File No. 33880

IN SUPREME COURT OF CANADA
(ON APPEAL FROM THE MANITOBA COURT OF APPEAL)

BETWEEN:

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

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and

Attorney General of Canada and Attorney General of Manitoba

Respondents

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PART I - STATEMENT OF FACTS

1. This case concerns the rights of the Métis people of Manitoba which were provided for in sections 31 and 32 of the *Manitoba Act, 1870* and subsequently given constitutional protection by virtue of the *Constitution Act, 1871.* The Appellants seek declarations that these rights were frustrated or defeated by virtue of breaches of fiduciary duty and unconstitutional actions and enactments by the federal Crown, as well as by unconstitutional or inoperative enactments of the provincial Legislature.

2. The Appellants rely on the facts of history, which are generally not in dispute. The Appellants rely on the facts as found by the trial judge and the Court of Appeal, except where indicated. The narrative of events is not in dispute. The documents themselves are not in dispute. The trial judge concluded, with respect to the documentary record, at **Trial Reasons, Record Vol. I-III**, paragraph 458, that:

> ...while there are nonetheless gaps in the documentary record, generally speaking, that which the Plaintiffs assert as regard the documentary record is correct.

3. The heart of this appeal engages the proper interpretation and characterization of the *Manitoba Act, 1870,* as well as the proper interpretation and characterization of federal and provincial statutory provisions relating to the *Manitoba Act.* As these are questions of law, the standard of review is therefore one of "correctness".

4. In *R v. Blais* [2003] 2 S.C.R. 236 (SCC), para. 33, this Court described the Métis as Canada's "negotiating partners in the entry of Manitoba into Confederation". Professor Gerhard Ens, an expert witness for the Crown, wrote in *Homeland to Hinterland,* 1996, that "the creation of a 'new nation' of mixed-blood people on the western prairies remains one of the most striking aspects of Canadian history". He also wrote that:

> For much of the nineteenth century, the Red River Settlement was considered a Métis homeland because living there allowed them to occupy this niche with assurance. Once the Red River Settlement ceased to provide important opportunities such as hunting, freighting, trading and provisioning, the colony ceased to be a Métis homeland. In this sense, one might view Riel's efforts during 1869-70 as an attempt to reconstruct a Métis identity in political or constitutional terms as its social and economic bases were eroding. [Emphasis added.]

5. Scott C.J.M., writing for the Manitoba Court of Appeal, summarized the historical background of the case in the Court's Reasons for Decision, (henceforth "**Reasons, Record Vol. III-IV**") paras. 14 - 168. He referred to the Royal Charter granted by the Crown to the Hudson's Bay Company of 1670, the Selkirk grant, the rivalry between the Hudson's Bay Company and the Northwest Company, and the development of the Red River Settlement. He wrote, at **Reasons, Record Vol. III-IV**, paras. 21 and 24 to 27:

> 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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> ...
>
> 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).
>
> 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.
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> 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. [Emphasis added.]

6. As Scott C.J.M. put it, at **Reasons, Record Vol. III-IV**, para. 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...

7. Even before Confederation, Prime Minister Sir John A. Macdonald wished to acquire Rupert's Land and the North-Western Territory for Canada. *The Constitution Act, 1867*, section 146, contemplated the transfer of these lands, by Order in Council, from the United Kingdom to Canada.

8. The story of Canada's purchase of Rupert's Land from the Hudson Bay Company for £300,000, and the acquisition of the North-Western Territory, the activities by Canadian surveyors at Red River, the attempt by Lieutenant Governor McDougall to enter the Red River Settlement a month before the actual transfer date of December 1, 1870, the Métis' refusal to allow him to enter, the Resistance led by the Métis, the establishment of the Provisional Government under the leadership of Louis Riel, the execution of Thomas Scott, the negotiations in Ottawa between the delegates of the Provisional Government and Sir John A. Macdonald and Sir George-Étienne Cartier, the passage of the *Manitoba Act, 1870,* the arrival of British troops and Canadian militiamen under Garnet Wolseley at Red River in August, 1870, are well known.[1]

9. Scott C.J.M. discussed the opposition by Canadians and others to the Provisional Government. He wrote, at **Reasons, Record Vol. III-IV**, para. 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.

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[1] Canada called Catherine Macdonald as an expert witness to describe the events at Red River in 1869-1870, including the formation of the Provisional Government, the nomination of the delegates to Ottawa, the execution of Thomas Scott, and the arrival of the troops. **Record Vol. XXV, Tab & Exhibit TE 16.**

10. Scott C.J.M.'s reference to Britain's requirement for "satisfactory assurances" is taken from a letter dated February 22, 1870 to Macdonald from Sir John Rose.[2] **Record Vol. VIII, Tab & Exhibit 1-0404**. Since late November of 1869, well before the execution of Scott on March 4, 1870, Macdonald's government had been seeking a commitment from the Imperial Government to provide troops. See e.g. **Record Vol. VII, Tab & Exhibit 1-0336.** Macdonald's Cabinet had, on February 4, 1870, formally proposed a British-led military expedition to Red River. The Cabinet advised the Colonial Secretary that delegates from Red River were coming "to negotiate with the Government here as to the terms on which the inhabitants will acquiesce in the transfer of the Territory to the Dominion". [Emphasis added.]

Record Vol. VIII, Tab & Exhibit 1-0390

11. Macdonald outlined his approach more clearly in a letter to Rose dated February 23, 1870 in which he said that Bishop Alexandre Taché and he had discussed the question whether a representative of the Imperial government should be sent to Canada. Macdonald said:

> [Taché] is strongly opposed to the idea of an Imperial Commission, believing, as indeed we all do, that to send out an overwashed Englishman, utterly ignorant of the Country and full of crotchets as all Englishmen are, would be a mistake.
>
> He would be certain to make propositions and consent to arrangements which Canada could not possibly accept.
>
> Everything looks well for a delegation coming to Ottawa including the redoubtable Riel. If we once we get him here, as you must know pretty well by this time, he is a gone coon. There is no place in the Ministry for him to sit next to Howe, but perhaps may make him a Senator for the Territory.
> ...
>
> These impulsive half breeds have got spoilt by this émeute [riot] and must be kept down by a strong hand until they are swamped by the influx of settlers. [Emphasis added.]

Record Vol. IX, Tab & Exhibit 1-0406

12. On March 4, 1870, Robert Herbert, permanent secretary at the Colonial Office, wrote to Rose on behalf of Lord Granville, the Colonial Secretary, and told him that:

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[2] Rose was Macdonald's first Minister of Finance, 1867 to 1869. Then he went to London as an investment banker. He was, according to the *Canadian Encyclopedia*, Vol. 3, 1985, Macdonald's oldest friend and, in London, a "quasi-official" representative of the Government of Canada.

> ...adequate concessions should be made by the Canadian Government to the Half Breeds, and [Granville] has informed Sir John [Young – the Governor General] of this opinion by telegraph. [Emphasis added.]
>
> **Record Vol. IX, Tab & Exhibit 1-0409**

13. By telegram dated March 5, 1870 Granville advised Governor General Sir John Young that:

> The proposed military assistance will be given if reasonable terms are given to the Roman Catholic settlers and if Canadian govt. enable H.M's Govt. to proclaim transfer simultaneous with movement of troops. [Emphasis added.]
>
> **Record Vol. IX, Tab & Exhibit 1-0410**

14. In February 1870 it was determined to send a delegation to Canada to negotiate. By letter dated March 22, 1870, Thomas Bunn, Secretary of the Provisional Government, authorized the delegates, Father Noël-Joseph Ritchot, Alfred Scott and Judge John Black to proceed to Ottawa and lay before the Government of Canada an accompanying list of terms and conditions upon which the people of Red River would consent to enter into Confederation.

Reasons, Record Vol. III-IV, paras. 52 – 54; **Record Vol. IX, Tab & Exhibit 1-0424**

15. By telegram dated April 23, 1870 Granville made it clear that Britain would be the final arbiter, advising the Governor General that troops could advance if the transfer took place immediately and provided that "Canadian Gov't to accept decision of H.M. Gov't on disputed points of settlers Bill of Rights". [Emphasis added.]

Trial Reasons, Record Vol. I-III, para. 142; **Record Vol. X, Tab & Exhibit 1-0456**

16. This set the stage for the negotiations. Macdonald knew that if he was to obtain British troops for a military expedition, he would either have to reach agreement with the delegates, or accept the decision of an "overwashed Englishman" on the terms under which the Hudson's Bay Company Territory would enter Canada. He had to reach an agreement.

17. On April 25, 1870 negotiations commenced. **Reasons, Record Vol. III-IV,** para. 60. On that day Joseph Howe wrote to Ritchot, Black and Scott:

> ...Sir John A. Macdonald and Sir George-Étienne Cartier have been authorized by the Government to confer with you on the subject of your mission and will be ready to receive you at eleven o'clock.
>
> **Record Vol. X, Tab & Exhibit 1-0458**

18. Catherine Macdonald described Father Ritchot as "the *de facto* leader of the three delegates". **Record Vol. XXV, Tab & Exhibit TE 16**, p. 48. See also William Morton in his introduction to Ritchot's Journal, in *Birth of a Province,* 1965, Chapter VI. [3]

Record Vol. VI, Tab & Exhibit 1-0005, pp. 131-132

19. In 1867, the four original provinces of Canada retained the ownership of public land. The instructions of the delegates sent from Red River were that the new province of Manitoba was similarly to have full control over public land. **Reasons, Record Vol. III-IV**, para. 54. Macdonald and Cartier told the delegates that Canada was prepared to acquiesce in the delegates' demand for a new province, but they said that Ottawa must retain ownership of public land. As the trial judge found, "...it was only when that fact was made clear to the delegates that the idea of the children's land grant first emerged," quoted in **Reasons, Record Vol. III-IV,** at para. 61.

