on satisfactory evidence of occupation before making a free grant. Even the appellants concede that some degree of occupation was required. There is no reference to the "usages of the country" in the *Act*. When subss. 32(3) and (4) were *de facto* merged in 1874, the concepts of undisturbed occupancy and actual peaceable possession became even more important.

708 Even though subs. 32(4) did not specifically provide for a free grant, Canada notes that the government ultimately provided a free grant for legitimate claims, entirely consistent with Cartier's letter of May 23, 1870.

709 Except for staked claims, there was no evidence at trial to show that

legitimate applicants under subss. 32(3) or (4) had a more difficult time proving their claims than applicants under subss. (1) and (2). In fact, Flanagan observed that claimants under subss. 32(3) and (4) who were actually living on their claims prior to July 15, 1870, had no more difficulty getting patents than did those under subss. (1) and (2). Dr. Ens testified that it was easy to obtain s. 32 patents.

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710 By definition, Canada suggests, there was no *bona fide* intention to occupy the staked lands prior to the passage of the *Act*. The reference to "the time of the transfer to Canada" in subs. 32(4) was not intended to give people a right to take advantage of the delay in creating the province once the *Act* was passed in order to obtain a benefit; this is confirmed by the preamble to s. 32.

711 With respect to delay, Canada says that if any occurred, it did not cause deprivation because people were not, in contrast to s. 31, kept off their lands in the interim.

712 There is no causal link between delays under s. 32 and the dispersal of one-half the Métis population by 1881. There was no evidence that the Métis were pushed out of Manitoba by their inability to secure s. 32 grants.

IV.4 Analysis and Decision Re Fiduciary Obligations and Section 32

IV.4.1 Whether Section 32 Engages the Crown-Aboriginal Fiduciary Relationship

713 I begin by addressing whether the Crown-Aboriginal fiduciary relationship was engaged in the administration of s. 32 of the *Act*. I have

already concluded in the earlier part of this decision devoted specifically to the honour of the Crown that this doctrine is not engaged when considering the provisions of s. 32.

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714 Whether a fiduciary relationship existed is relevant in that, if answered in the affirmative, the question whether there was a specific fiduciary duty would proceed based on the analysis found in other Aboriginal fiduciary duty cases, looking at whether the Crown has assumed discretionary control over a cognizable Aboriginal interest: *Haida* at para. 18 and *Wewaykum* at para. 85.

715 In *Galambos*, the Supreme Court of Canada discussed the distinction between *per se* fiduciary relationships (like the Crown-Aboriginal fiduciary relationship) and *ad hoc* fiduciary duties (such as the one at issue in *Authorson*). As Cromwell J., writing for the court, explained (at paras. 36, 48):

> Certain categories of relationships are considered to give rise to fiduciary obligations because of their inherent purpose or their presumed factual or legal incidents … These categories are sometimes called *per se* fiduciary relationships. … It is important to remember, however, that not every legal claim arising out of a *per se* fiduciary relationship, such as that between a solicitor and client, will give rise to a claim for a breach of fiduciary duty.
>
> [The Court of Appeal] held, … that the particular circumstances of the relationship between Ms. Perez and Mr. Galambos and his firm gave rise to what may be called an *ad hoc* fiduciary duty. This means that apart from the categories of relationships to which fiduciary obligations are innate, such obligations may arise as a matter of fact out of the specific circumstances of a particular relationship: see, e.g., *Lac Minerals*, at p. 648; *Hodgkinson*, at p. 409. The existence of the fiduciary obligation is thus primarily a question of fact to be determined by examining the specific facts and circumstances: *Lac Minerals*, at p. 648.

See also *Hodgkinson* at pp. 409-10 and *Frame* at p. 136.

716 Once a *per se* category of fiduciary relationship is established, the decision whether an enforceable fiduciary duty exists is then approached with reference to broad statements on fiduciary obligations (see, for example, *Hodgkinson*, *Gladstone* and *Guerin*), based on precedents within the same or comparable relationships. Conversely, the test for determining whether an *ad hoc* fiduciary obligation exists was set out by the Supreme Court in *Galambos*. While there is a single body of fiduciary law in Canada, like any other aspect of law, precedential and analytical relevance increases with factual similarity.