20. Ritchot wrote in his Journal on May 2, 1870:

> Sir George and Sir John were present. Examination and discussion of the draft bill; land question. The ministers offered 1,200,000 acres of land to be distributed among the children of the *métis*. We discuss anew the form or manner of distributing the lands. We continued to claim 1,500,000 acres and we agreed on the mode of distribution as follows, that is to say: The land will be chosen throughout the province by each lot and in several different lots [*sic*] 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 which could pass laws to ensure the continuance of these lands in the *métis* families. The clause itself should follow. [Emphasis added.]
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> **Trial Reasons, Record Vol. I-III**, para. 113; **Reasons, Record Vol. III-IV**, para. 63; **Record Vol. VI, Tab & Exhibit 1-0005**, p. 143

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[3] Father Noël-Joseph Ritchot was a Roman Catholic priest. He kept his journal in French. It was stored in the archives of the presbytery of Saint-Norbert, Manitoba. Prof. G.F.G. Stanley published the journal in *La Revue d'Histoire de L'Amérique Française*, March, 1964. Prof. W.M. Morton translated the journal into English in his book *Birth of a Province*, 1965. Scott C.J.M. mentioned, at **Reasons, Record Vol. III-IV,** para. 16, the trial judge's reference to the need to read the sources "in the light of the biases of their authors". Scott C.J.M. said that Father Ritchot was a primary example of such a source, since he had been described by Catherine Macdonald as "devoted to the cause of the people he adopted". Nonetheless, as Scott C.J.M. says, in the same paragraph, Ritchot's journal is "the only chronicle in existence of their momentous meetings" and it is apparent that Scott C.J.M. himself relied on Ritchot's journal from **Reasons, Record Vol. III-IV,** paras. 63 to 79, in providing his "Historical Background".

21. On May 2, 1870, Macdonald wrote out in his own hand the following:

> In order to compensate the claims of the half-breed population, as partly inheriting the Indian rights, there shall be placed at the disposal of the local Legislature one million and a half acres of land to be selected anywhere in the territory of the Province of Manitoba, by the said Legislature, in separate or joint lots, having regard to the usages and customs of the country, out of all the lands now not possessed, to be distributed as soon as possible amongst the different heads of half breed families according to the number of children of both sexes then existing in each family under such legislative enactments, which may be found advisable to secure the transmission and holding of the said lands amongst the half breed families -- To extinguish Indian claims ... [Emphasis added.]
>
> **Trial Reasons, Record Vol. I-III,** para.114; **Reasons, Record Vol. III-IV,** para. 190; **Record Vol. XI, Tab & Exhibit 1-0468**

22. Later the same day the bill which was to become the *Manitoba Act* was presented to the House of Commons for first reading, although there was not yet a printed version. In introducing the subject of the children's land grant, Macdonald told the House that:

> There shall, however, out of the lands there, be a reservation for the purpose of extinguishing the Indian title, of 1,200,000 acres. That land is to be appropriated as a reservation for the purpose of settlement by half-breeds and their children of whatever origin on very much the same principle as lands were appropriated to U.E. Loyalists for purposes of settlement by their children. This reservation, as I have said, is for the purpose of extinguishing the Indian title and all claims upon the lands within the limits of the Province. [Emphasis added.]
>
> **Reasons, Record Vol. III-IV,** para. 65; **Trial Reasons, Record Vol. I-III,** para. 115; **Record Vol. X-XI, Tab & Exhibit 1-0467**, p. 1302

23. Close to the end of the day's sitting, Macdonald added:

> ... the reservation of 1,200,000 acres which it was proposed to place under the control of the Province, was not for the purpose of buying out the full blooded Indians and extinguishing their titles. There were very few such Indians remaining in the Province, but such as there were they would be distinctly under the guardianship of the Dominion Government. The main representatives of the original tribes were their descendants, the half-breeds, and the best way of dealing with them was the same as United Empire loyalists had been dealt with, namely giving small grants of land for them and their children. [Emphasis added]
>
> **Reasons, Record Vol. III-IV,** para. 65; **Trial Reasons, Record Vol. I-III,** para. 118; **Record Vol. X-XI, Tab & Exhibit 1-0467**, pp. 1329-1330

24. As had been agreed with the delegates, Macdonald clearly told the House that the proposed children's grant would be under the "control of the Province". But the trial judge erroneously said that "...Canada never agreed to place any of the lands in the new province under the

jurisdiction, authority or control of the local Legislature" and that "...on the evening of May 2, 1870 ... Macdonald, speaking in Parliament, ... went on to say that the assistance of the local Legislature would be invoked but always with the express sanction of the Governor General". **Trial Reasons, Record Vol. I-III,** paras. 491 – 492. However, as is evident from the passage of Hansard quoted by the trial judge himself at **Trial Reasons, Record Vol. I-III,** para. 115, **Record Vol. X-XI, Tab & Exhibit 1-0467**, page 1302, the reference to the assistance of the local Legislature being invoked with the "express sanction of the Governor General" was in respect of the hay privilege (s.32(5)), not section 31.

25. The trial judge's error was embraced and compounded by Scott C.J.M. at paras. 65, 171 and 238(e) without any reference to the Hansard passage. It was described by Scott C.J.M. as a "key finding". This constituted a "palpable error", and, as a result of the extent to which Scott C.J.M. relied on the trial judge's error in dismissing the significance of Canada's change of position between first and second reading, it was overriding.

26. During the same first reading debate, on May 2, Cartier told the House:

> The land, except 1,200,000 acres, was under the control of the [federal] Government, and these were held for the purpose of extinguishing the claims of the half-breeds, which it was desirous not to leave unsettled, as they had been the first settlers, and made the Territory. These 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. The policy, after settling these claims, was to give away the land so as to fill up the country. [Emphasis added.]
>
> **Reasons, Record Vol. III-IV,** para. 66; **Trial Reasons, Record Vol. I-III**, para. 116; **Record Vol. X-XI , Tab & Exhibit 1-0467**, p. 1309

27. Debate on second reading commenced on May 4, 1870. On that day a printed bill was first placed before the House. However, the bill was no longer as Ritchot and the delegates had understood it would be, nor as it had been described in the House on May 2. The children's grant was still there.[4] But it was not placed under the control of the local Legislature. It was not provided that the land would be given to the half-breed heads of families to distribute to their

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[4] As a result of expanding the provincial boundaries to include Portage la Prairie the grant was enlarged to 1,400,000 acres. **Reasons, Record Vol. III-IV,** para. 67.

children. Instead, the administration and implementation of the children's grant were assumed solely by and under the jurisdiction of the federal Crown.

28. On May 4, Macdonald and Cartier provided further elaboration on the contents of the Bill which now included s. 31 in its current form. Macdonald said of the Métis reserve:

> ...Those clauses referred to the land for the half-breeds, and go toward extinguishing the Indian title. If those half-breeds were not pure-blooded Indians, they were their descendants. There were very few full-blooded Indians now remaining, and there would not be any pecuniary difficulty in meeting their claims. Those half-breeds had a strong claim to the lands, in consequence of their extraction, as well as from being settlers. The Government therefore proposed for the purpose of settling those claims, this reserve of 1,400,000 acres. The clause provided that the land should be regulated under Orders in Council by the Governor General, acting through the Lieutenant Governor, who should select such lots or tracts in such parts of the Province as he might deem expedient to the extent aforesaid, and divide the same among the children of half-breeds -- heads of families. No land would be reserved for the benefit of white speculators, the land being only given for the actual purpose of settlement. The conditions had to be made in that Parliament who would show that care and anxiety for the interest of those tribes which would prevent that liberal and just appropriation from being abused. [Emphasis added.]

Reasons, Record Vol. III-IV, para. 67; **Record Vol. X-XI, Tab & Exhibit 1-0467**, p. 1359

29. On May 5, 1870 the delegates from Red River met with Macdonald and Cartier to complain that the Bill had been changed from what had been agreed to. Macdonald and Cartier then assured the delegates the understandings that had been reached would be implemented by Order in Council. Ritchot wrote in his Journal, dated May 5, 1970:

> ... the Bill appeared very much modified. Several clauses displeased me fundamentally. I saw our colleagues and some friends. We saw Sir George and Sir John; we complained to them. They declared that in practice it amounted to the same thing. For us they promised that they would give us by order in council, before our departure, assurance of the carrying out of our verbal understandings; but that for the present it would be impossible to get the Bill passed if one changed its form, that they would have a bad enough time to get it passed just as it was, that in any case we had nothing to fear, our verbal agreements were known and approved by the ministry who had promised to give us the order in council for the execution of our understandings.
>
> The two ministers seeing that we were strongly opposed promised us, among other things, to authorize by order in council the persons we would choose to name ourselves as soon as might be after the Bill should be passed -- to form a committee charged with choosing and dividing, as may seem good to them, the 1,400,000 acres of land promised. I promised for my part to take the matter into consideration and to yield to their desire, if I could convince myself that I could do it. [Emphasis added.]

Reasons, Record Vol. III-IV, para. 68; **Record Vol. VI, Tab & Exhibit 1-0005**, p. 147

30. On May 6, 1870 Ritchot wrote in his journal, "It is already settled – and we will be given all the desired guarantees before our departure".

Reasons, Record Vol. III-IV, para. 69; **Record Vol. VI, Tab & Exhibit 1-0005**, pp. 147-148

31. Cartier gave the following account in the House of Commons, on May 9, 1870:

> ...The land question was the most difficult one to decide of any connected with the measure; it was one of the most important connected with the welfare of the Territory; it would soon be necessary to construct a railway through Red River and consequently the Dominion Parliament would require to control the wild lands. If the lands were left in the hands of the Local Parliament there might be great difficulty in constructing the British Pacific Railroad, although the Dominion Government held the control of lands it was only just to give something in return for them. Thus arose the reserves. Was it not just and liberal to provide for the settlement of those who had done so much for the advancement of the Red River country -- the Indian half-breeds? The intention of the Government was to adopt a most liberal policy with respect to the settlement of the Territory. [Emphasis added.]

Trial Reasons, Record Vol. I-III, para. 137; **Record Vol. X-XI, Tab & Exhibit 1-0467**, p. 1446

32. On May 9, 1870, Cartier also told the House:

> ... any inhabitant of the Red River country having Indian blood in his veins was considered to be an Indian. They were dealing now with a territory in which Indian claims had been extinguished[5], and had now to deal with their descendants -- the half-breeds...

Record Vol. X-XI, Tab & Exhibit 1-0467, p. 1450

33. The bill received Royal Assent on May 12. **Reasons, Record Vol. III-IV,** para. 56. It provided for the establishment of a new province (the so-called postage-stamp province) and a Legislature. It also provided public funding for Roman Catholic schools (s. 22), for French and English as official languages (s. 23), for 1.4 million acres of land for the children of the Métis (s. 31), and for confirmation of the titles of Métis and other settlers (s. 32).

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[5] Cartier was no doubt referring to the Selkirk Treaty, which, as Scott C.J.M. wrote at **Reasons, Record Vol. III-IV,** para. 21, was "considered to constitute an extinguishment of 'Indian title' to the lands in question

34. Ritchot remained in Ottawa, waiting for the promised orders in council but none were forthcoming. On May 18, 1870 Ritchot wrote to Cartier about his concerns with the Bill as passed:

> We had agreed, as you are aware, to leave the selection and division of the lands to be divided amongst the children of the half-breeds to the Local Legislature; You thought proper, for good reasons I doubt not, to substitute for that mode of division the 27th section [section 31], which leaves that selection and division to the Governor General in council. In view of our objections and observations, Sir John and you promised to cause to be authorized by the Governor in Council before our departure, 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. Sir John then proposed to appoint Bishop Taché as one of the members of the Committee. In that case the [Anglican] Bishop of Rupert's Land might also be selected with other citizens to form the Committee.
>
> I trust you will be able to settle this matter before our departure. [Emphasis added.]
> **Reasons, Record Vol. III-IV,** para. 72; **Record Vol. XVII, Tab & Exhibit 1-0997**, p. 73

35. After taking Ritchot and Scott to see the Governor General the next day, Cartier, on his own behalf and on behalf of his Cabinet colleagues, provided Ritchot and Scott with a letter, dated May 23, 1870,[6] which referred to the right of persons in s. 32(4) to obtain land without payment, and included two postcripts:

> P.S. -- You may at any time make use of this letter, in such manner as you shall think proper, in any explanation you may have to give connected with the object for which you were sent as delegates to the Canadian Government....
>
> [P.P.S.] I have, moreover, the honor to assure you, as on my own behalf as on behalf of my colleagues, that as to the million four hundred thousand acres of land reserved by the 31st section of the *Manitoba Act*, for the benefit of the families of half-breed residents, 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, 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 of the half-breeds residing in the Province of Manitoba at the time when the transfer is to be made to Canada. [Emphasis added.]
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> **Reasons, Record Vol. III-IV,** para. 74-77; **Record Vol. XI, Tab & Exhibit 1-0499**

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[6] The body of Cartier's letter also alluded to the question of amnesty. The Appellants are not, of course, concerned with the question of amnesty, but simply wish to alert the Court to the fact that it is a question that permeates much of the later documentation.

36. Ritchot returned to Red River with the *Manitoba Act,* the assurances received from Macdonald and Cartier, and Cartier's letter of May 23, 1870. At a special session of the Legislative Assembly of Assiniboia held on June 24, 1870, Ritchot presented a report to the Assembly and reported in particular on the negotiations regarding the 1,400,000 acres. He said that "satisfactory assurances" had been received regarding the land question so that, "wherever there is a doubt as to the meaning of the Act, let me state, it is to be interpreted in our favour". 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...
>
> **Reasons, Record Vol. III-IV**, para. 78; **Record Vol. XII, Tab & Exhibit 1-0512**, p. 3

Cartier's letter of May 23, 1870 was read in full, including the postscripts. Father Ritchot then said:

> 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). [Emphasis added.]
>
> **Reasons, Record Vol. III-IV**, para. 78; **Record Vol. XII, Tab & Exhibit 1-0512**, p. 5

37. It was moved, seconded and carried:

> ...the Legislative Assembly of this country do now, in the name of the people, accept the *Manitoba Act*, and decide on entering the Dominion of Canada, on the terms proposed in the Confederation Act.
>
> **Trial Reasons, Record Vol. I-III**, para. 148; **Record Vol. XII, Tab & Exhibit 1-0512**, p. 6

38. The *Manitoba Act* came into force on July 15, 1870. Section 31 of the *Act* provided that, "towards the extinguishment of the Indian Title to the lands in the Province," 1.4 million acres was to be appropriated, selected, divided and granted to the children of the Métis heads of families, "for the benefit of the families of the half-breed residents". Section 32 of the *Act* provided for the confirmation of the titles held by the settlers, chiefly Métis, occupying lots along the banks of the Red and Assiniboine Rivers and elsewhere. The *Constitution Act, 1871*, which gave constitutional effect to the *Manitoba Act,* came into force on June 29, 1871.

39. Adams Archibald, the Lieutenant Governor, arrived in August, 1870. He had a census carried out; it was completed on December 9, 1870. It showed that the Red River Settlement had a population of approximately 12,000 and that about 10,000 of them were Métis. It also indicated that about 7,000 of the Métis were children (under the age of twenty-one)[7].

Reasons, Record Vol. III-IV, para. 58, **Record Vol. XII, Tab & Exhibit 1-0541**

40. Implementing Section 31 required determining the number of Métis children and devising a method of allotting a parcel of land to each child. *Order in Council April 25, 1871* provided that the method of selection would be by a province-wide lottery, though in the end the method used was by a lottery held in each parish. By way of these lotteries a parcel of land in one of the townships assigned to a particular parish would be allotted to each child.

41. There were three successive allotments of land to the children. The first allotment in 1873 was cancelled as a result of its having incorrectly included heads of families, rather than only their children. A second allotment was completed in 1875, but it was cancelled on the basis of a new and, the Appellants say, quite obviously flawed estimate of the total number of children. A third allotment, begun in 1876, was not completed until 1880.

Reasons, Record Vol. III-IV, paras. 113, 132-134

42. The process of actually granting patents to the land after allotment was not completed for many years, though the bulk of the patents had been issued by 1881.

Reasons, Record Vol. III-IV, para. 161

43. The federal government had in 1876 miscalculated the number of children entitled to participate in the grant. As a result of this error 993 children (about one-seventh of the total) had been left out. They did not receive any of the land to which they were entitled under s. 31. In 1885 it was

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[7] This can be determined from later documents and, especially, the Crown's 1873 decision based on that census to make 190-acre grants to the children. The precise number of children would have been 7,368. See **Trial Reasons, Record Vol. I-III,** para. 203.

ordered that they be issued scrip in lieu of land. In the end, distribution of the children's grant took more than 15 years.

Reasons, Record Vol. III-IV, paras. 146 -147

44. In the meantime, beginning in 1873, the Manitoba Legislature enacted a series of statutes which singled out the Métis children and the 1.4 million acres set aside for them and, beginning in 1877, facilitated the sale of the children's interest in those lands, ultimately regardless of whether the land had been merely allotted or actually granted to them. Under these laws much of the land was sold before grant, in many cases by minors and often for "improvident" prices.

Reasons, Record Vol. III-IV, para. 577

45. At the same time the process under s. 32, of confirming titles of the Métis settlers and others in possession of river lots, suffered similar delays. Moreover there were strict tests for establishing possession. Much of the land they possessed was sold prior to grant.