717 Section 32 of the *Act* was of general application. Unlike s. 31, it applied to all settlers, not only to the Métis. It contained no direct reference to extinguishment of Indian title, or to the Métis or Indians in any way. As the preamble to s. 32 states, its purpose was to regularize existing property rights and entitlements.

718 The appellants claim that the Crown-Aboriginal fiduciary relationship was engaged in the administration of s. 32. They point out that 85 percent of the recipients of s. 32 grants were Métis, and argued at the hearing that the appellants should not be in a worse position regarding s. 32 than they are with s. 31 just because their neighbours also benefitted from it.

719 The trial judge found no fiduciary duty with respect to s. 32. He wrote that "[t]he provisions of s. 32 did not apply to the Métis as Métis, but it applied to all settlers. Its purpose had nothing to do with the aboriginality

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of the Métis, but was simply to quiet titles and assure the retention of lands by all residents of Red River who had held such land prior to transfer" (at para. 1170).

720 In *Gladstone v. Canada (Attorney General)*, 2005 SCC 21, [2005] 1 S.C.R. 325, the Supreme Court of Canada, *per* Major J., wrote (at para. 23):

> … Although the Crown in many instances does owe a fiduciary duty to aboriginal people, it is the nature of the relationship, not the specific category of actor involved, that gives rise to a fiduciary duty. Not every situation involving aboriginal people and the Crown gives rise to a fiduciary relationship. See *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 18, *per* McLachlin C.J. The provisions of the *Fisheries Act* dealing with the return of things seized are of general application. I agree with the trial judge and the Court of Appeal that the respondents' aboriginal ancestry alone is insufficient to create the duty in these circumstances.
>
> [emphasis added]

721 Sinclair J., writing in *Canada (Attorney General) v. Virginia Fontaine Memorial Treatment Centre Inc. et al.*, 2006 MBQB 85, 203 Man.R. (2d) 48, struck parts of the pleadings because they disclosed no basis for their claim of a Crown-Aboriginal fiduciary duty. He wrote that "a bald assertion of a fiduciary obligation and breach of fiduciary duty arising solely from the defendants' status as Indians under the *Indian Act* and/or the *Constitution Act 1867* is not a sufficient pleading upon which to found a claim or a defence" (at para. 69). He pointed out that "there is no other Aboriginal interest alleged other than the fact that the corporations were funded to run treatment programs for Aboriginal people" (at para. 70); thus, any duty that arose was "… not, in particular, a duty that arose because of

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the Crown's relationship with the defendants by virtue of their status as Aboriginal people" (*ibid.*).

722 Much like in *Gladstone* and in *Virginia Fontaine Memorial Treatment Centre*, the obligations associated with s. 32 simply did not arise in the context of the Crown-Aboriginal relationship. While many of its beneficiaries were Aboriginal, so were those making fiduciary claims in *Gladstone* and *Virginia Fontaine Memorial Treatment Centre*. More is required in order to place a given interaction within the Crown-Aboriginal fiduciary relationship.

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IV.4.2 Was a Public Law Fiduciary Duty Owed in the Administration of Section 32?

723 The trial judge in the present case found that there was no fiduciary duty owed to the appellants with respect to s. 32 of the *Act*, writing that "the persons entitled under s. 32 had no interest in the land independent of the Crown and furthermore enjoyed whatever interest they had by sufferance of the Crown" (at para. 685) (emphasis added). I agree that those entitled to the benefit of s. 32 were not owed fiduciary obligations in its administration.

724 The Crown has many obligations and does not normally owe fiduciary duties in carrying them out. While *Guerin* was a decision made in the context of the Crown-Aboriginal relationship, it remains the leading case on Crown fiduciary obligations generally. In *Guerin*, Dickson J. (as he then was) made the following oft-quoted general observation with respect to Crown fiduciary duties (at p. 385):

> It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function. The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. As was pointed out earlier, the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary.
>
> [emphasis added]

725 In *Wewaykum*, Binnie J. referred to *Guerin* as follows (at para. 74):

> The enduring contribution of *Guerin* was to recognize that the concept of political trust did not exhaust the potential legal character of the multitude of relationships between the Crown and aboriginal people. A quasi-proprietary interest (e.g., reserve land) could not be put on the same footing as a government benefits program. The latter will generally give rise to public law remedies only. The former raises considerations "in the nature of a private law duty" (*Guerin*, at p. 385). Put another way, the existence of a public law duty does not exclude the possibility that the Crown undertook, in the discharge of that public law duty, obligations "in the nature of a private law duty" towards aboriginal peoples.