46. The trial of the action was held before MacInnes J. in the Manitoba Court of Queen's Bench. He dismissed the action: 2007 MBQB 293, 223 Man. R. (2d) 42. On appeal to a five-judge bench of the Manitoba Court of Appeal, the Appellants' appeal was dismissed, Scott C.J.M. writing for the Court of Appeal: 2010 MBCA 71.

47. The Appellants submit that the Crown had a fiduciary duty under s.31 to distribute the 1.4 million acres to the approximately 7,000 children in the way in which a person of ordinary prudence would manage their own affairs. The Crown failed in its duty in that the distribution of the grants to the children was accompanied by mistake after mistake, delay after delay. It took more than 15 years to issue patents in the names of the children. The Appellants seek a declaration that the Crown failed to comply with its constitutional obligation under s. 31 – that it was in breach of its fiduciary duty thereunder.

48. The Appellants also submit that the Manitoba legislation dealing with sales of the 1.4 million acres was unconstitutional, in that it dealt with matters of exclusive federal jurisdiction or, in the alternative, was inoperative as a result of federal paramountcy.

49. The Appellants submit that the Crown had a constitutional obligation, under s. 32, to the Métis settlers already occupying land along the rivers, to proceed without unnecessary delay and restrictions in the confirmation of their titles, that this too was also a fiduciary obligation, and that the Crown was in breach of that fiduciary duty as well.

50. The Appellants submit that, even if these obligations were not fiduciary in nature, they were nevertheless obligations imposed by the Constitution.

PART II - ISSUES

51. The Appellants submit that the Manitoba Court of Appeal erred in law with respect to each of the following issues by:

a. ***Standing:*** ruling that the Applicant Manitoba Métis Federation (MMF) lacks standing;

b. ***Mootness:*** ruling that issues in the case at bar are moot, in the face of the judgment of this Court in *Dumont v. Canada and Manitoba,* [1990] 1 S.C.R. 279;

c. ***Minority Protection:*** failing to rule that s. 31 and 32 of the *Manitoba Act* are to be construed in accordance with the law governing protection of minorities in Canada;

d. ***Fiduciary Duty and Breach of Fiduciary Duty:***

i. failing to rule whether the Métis had Aboriginal title or a cognizable interest in land or otherwise sufficient to ground a fiduciary duty;

ii. failing to determine the content of any fiduciary duty;

iii. failing to consider the actual language of the *Manitoba Act*, or to consider the speeches of the framers of the *Manitoba Act*, or to apply the principles of constitutional interpretation relating to minorities and aboriginal peoples as laid down by this Court;

iv. requiring the Appellants to prove that the Crown had been guilty of "deliberate ineptitude";

v. giving an unduly extended meaning to the Crown's "competing interests";

vi. failing to find a fiduciary duty and breach of same, or, in the alternative, failing to find that Canada did not properly implement s. 31 in accordance with its terms;

e. ***Constitutional obligations and the Honour of the Crown:*** failing to fulfil constitutional obligations owed to the Métis, which obligations engaged the Honour of the Crown;

f. ***Provincial legislation:*** failing to find that Manitoba's legislation was *ultra vires* or, in the alternative, inoperative under the doctrine of federal paramountcy;

g. ***Section 32:*** failing to find that the Crown did not fulfil its fiduciary duty under s. 32 or, in the alternative, did not properly implement s. 32 in accordance with its terms; and

h. ***Limitations:*** failing to consider whether the rule concerning the application of limitations statutes in *Ravndahl v. Saskatchewan* [2009] 1 S.C.R. 18 applies to a claim for a declaration that the Crown has, in failing to carry out a constitutionally-mandated fiduciary duty, acted unconstitutionally.

PART III - ARGUMENT

A. STANDING

52. The Court of Appeal did not disturb the trial judge's conclusion that the individual Appellants had standing, but, like the trial judge, it denied standing to the Appellant Manitoba Métis Federation ("MMF").

Reasons, Record Vol. III-IV, para. 268

53. The Métis of Manitoba, Canada's "negotiating partners in the entry of Manitoba into Confederation", as a collectivity, as a people, as a nation, had an interest in the prompt and prudent distribution of the 1.4 million acres, in individual parcels, to the approximately 7,000 Métis children, and in the prompt confirmation of titles to the Métis settlers under s. 32. The Manitoba Métis Federation represents the Métis people today, and therefore has standing today to bring this action.

54. In earlier proceedings, Canada moved to strike the action at bar, then styled *Dumont v. Canada and Manitoba*, [1988] 5 W.W.R. 193. O'Sullivan J.A., in his dissenting reasons in the Manitoba Court of Appeal (it will be remembered that the judgment of the majority was reversed on appeal to this Court, ([1990] 1 S.C.R. 279), wrote, at p. 197:

> But, as far as I can see, what we have before us in court at this time is not the assertion of bundles of individual rights but the assertion of the rights and status of the half-breed people of the Western plains.
>
> ...
>
> In my opinion, it is impossible in our jurisprudence to have rights without a remedy and the rights of the Métis people must be capable of being asserted by somebody. If not by the present plaintiffs, then by whom?

55. On appeal to this Court, the action was allowed to proceed by this Court based on its extra-judicial utility in bringing about and facilitating negotiations in respect of a land claims agreement for the Métis of Manitoba. *Dumont v. Canada and Manitoba, supra.* The importance of such settlements was described by this Court in *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham,* 2011 SCC 37. Should such negotiations come about, the MMF will be the appropriate negotiating party on behalf of the Métis people of Manitoba.

B. MOOTNESS

56. This issue was not raised below by Canada. Only Manitoba pursued the issue of mootness.

Reasons, Record Vol. III-IV, para. 354

57. The Court of Appeal ruled that that "the case is moot and that this court should not exercise its discretion to decide the moot constitutional issues raised by the appellants". **Reasons, Record Vol. III-IV**, para. 368. Moreover the Court of Appeal stated a) "... 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" (para. 372); b) the issue of mootness was not before this Court in its earlier judgment in the action at bar in *Dumont* (para. 373); c) 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" (para. 373); and, finally,

d) that "the determinative factor is that the impugned statutes (federal and provincial) are all spent or repealed". (para. 374).

58. With respect, a) this Court has already ruled in *Dumont* that these particular "moot constitutional issues" should be decided and it was not open to the Court of Appeal to decline to give effect to this decision; b) it is clear that the issue of mootness was before this Court in *Dumont*; c) the fact that the "relief sought is a declaration in aid of extra-judicial political relief" was precisely the reason why this Court held that the claim of unconstitutionality was justiciable and should proceed to trial – it can hardly then be considered to be a reason not to decide whether the impugned legislation was unconstitutional, and d) in 1990, when this Court heard *Dumont, supra*, those same statutes were at that time spent or repealed.

59. The issue of mootness had been decided by the Manitoba Court of Appeal in *Dumont*; Twaddle J.A. for the majority determined, at p. 207, that the court was being asked to consider "the constitutional validity of spent legislation". Only then did he go on to consider whether the court should grant a declaration to enable the Appellants to pursue extra-judicial relief. On the latter issue he held against the Appellants. He held, at p. 210, that "the settlement of Métis claims will not be promoted in any real sense by the making of the declaration sought by the plaintiffs". This Court reversed the Manitoba Court of Appeal on that very issue and, the Appellants submit, the matter has since then been *res judicata.*

60. This Court, in *Dumont*, could not have reached the question of whether an action brought in aid of an extra-judicial remedy could proceed, except on the basis that the matter was otherwise moot.[8] The fact that Manitoba chose to take no position on Canada's motion to strike that was the subject of the appeal in *Dumont* does not mean that the spent nature of provincial legislation was not considered, or that there is anything about the provincial legislation that would raise a different legal issue. *Res judicata* by way of issue estoppel applies to every party to a proceeding who could have raised the issue, regardless of whether they chose to do so.

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[8] Henry S. Brown in *Supreme Court of Canada Practice* Carswell 2010, at p. 26, refers to *Dumont* under the heading of "Mootness," and makes the point that in *Dumont* the Applicants were entitled to a declaration to resolve an extra-judicial dispute "even though no controversy exists".

Henderson v. Henderson (1843), 3 Hare 100, 67 E.R. 313

61. In the alternative, if the fact that Manitoba chose to take no position means that the mutuality requirement of issue estoppel was not fulfilled, then the Appellants say that it is nonetheless an abuse of process for Manitoba to attempt to raise the issue of mootness thereafter.

Toronto (City) v CUPE Local 79, [2003] 3 SCR 77 paras. 35 – 42

62. The Appellants say now, as they did before this Court in *Dumont*, that the declarations that they seek will obviously be greatly to their advantage in seeking a land claims agreement under s. 35(3) of the *Constitution Act, 1982*. That was the holding of this Court in *Dumont.*

63. In any event, the criteria referred to in *Borowski v. A.G. (Canada)*, [1989] 1 S.C.R. 342 for the Court to consider in determining whether to hear an appeal even if the appeal is moot, are met in the case at bar: 1) there is an adversarial context, 2) judicial economy will be served, and 3) an important public issue will be resolved.

See also *Doucet-Boudreau v. Nova Scotia*, [2003] 3 S.C.R. 3

C. MINORITIES UNDER THE CANADIAN CONSTITUTION

64. In the *Secession Reference* [1998] 2 S.C.R. 217, at paras. 79 to 82, the Court emphasized this country's long tradition of protecting the rights of minority peoples, extending back at least to 1867. The Appellants submit that the provisions of sections 31 and 32 of the *Manitoba Act* were early examples of this tradition; one entrenched in our history and in our Constitution.

65. In the *Secession Reference*, at para. 32, the Court identified "four fundamental and organizing principles of the Constitution", namely, "federalism; democracy; constitutionalism and the rule of law; and respect for minorities" and said, at para. 80, "We emphasize that the protection of minority rights is itself an independent principle underlying our constitutional order". The Court then said, at para. 82, referring to s. 35 of the *Constitution Act, 1982*, but in words that the Appellants submit apply equally to s. 31 and s. 32 of the *Manitoba Act,* that it:

> ...recognized not only the occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive

> governments. The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value. [Emphasis added.]

66. The Court also said in the *Secession Reference*, *supra*, at para. 43, that:

> Federalism was a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today. At Confederation, political leaders told their respective communities that the Canadian union would be able to reconcile diversity with unity.

67. The Appellants argue that the *Manitoba Act*, a constitutional instrument, must also be read as "a legal response to the underlying political and cultural realities that existed in [1869-1870]". The historical record in the case at bar illuminates these "political and cultural realities". Sections 22, 23, 31 and 32 of the *Manitoba Act* were means specifically chosen to assure the people of Red River, and in particular the Métis, that "the Canadian union would be able to reconcile diversity with unity".

68. In *R v. Blais, supra*, the Court wrote, at para. 17:

> The [*Natural Resources Transfer Agreement, 1930*] is a constitutional document. It must therefore be read generously within these contextual and historical confines. A court interpreting a constitutionally guaranteed right must apply an interpretation that will fulfill the broad purpose of the guarantee and thus secure "for individuals the full benefit of the [constitutional] protection" *R. v. Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344. "At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the [constitutional provision] was not enacted in a vacuum, and must therefore…be placed in its proper linguistic, philosophic and historical contexts": *Big M. Drug Mart*, *supra,* at p. 344. [Emphasis added.]

69. The Appellants submit that this language applies to both s. 31 and s. 32. The "broad purpose" of s. 31 and s. 32, which assured the Métis that they would be landholders, settlers in the new Province, was, to adapt the Court's language in *R. v. Powley*, [2003] 2 S.C.R. 207 at para. 13 in respect of s. 35 of the *Constitution Act, 1982*, "based on a commitment to recognizing the Métis and enhancing their survival as distinctive communities".

70. In the *Secession Reference* the Court wrote, at para. 74:

> ... a constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority.

71. The Appellants submit that this was the purpose of s. 22 and s. 23[9] and of s. 31 and s. 32 of the *Manitoba Act*.

72. In *Forest v. A.G. Manitoba,* [1979] 4 WWR 229, a case dealing with Manitoba's *Official Language Act* of 1890, which purported to abrogate s. 23 of the *Manitoba Act*, Freedman C.J.M., writing for a five-judge panel of the Manitoba Court of Appeal, said, at p. 245:

> History supports the view that Section 23, like Section 22 on denominational school rights, was intended to be a protection for minorities in Manitoba against the possible ill will of the majority. The French-speaking citizens of Manitoba, including not only the famous Louis Riel but all the representatives of the French-speaking parishes (who, it must be mentioned, reached a remarkable unanimity with their English-speaking representatives) were induced to put an end to the Red River insurrection and to support the creation of a Province and its union with Canada only on the basis that their rights would be ensured for the future. The enactment of the *Official Language Act* deprived them of the linguistic rights which were safeguarded, or thought to be safeguarded, under Section 23. [Emphasis added]

73. Sir John A. Macdonald and Louis Riel both spoke of the position of the Métis at the time preceding the *Manitoba Act*. On October 14, 1869 Macdonald, in a letter to J.Y. Bown, an Ontario Member of Parliament who had a brother residing at Red River, wrote:

> ...it will require considerable management to keep these wild people quiet. In another year the present residents will be altogether swamped by the influx of strangers who will go in with the idea of becoming industrious and peaceable settlers. [Emphasis added.]
>
> **Record Vol. VII, Tab & Exhibit 1-0302**

74. On October 25, 1869, a little more than a week later, Riel spoke to the Council of Assiniboia, stating that the Métis:

> ...were uneducated and only half civilized and felt if a large immigration were to take place they would probably be crowded out of a Country which they claimed as their own, that they knew that they were in a sense poor and insignificant that they had felt so much

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[9] Sections 22 and 23 have already been litigated. The struggle to enforce public funding for Roman Catholic denominational schools was successful in the Supreme Court of Canada but lost in the Privy Council at the turn of the last century in *Barrett v. City of Winnipeg* (1892) 19 S.C.R. 374; [1892] A.C. 445 (P.C.). The promise that there would be two official languages was successfully litigated in more recent times in *A.G. Manitoba v. Forest* [1979] 2 S.C.R. 1032 and *Re Manitoba Language Rights* [1985] 1 S.C.R. 721.

> at being treated as if they were more insignificant than they in reality were; that their existence, or at least their wishes had been entirely ignored... [Emphasis added.]
>
> **Record Vol. VII, Tab & Exhibit 1-0304**

75. But the trial judge held that the Métis did not qualify as a minority, since they were, at the time of Manitoba's entry, a majority of the inhabitants of the new province. Scott C.J.M. said that the trial judge concluded that:

> Section 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. [Emphasis added.]
>
> **Reasons, Record Vol. III-IV**, para. 174

76. The Court of Appeal did not disturb this interpretation. Indeed, Scott C.J.M. made no reference to the *Secession Reference,* to the jurisprudence of this Court or to the Manitoba Court of Appeal itself in *Forest v. A.G. Manitoba*. But the Court of Appeal's reasoning fails to recognize that in 1870 the majority of residents were also French-speaking and Roman Catholic.

77. In the *Secession Reference*, *supra*, at para. 79, the Court, in dealing with the protection of minorities discussed "a number of specific constitutional provisions protecting minority language, religion and education rights". The Court, in the same paragraph, said "Some of those provisions are...the product of historical compromises". [Emphasis added]

78. In *Trinity Western University v. College of Teachers (B.C.),* [2001] S.C.R. 772 at para. 34, the Court described section 93 of the *Constitution Act, 1867* as part of the "historic compromise" which made Confederation possible, and that section 22 of the *Manitoba Act* which protected the rights of Roman Catholics in the province of Manitoba, was "to the same effect".

79. The Appellants submit that s. 31 of the *Manitoba Act* was no less an "historic compromise" than sections 22 and 23 of the *Manitoba Act*. Nonetheless, while the Manitoba Court of Appeal has found that the provisions of the *Manitoba Act* relating to the rights of the Roman Catholics and the French-speaking people (most of whom were Métis and in any event, both, like the Métis, were a majority pre-1870) were intended to protect them against the "ill will of the majority," it

has refused in the case at bar to so regard the provisions of the *Act* in respect of land for the Métis, both French and English-speaking. This is a profound error in the interpretation of the *Manitoba Act*.

F. SECTION 31: FIDUCIARY DUTY EMBEDDED IN THE CONSTITUTION

80. Section 31 of the *Manitoba Act* was enacted "towards the extinguishment of Indian Title to the lands in the Province" and provided that, "for the benefit of the families of the half-breed residents," each of their approximately 7,000 children should receive a grant of land out of an appropriation of 1.4 million acres set aside for the purpose. Scott C.J.M. held that the administration and implementation of the children's grant was under the "complete control" of the Crown. **Reasons, Record Vol. III-IV,** para. 513. The Appellants submit that there was therefore a Crown-Aboriginal fiduciary duty owed by the Crown to the Métis families and their children, and entrenched in the Constitution.

81. The Appellants point out that s. 23 of the *Manitoba* Act similarly imposed a constitutionally entrenched duty, in that case, on the Legislature. In *Re Manitoba Language Rights* [1985] 1 S.C.R., 721, the Court said, at p. 744:

> The constitutional entrenchment of a duty on the Manitoba Legislature to enact, print and publish in both French and English in s. 23 of the *Manitoba Act, 1870* confers upon the judiciary the responsibility of protecting the correlative language rights of all Manitobans including the Franco-Manitoban minority. The judiciary is the institution charged with the duty to ensuring that the government complies with the constitution. We must protect those whose constitutional rights have been violated, whomever they may be, and whatever the reasons for the violation. [Emphasis added.]
>
> See also *Doucet-Boudreau v. Nova Scotia*, [2003] 3 S.C.R. 3, at para. 28

82. This Court has determined that a fiduciary duty can be entrenched in the Constitution. In *R. v. Sparrow* [1990] 1 S.C.R. 1075 Dickson J. and La Forest J., in joint reasons for judgment dealing with the construction of s. 35 of the *Constitution Act, 1982,* wrote at p. 1108 and 1109:

> The Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship…is trust-like rather than adversarial and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship…

> There is no explicit language in the provision [section 35 of the *Constitution Act, 1982*] that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. [Emphasis added.]

83. Similarly the Crown's fiduciary duty incorporated in s. 31 of the *Manitoba Act* imports "some restraint on the exercise of sovereign power", that is, the discretion conferred on the Crown under that section was limited by the fiduciary obligation - a constitutional obligation - it owed to the Métis families and their children under that section.