726 In terms of the general application of the fiduciary duty created in *Guerin* to non-Aboriginal relationships, I note that Lorne Sossin, writing in "Public Fiduciary Obligations, Political Trust, and Equitable Duty of Reasonableness in Administrative Law" (2003), 66 Sask. L. Rev. 129 at 140-41, considered how *Guerin* might relate to non-Aboriginal fiduciary

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cases and expressed considerable skepticism about *Guerin*'s impact in this area of the law given the *sui generis* nature of the fiduciary relationship between the Crown and Aboriginal peoples (at pp. 143-44).

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727 In *Authorson 2002*, the Ontario Court of Appeal, taking its lead from *Guerin*, found that the Crown owed fiduciary obligations to war veterans whose pensions were being managed by the federal Department of Veterans Affairs (DVA). The DVA managed the pensions because the veterans were themselves incapable of managing their own financial affairs (see para. 1). When the case later reached the Supreme Court of Canada, 2003 SCC 39, [2003] 2 S.C.R. 40, the decision was overturned on a different basis and the Crown agreed that "throughout the relevant time it acted as a fiduciary for each of the veterans" (at para. 2).

728 As we have seen, the matter came again to the Ontario Court of Appeal in 2007. At that time the issue was damages; the veterans arguing that the decision of the Supreme Court in 2003 extended only to interest and did not preclude an award of damages for failing to invest. The Ontario Court of Appeal disagreed, concluding that the Supreme Court's decision constituted a complete bar to the proceedings. Leave to appeal to the Supreme Court was denied.

729 For the purposes of s. 32, it is the Ontario Court of Appeal's analysis and conclusions in its *Authorson 2002* reasons that are relevant.

730 In oral argument before this court, the appellants relied on *Authorson 2002*, in support of their claim that the Crown owed them a fiduciary duty in administering s. 32 even outside the Crown-Aboriginal relationship. For its

part, Canada distinguished *Authorson 2002* in a manner similar to how it distinguished many of the Crown-Aboriginal fiduciary cases, emphasizing that there is no ongoing management of any asset, as it argued was the case in the other decisions. Neither *Authorson* decision was argued before the trial judge.

731 An important aspect of *Authorson 2002* is that the funds being managed by the Crown belonged to the veterans themselves. The Crown's position before the Ontario Court of Appeal was that if a trust existed it was at most a political trust, unenforceable in the courts, because the language in the statutory scheme did not explicitly place a fiduciary duty on the Crown (see para. 57).

732 In its 2002 decision, the Ontario Court of Appeal distinguished the "political trust" cases relied upon by the Crown (at para. 60):

> In our view, neither of these cases dictates the result contended for by the appellant in this case. Importantly, unlike this case, in neither case could it be said that the funds held by the Crown were in any sense owned by those claiming that the Crown held the funds in trust for them. Here, the fact that each veteran had a property interest in the fund being administered on his behalf is a clear indication that this is not a political trust. By contrast, the "political trust" cases involve not private funds, but public funds or property held by the Crown, whose distribution is found to be the province of the political arena, not the courts.
>
> [emphasis added]

733 The nature of the pensioners' interest in the property was essential in distinguishing the facts in the *Authorson* appeals from the political trust cases.

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734 I note, however, that there are other significant differences between s. 32 and the scheme at issue in *Authorson 2002*. At para. 73, the court wrote that "… when the Crown through the DVA is directed to administer for the benefit of a veteran his funds, which he is incapable of managing himself, the Crown shoulders a fiduciary obligation to that veteran. The legislation that results in this administration, its nature and effect and its context make this clear." The nature of the scheme was described as follows (*ibid.*):

. . . . .