84. In *Air Canada v. Attorney General of British Columbia* [1986] 2 S.C.R. 539, La Forest J. said, at p. 545 and 546:

> All executive powers, whether they derive from statute, common law, or prerogative must be adapted to conform with constitutional imperatives...
> ...
>
> For whatever discretion there may be in a non-constitutional matter, in a case like the present, the discretion must be exercised in conformity with the dictates of the Constitution and the Crown's advisers must govern themselves accordingly. Any other course would violate the federal structure of the Constitution. [Emphasis added.]

85. In the *Secession Reference*, *supra*, the Court held, at para. 72:

> Simply put the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action comply with the law, including the Constitution... [Emphasis added.]

In the case at bar, the vast discretion conferred on the Crown by s. 31, had to be "be adapted to conform with constitutional imperatives". The Crown had the duty to deal promptly and prudently with the distribution of the 1.4 million acres, having regard to the best interests of the 7,000 children and their families.

86. In *Mahe v. Alberta*, [1990] 1 S.C.R. 342, Dickson C.J.C., in making a general declaration with respect to the obligations placed by s. 23 of the *Charter of Rights* on the provincial government to provide French-speaking parents with management and control over French-language education for their children, wrote at p. 393:

> ...the government should have the widest possible discretion in selecting the institutional means by which its s. 23 obligations are to be met; the courts should be loath to interfere and impose what will necessarily be procrustean standards, unless that discretion is not exercised at all, or is exercised in such a way as to deny a constitutional right. [Emphasis added.]

87. The Appellants submit that the discretion conferred by s. 31 on the Crown was one which required the Crown to implement s. 31 so as to protect the constitutional rights of the Métis children and their families; in fact, it was exercised in such a way as to deny them their constitutional rights.

i. Section 31 and Fiduciary Duty

88. History tells us that the interests of the Métis would likely have been ignored if there had been no Resistance, no Provisional Government and no negotiations leading to the passage of the *Manitoba Act*. The plain fact is that the Crown took it upon itself to uphold the interests of the 7,000 children (at a time when the Métis were a political and military force to be reckoned with) with a view to bringing Manitoba peacefully into Confederation and thereby gaining for Canada sovereignty over half a continent.

89. In *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at page 384 Dickson J. held that a fiduciary duty may arise by statute, undertaking or agreement. In the case at bar it arose by statute. Section 31 provided that the entire scheme of selecting, dividing and granting land to the children, "towards the extinguishment" of Aboriginal title and "for the benefit of the families of the half-breed residents", would be implemented by the Governor in Council. The Appellants submit that the language of s.31 and the speeches of the framers track the language of fiduciary obligation as developed in the jurisprudence of this Court in, for example, *Guerin v. The Queen, supra*; *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344; *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245; see also *Alberta v. Elder Advocates of Alberta,* 2011 SCC 24, paras. 30–38, 48–49.

90. The trial judge found that, because in his view the Métis had no Aboriginal title, there was no extinguishment, and the reference thereto by Parliament in s. 31 was "essentially a political

expedient": **Trial Reasons, Record Vol. I-III**, para. 185. Accordingly the trial judge ruled that the Crown had no fiduciary duty towards the Métis.

Trial Reasons, Record Vol. I-III, paras. 631–633

91. The Court of Appeal did, however, deal with fiduciary duty. Scott C.J.M. held that there are two necessary elements to a Crown - Aboriginal fiduciary duty. There must be, he wrote, at **Reasons, Record Vol. III-IV,** para. 472, "a specific or cognizable Aboriginal interest and an undertaking of discretionary control over that interest by the Crown".

A Specific or Cognizable Aboriginal Interest

92. The Court of Appeal concluded that:

a. "...the Métis are Aboriginal" (**Reasons, Record Vol. III-IV,** paras. 376–384);

b. "the Métis arguably had rights that were not held by others living in what was to become Manitoba" (para. 475);

c. "The interest held by the Métis in the [*Manitoba*] *Act* lands is arguably comparable to that of the bands in *Wewaykum* in that...they had occupied lands in Assiniboia for decades" but added that, unlike the situation in *Wewaykum* "some significance might be accorded to the fact that section 31 purports to give the Métis children land grants in return for the extinguishment of Indian title" and that while "...it is far from clear what interest the Métis of Red River actually had prior to s. 31 being enacted, if any, their ability to claim Aboriginal title was lost (or at least seriously impeded) through its enactment" (para. 504-505);

d. "... 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" (para. 506);

e. "...it is possible that the Métis could have an interest in land sufficient to meet this particular requirement towards establishing a fiduciary duty" (para. 507), and

f. "...the test for a cognizable Métis interest, if there is one, by definition would certainly not require that a reserve be involved" (para. 508). [Emphasis added.]

93. Nevertheless, the Court of Appeal declined to rule on whether the Métis had Aboriginal title, on the basis that Aboriginal title was not a necessary prerequisite to finding a fiduciary duty – a sufficient cognizable Métis interest would be enough. But the Court of Appeal then declined to rule on whether the Métis had such a cognizable interest in the land because, Scott C.J.M. said, he intended to rule that no breach of fiduciary obligation had been established. He wrote, at **Reasons, Record Vol. III-IV**, para. 509:

> The question of what does constitute a cognizable Métis interest, and whether one exists in this truly unique case I leave for another day.

An Undertaking of Discretionary Control by the Crown

94. The Court of Appeal did rule, however, under the second requirement, that the Crown had undertaken "complete control" over the disposition of the children's grant. Scott C.J.M. wrote:

> 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.
> ...
>
> 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.
> ...
>
> 533 The Métis were not only vulnerable in the sense described, but they trusted Canada to act in their best interests. ...
>
> 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. [Emphasis added.]

95. It follows from the Court of Appeal's ruling that the second element for establishing a fiduciary duty in this type of case has been met, and that if it had ruled that the Métis had Aboriginal title, or at least a sufficient cognizable interest in land, a finding of fiduciary duty would have resulted. The Appellants say that by declining to rule on the first issue, the Court of Appeal erred in law since it is not possible to determine whether a fiduciary duty has been breached without first determining if such a duty exists, and, if so, what is its specific substance.

See *Wewaykum, supra,* especially paras. 86 to 106

96. The Court of Appeal did note that the general standard of conduct required of a fiduciary is that of a person of ordinary prudence handling his own affairs and that a fiduciary is also required to act with reference to the beneficiary's best interests in fulfilling its fiduciary obligations. It also referred to the requirement that that fiduciaries act honourably, with honesty, integrity, selflessness, and the utmost good faith towards the best interests of their beneficiaries and that bad faith is not necessary in order to prove that a fiduciary obligation has been breached.

Reasons, Record Vol. III-IV, paras. 537-538

97. However, more than the general standard of conduct has to be considered and determined. In *K.L.B. v. British Columbia,* [2003] 2 S.C.R. 403, 2003 SCC 51, McLachlin C.J.C. wrote at para. 41:

> In *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at pp. 646-47, La Forest J. noted ... that "[t]he obligation imposed may vary in its specific substance depending on the relationship." (p. 646). [Emphasis added.]

98. The Appellants submit that the Court of Appeal was in no position to determine whether there was a breach of fiduciary duty in the case at bar because it was necessary to first determine the existence of a fiduciary duty and then to consider its "specific substance" before going on to the issue of breach. Whether a breach has occurred cannot be considered in a vacuum.

Aboriginal Title - A Political Expedient?

99. The Court of Appeal held, at **Reasons, Record Vol. III-IV**, para. 238(e) and 242, that one of the trial judge's "critical findings" was that "s. 31 was essentially a political expedient to bring about Manitoba's entry as a new Canadian province" and that "the reference to 'extinguishment of the

Indian Title,' was the vehicle of convenience chosen to accomplish it".

100. Scott C.J.M. then wrote, at **Reasons, Record Vol. III-IV,** para. 242:

> A review of the history of the discussions in Parliament in early May, 1870, reference 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.

This "critical finding" may be couched in language which treats it as if it were a finding of fact. The question before the Courts below, however, was a question of the interpretation of the wording of s. 31 of the *Manitoba Act,* in particular the meaning and effect of the reference to the extinguishment of "Indian Title" – a question of law. At the very least the trial judge's "finding" was one of mixed law and fact involving an "extricable error of law": *Housen v. Nikolaisen,* [2002] S.C.R. 235, at paras. 33-35.

101. Parliament could not have been clearer in stating the purpose of s. 31 – "and whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province..."[10]

102. The Appellants submit that the trial judge and the Court of Appeal could not go behind the declaration that s. 31 was enacted "towards the extinguishment of Indian title" by characterizing those words as merely a "political expedient" and not to be taken seriously in accordance with their plain meaning. Indeed, at **Reasons, Record Vol. III-IV,** paras. 504-505, the Court of Appeal itself acknowledged that the words did have substantive effect, in that the Métis' "...

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[10] In 1874 Parliament returned to the issue, when it enacted *An Act Respecting The Appropriation Of Certain Dominion Lands In Manitoba,* 1874, 37 Vic. c. 20, **Record Vol. XVII, Tab & Exhibit 1-1000**, which read:

> ...and whereas no provision has been made for extinguishing the Indian title to such lands as respects the said half-breed heads of families...and whereas it is expedient to make such provision... [Emphasis added.]

This, too, according to the reasoning of the trial judge and the Court of Appeal, would have to be disregarded as a "political expedient". So too the ***Dominion Lands Act***, 1879, s. 125 (e):

> 125. The following powers are hereby delegated to the Governor in Council:
> ...
> (e) To satisfy any claims existing in connection with the extinguishment of the Indian title, preferred by Half-breeds resident in the North-West Territories outside the limits of Manitoba, on the fifteenth day of July, one thousand eight hundred and seventy, by granting land to such persons, to an extent, and on such terms and conditions as may be deemed expedient. [Emphasis added.]

ability to claim Aboriginal title was lost (or at least seriously impeded) through [s. 31's] enactment". [Emphasis added.]

103. It was in fact Parliament, in s. 31, that had deemed it "expedient, towards the extinguishment of the Indian Title" to appropriate 1.4 million acres for the children. Canadian courts interpret statutes. They don't take it upon themselves to rewrite or ignore provisions of statutes so as to nullify Parliament's expressed intention. Courts of law "must obey and give effect to [Parliament's] determination".

Labrador v. The Queen [1893] A.C. 104

Speeches in the House by the framers of the *Manitoba Act* about Aboriginal Title

104. Neither the trial judge nor the Court of Appeal gave any weight in their interpretation of s.31 to the speeches in the House by the framers of the *Manitoba Act.*

105. The Appellants submit that the jurisprudence laid down by this Court has established the importance of the speeches of the framers of the Constitution in determining the meaning and purpose of constitutional provisions: *Senate Reference*, [1980] 1 S.C.R. 54 (SCC), Laskin C.J.C. at pages 66 – 67; *Secession Reference, supra,* at para. 43; and *Consolidated Fastfrate Inc. v. Teamsters*, [2009] 3 S.C.R. 407, Rothstein J. at para. 33.

106. Macdonald and Cartier were authorized by the Cabinet to confer with the delegates from Red River. They worked out, in negotiations with Father Ritchot and the other delegates, the compromise that is the *Manitoba Act*. Who better to tell us the meaning and purpose of section 31? And they repeatedly told the House that the purpose of s. 31 was to extinguish the "Indian Title" of the Métis.

107. Although the Court of Appeal refused to consider what Macdonald and Cartier told the House in 1870, nevertheless, at **Reasons, Record Vol. III-IV,** para. 156, Scott C.J.M. quoted an isolated passage from Macdonald's speech to the House in the great debate of 1885 on the Northwest Rebellion, which took place while Louis Riel awaited trial for high treason. He said that

Macdonald's 1885 speech was "of considerable assistance in explaining events leading up to, and following, the creation of the new province..." He added that Macdonald was at that time looking back, "with the benefit of 15 years of hindsight".[11] But Scott C.J.M. did not consider the additional passage from Macdonald's same 1885 speech:

> So far as the half-breeds were concerned, 1,400,000 acres were set apart for the purpose of meeting their claims.
>
> ...
>
> It was then decided to grant each of the half-breed inhabitants of the Province a free patent for 140 acres of land, in extinguishment of their Indian title. [Emphasis added.]
>
> **Record Vol. XXII, Tab & Exhibit 1-1678**, p. 3113

108. See also the statements by Edward Blake, the Leader of the Opposition, and Wilfred Laurier in the same debate, both of whom referred to the provision of the children's grant in compensation for the extinguishment of "Indian Title".

See Blake at **Record Vol. XXII, Tab & Exhibit 1-1678,** p. 3076; Laurier at p. 3124

109. Not a word about "a political expedient". The Commons itself proceeded throughout on the footing that the statute meant what it said. What all the leading figures of 1870 and 1885 regarded as a policy followed in the *Manitoba Act* has been, without the slightest justification, perfunctorily dismissed by the courts below. The Appellants submit that the plain language of the statute and the speeches of the framers put to rest any question as to whether the Métis had Aboriginal title, and put to rest any question whether s. 31 was enacted "towards the extinguishment of Indian Title".

110. In the alternative, as Scott C.J.M. suggested at para. 509, even under his approach (i.e., that there is no need to determine whether the Métis had Aboriginal title) the important question remains in what he called "this truly unique case" as to whether the Métis had a cognizable interest in land

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[11] In *R. v. Blais*, supra, the Court referred, at para. 22, to the language of s. 31 and stated that the phrase "towards the extinguishment of the Indian Title in the Province" was "expressly recognized at the time as being an inaccurate description". The Court cited the same words of Macdonald from 1885 as did the Court of Appeal. However, the Court was dealing there with the meaning of the word "Indian" in s. 13 of *NRTA*. The Court rejected the use of "Indian Title" in s. 31 to show that the Métis were to be considered to be Indians for the purposes of the *NRTA*. In that limited sense, as Macdonald explained, "Indian Title" was a misnomer, as indeed it would have been if used to describe the Aboriginal title of the Inuit – but the expression "Aboriginal title" had not yet been coined. No doubt Macdonald and Parliament would have referred to it as "Aboriginal title" had the expression then been in use.

less than Aboriginal title but sufficient to ground a fiduciary duty. If the Court is disposed to rule that the Métis did not have Aboriginal title, the Appellants submit that nevertheless the Métis had "a cognizable interest in land...sufficient to ground a fiduciary duty", that is, the interest that the Métis families and their children had, after the passage of s. 31, in the children's grant – a legal or significant practical interest in the due administration of the 1.4 million acres.

ii. The Purpose of The Children's Grant: The Content of the Fiduciary Duty

111. The trial judge held there was no fiduciary duty owed to the Métis. He found, at **Trial Reasons, Record Vol. I-III**, paras. 655 and 929 respectively, that the children's grant "was intended simply to give the families of the Métis through their children a head start in the new country in anticipation of the probable and expected influx of immigrants" and that "each Métis child in Manitoba would have the opportunity to own and settle upon a piece of land within the new province if he or she so chose". [Emphasis added]

112. The Court of Appeal agreed, at **Reasons, Record Vol. III-IV,** para. 238(d), that "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". [Emphasis added.] But even if the purpose of the children's grant was nothing more than to provide the Métis children with a "head start," as both the trial judge and the Court of Appeal determined, no such head start was in fact provided.

113. Not only does the wording of s. 31 itself set out that the children's grant is "for the benefit of the families of the half-breed residents," the statements in the House by Macdonald and Cartier in 1870 tell us the purpose of the children's grant, the content or specific substance of the Crown's fiduciary duty. Neither the trial judge nor the Court of Appeal gave any weight to those statements. Scott C.J.M., at **Reasons, Record Vol. III-IV,** para. 550, dismissed the speeches of Macdonald and Cartier as "political speeches" by "various politicians".

114. On each occasion that Macdonald and Cartier spoke on the subject of the children's grant during the debate on the *Manitoba Act,* they stressed that the grants were for the purposes of settlement

of the children, and Macdonald specifically emphasized that "no land would be reserved for the benefit of white speculators, the land being given only for the actual purpose of settlement" and that it would be necessary to "prevent that liberal and just appropriation from being abused".[12]

115. These were solemn, considered statements by the two leading ministers in the Government of Canada, who had conducted the negotiations with the delegates from Red River. The grant was for purposes of settlement, not sale. This would be in the best interests of the children. The Crown could not, consistently with its fiduciary obligation to the 7,000 Métis children who were the beneficiaries under s. 31, abandon this goal.

116. Scott C.J.M. erroneously wrote, in respect of what Macdonald and Cartier told the House about the purpose of the children's grant, that the Appellants had argued below that speeches by "various politicians" regarding the purpose of s. 31 constituted "binding representations" and he ruled that the Métis had to prove reliance on them (as if they had claimed that they had a contract with the Crown). He held, at **Reasons, Record Vol. III-IV,** para. 550:

> Without proof of reliance, these alleged representations cannot expand the content of the Crown's fiduciary duty in the circumstances. [Emphasis added.]

117. The Appellants did argue below that the Métis relied on "the promises, assurances and representations that were made by the Crown and its representatives" in the negotiations preceding and following the introduction of the *Manitoba Act*. These materials place the *Manitoba Act* "in its proper linguistic, philosophic, and historical context". The Appellants argued - and argue - that the statements by Macdonald and Cartier inform the purpose of s. 31 and the content of the Crown's fiduciary duty.

118. The Appellants did not seek to "expand" the Crown's fiduciary duty, but rather to ensure that the courts below understood the content of the fiduciary duty that the Crown had taken upon itself. This could not be known without considering what Macdonald and Cartier told the House in explaining the purpose of the children's grant.

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[12] Whatever Macdonald's earlier view of the Métis had been, at the time he spoke in the House he was certainly committed to the broad guarantee of Métis rights set out in the *Manitoba Act*.

119. The Appellants say that the framers clearly understood that the effect of s. 31 was to impose a fiduciary duty on the Crown. The Appellants rely on what Cartier told the House on April 13, 1871 when he was asked whether conditions of settlement (which were to be imposed on ordinary homesteaders) would be imposed on the children. On that occasion he said that:

> The Government could not now impose settlement duties as a great number of those entitled to the lands under the Act were children. Until the children came of age the Government were the guardians of the land, and no speculators would be suffered to get hold of it. [Emphasis added.]