> (d) In setting up this obligation the legislative provisions make <u>no distinction between the Crown as administrator and a private citizen as administrator</u>. Both must administer the veteran's pension for his benefit.
>
> . . . . .
>
> (h) When it is directed to administer a veteran's pension the essential nature of the task undertaken by the Crown is clear. It must act for the benefit of the veteran in managing his funds because the veteran is incapable of doing so himself. <u>This is quintessentially the kind of act, whether done by Crown or citizen, which courts have regulated using the law of fiduciary duty.</u> This task simply cannot be said to be a governmental action or obligation to be regulated by Parliament or perhaps by public law. As administrator, the Crown must respond to only one imperative, that is to act for the benefit of the veteran. This is demanded by the legislation. The Crown as administrator cannot be moved by other policy considerations. It is not choosing between public policy alternatives and <u>cannot be said to be discharging a governmental function or public duty.</u> Rather, it is undertaking a precisely defined duty to a particular veteran, as the result of an individualized determination of incapacity. The essential nature of the task undertaken by the Crown as administrator is thus indicative of a private right, enforceable by the veteran, as opposed to the performance of a public duty by the Crown.

735 The scenario before the courts in *Authorson* was therefore not one in

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which the Crown was burdened with fiduciary obligations in the course of its public obligations. Rather, the Crown was not permitted to avoid fiduciary responsibility in a situation in which private parties, such as those private administrators who were doing the same task as the Crown under the same legislation, would be held to a fiduciary standard. Conversely, the distribution of land to early settlers through s. 32 to recognize already existing rights was a quintessentially public act.

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736 The appellants, therefore, have not established that a fiduciary obligation arose in the administration of s. 32. Not only did they not hold an independent property interest, but they have not established that the obligations owed were, as Dickson J. explained in *Guerin* at p. 385, "in the nature of a private law duty." As such, I am compelled to reach the same conclusion as the British Columbia Court of Appeal in *Young v. McLellan et al.*, 2005 BCCA 563, 218 B.C.A.C. 195, namely, that s. 32, unlike s. 31, does not create "that extra degree of obligation or special relationship" (at para. 22) between the appellants and the respondents that must be present for a fiduciary duty to exist.

PART V
SUMMARY AND CONCLUSION

737 To conclude, I provide the following summary:

(a) The appellants' claim for a declaration that the Crown breached its fiduciary duty under ss. 31 and 32 of the *Act* is statute-barred. The request for a declaration of constitutional

invalidity of the relevant Orders in Council and statutes of Canada and Manitoba is not subject to a statutory limitation period.

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(b) The equitable doctrine of laches does not apply to the claim that Manitoba's statutory enactments were unconstitutional. While it is arguable that the claim that Canada misinterpreted its constitutional obligations under ss. 31 and 32 of the *Act* is barred by laches, it is not necessary to decide this question because all proceedings commenced by the appellants are moot.

(c) The trial judge's exercise of his judicial discretion not to grant the declaratory relief sought should not be interfered with.

(d) The trial judge did not exercise his discretion on the basis of a wrong principle or commit an error in law in the exercise of his discretion in denying the appellant Manitoba Métis Federation Inc. standing.

(e) A fiduciary relationship arises between the Crown and Aboriginals; the Métis are Aboriginal.

(f) The test for determining whether a fiduciary obligation exists within a Crown-Aboriginal relationship is composed of two parts; a specific or cognizable interest, and an undertaking of discretionary control by the Crown in the nature of a private law

duty. A finding of Aboriginal title is not an essential component of a Crown-Aboriginal fiduciary duty or obligation.

(g) The trial judge did not commit palpable and overriding error when he concluded that the appellants failed to prove any breach of duty with respect to any of the five specific complaints made by the appellants. This being so, it is unnecessary to decide whether in the particular circumstances the Crown did in fact owe a fiduciary obligation to the appellants.

(h) With respect to s. 32, the trial judge did not err when he found the obligations associated with s. 32 did not arise in the context of a Crown-Aboriginal relationship. He was correct to conclude there was no fiduciary duty or obligation owed to the settlers.

738 I would therefore dismiss the appeal with costs to each of the respondents.

_______________________________ C.J.M.

I Agree:

_________________________________ J.A.

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I Agree:

__________________________________ J.A.

I Agree:

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