Then, Cartier made his meaning even plainer: "...the people could not sell the lands until they came of age" [Emphasis added.]

Trial Reasons, Record Vol. I-III, para. 635; **Record Vol. XIV, Tab & Exhibit 1-0601**, p. 1086

120. Finally, it must be noted that the succeeding Liberal government also understood that the Government was subject to a fiduciary duty. On March 14, 1877 Sir Richard Scott, Secretary of State, told the Senate:

> The Government were the guardians of these people, and it was their duty to see that they were protected in their rights to their properties. [Emphasis added.]
>
> **Record Vol. XIX, Tab & Exhibit 1-1268**, p. 172

121. An examination of the statute and the speeches of Macdonald and Cartier shows that the content of the Crown's fiduciary duty included the following:

a. The distribution of the children's grant was, according to s. 31, to be "for the benefit of the families" and for purposes of settlement. This would enable the Métis to remain a distinctive community in the new province. Such a goal necessarily entailed a method of distribution which would enable the children's lots to be distributed in a manner that would make them practically usable for settlement by Métis families and their children.

b. The distribution should take place without delay. The trial judge and Scott C.J.M. both held that s. 31 was intended to provide a "head start".

c. There could be no alienation prior to allotment or grant. Macdonald and Cartier had variously said the grant was not for sale to speculators, that it was not to be "abused".

d. There could be no sales before children achieved majority. Cartier had told the House on April 13, 1871 that the Government were "guardians of the land," and that "...the people could not sell the lands until they came of age".

e. All of the Métis children were entitled to receive grants of land.

122. These were the measures that a person of ordinary prudence conducting the management of their own affairs in light of the purposes of s. 31 would employ to protect the best interests of the children.

123. The Appellants say that even if there was no fiduciary duty, these same requirements were in any event constitutional obligations derived from s. 31 and the speeches of the framers.

E. BREACH OF FIDUCIARY DUTY: RANDOM SELECTION

124. The Appellants submit that in order to benefit the families, the lands allotted to the children of the Métis should have been distributed so as to be contiguous to or in the vicinity of their parents' lots along the rivers, so far as that was possible, or that at the very least the lands allotted to siblings should have been clustered.

125. Macdonald and Cartier made it clear to the House that the scheme was intended to enable the children to become settlers, not to make their land available for sale. If the object was to benefit the families by enabling the children to settle on their lots, and not to facilitate sales, there would have to be provision made to achieve Métis family landholdings that were contiguous, clustered, or distributed on some other basis that was consistent with s. 31 and what Macdonald and Cartier had told the House.

126. Macdonald and Cartier, on May 2, 1870, stated to the House, that the land would be given to heads of families for distribution among the children under the control of the Province. When the printed version of the Bill, presented to the House on second reading on May 4, did not include such a provision, Macdonald and Cartier promised Ritchot instead to authorize "a Committee of men whom we ourselves were to propose to select these lands and divide them among the children of the half breeds". But that committee was never established. The federal Cabinet assumed complete control.

127. It was clear that a measure of discretion would have to be used in distributing the grants. That is why the distribution was to be made by the local Legislature, or "a committee of men whom we ourselves were to propose", that is a body in whom the Métis, English-speaking and French-speaking, would have confidence. The task would not be an easy one, but no one suggested it could not be done. It was the method by which the words of s. 31 ("for the benefit of the families of the half-breed residents") could have been implemented, the means by which family landholdings could have been grouped. Did Macdonald and Cartier, when they told the House that the lands were to be given to the heads of families to distribute among their children intend that the land should be scattered randomly either within a township or across several townships? It hardly seems likely. Was that their intention when they told the House that the purpose was settlement, not sale? The answer must be no.

128. There was no evidence adduced that the scheme as envisaged by the Métis and promised by Macdonald and Cartier was impracticable as a way to provide for settlement of the Métis children, nor was there evidence that representatives of the Crown believed it was impracticable.[13]

129. But the federal Crown established instead a lottery scheme, which meant that for many if not most of the Métis, it was pointless to keep these scattered parcels in family ownership. The Crown then delayed the distribution for so long that by the time the final distribution actually got

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[13] Lieutenant Governor Archibald, in his letter of December 27, 1870, did not recommend a lottery. He discussed at length the wishes of the Métis, both French and English. But he did not indicate that it would be impracticable to carry out the wishes of the Métis.

underway the local Legislature's only concern was to facilitate the sale of the land grant in order to discontinue Métis ownership.

130. In *Dumont, supra,* O'Sullivan J.A., dissenting in the Court of Appeal, wrote at p. 200:

> The governments knew well how to allot land in such a way as to enable a community to live as such. They were able to accommodate the Mennonites by the eastern reserve and the western reserve and they were able to accommodate the French-Canadians on Pembina mountain. There, settlers were not given land at random; land was allotted only to persons who shared common values.

The federal government set aside lands in Manitoba *en bloc* in 1873 for the Mennonites. According to Professor Ens, within these blocks the individual Mennonites could choose their land: **Record Vol. V, Transcript,** vol. 25B, May 24, 2006, p. 3, line 5 to p. 4, line 5. For the Mennonites there was no such thing as random selection.

131. Against this background *OIC April 25, 1871* provided for division of the children's grant by random selection. On its face *OIC April 25, 1871* does not even contemplate lotteries on a parish-by-parish basis, but rather a province-wide lottery. In the event a series of lotteries was held parish-by-parish.

132. The children's grants were scattered all over townships and at varying distances from each parish. The maps produced by Canada show graphically how the lottery scheme resulted in the lots granted to the children of each Métis family being a great and often unworkable distance from one another: **Record Vol. XXVII, Tab & Exhibit TE 28**, general map No. 4. The lots of children in the same family were often located far from each other and frequently in townships[14] far from their families' parishes. According to the maps, a family's children's lots might be scattered 10, 20, 30, 40 or more miles apart over several of those townships in a province still relatively devoid of roads. **Record Vol. V, Transcript,** vol. 16, May 8, 2006, page 48, lines 8-13.

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[14] At trial, coloured pins were inserted into Map, **Exhibit TE 28,** showing the actual dispersion of the grants for siblings of the same families. Those pins were removed at the end of the trial, but replaced with handwritten notation with X's and O's, which remain on the Map that is reproduced in the Record at **TE 28.**

133. Prof. Flanagan in his report, "Historical Evidence," wrote about the impact of the lottery:

> Even if the Métis had wanted to remain in Manitoba to become commercial farmers, they would not necessarily have wanted to settle on their particular children's allotments. The Métis tended to move in large, clan-like groups of relatives, consisting of parents and children, brother and sisters, and in-laws. But the partition of reserve land into 240 acre parcels made it difficult to resettle as a group; it would only be chance if a group of relatives happened to get allotments near each other. [Emphasis added.]
>
> **Record Vol. XXVI, Tab & Exhibit TE 18**, p. 91

134. As the Royal Commission on Aboriginal Peoples put it, in *Royal Commission on Aboriginal Peoples* vol. VI, Tab 81, p. 223-224:

> ..."title extinguishment" land grants were widely dispersed rather than being concentrated in areas contiguous to Métis settlements, thus frustrating dreams of a cohesive homeland.

135. Scott C.J.M. wrote, at **Reasons, Record Vol. III-IV,** para. 574, that:

> 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.

136. But there was no evidence that the size of the children's lots made grouping them impracticable. Of course, as we shall see, the size varied with each allotment (140 acres in the first allotment, 190 acres in the second allotment, and 240 acres in the third allotment). More importantly, the Court of Appeal here did not address the question of whether the Crown as fiduciary, had the obligation to adopt a scheme designed, at least as far as possible, to group them by family, even if that entailed a measure of difficulty. It is conceded that the Crown took no such steps.

137. It will be recalled that in his letter of May 23, 1870 Cartier had promised that the regulations governing the implementation of s. 31 "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 [the land]". None of the Métis, French or English-speaking had expressed a wish to divide the land randomly by way of a lottery.

138. Scott C.J.M. wrote at **Reasons, Record Vol. III-IV**, para. 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. [Emphasis added.]

139. The Appellants did not argue that the Métis should have been allowed to pick land wherever they wished. What the Appellants argued is that the Crown, having rejected the idea of the Legislature supervising the distribution of the land by the heads of families, having rejected the idea of a committee of local men to do the same, did not itself establish criteria which would enable the assignment of grants to the children to be based on a model that would enable the families' holdings to be as close together as possible. A measure of discretion would have to be used. But the Crown left it entirely to chance.

140. Neither the trial judge nor the Court of Appeal considered the speeches of Macdonald and Cartier as bearing on the matter. Had they done so, it would have been apparent that random selection would undermine the framers' intention that the children were to settle on the land and not sell it. They considered the meaning of Cartier's letter without regard to the most important evidence throwing light on Cartier's intent, i.e., what Cartier had said to the House.

141. The Court of Appeal stated at **Reasons, Record Vol. III-IV,** para. 571 that there were "few, if any, complaints" in respect of the decision to divide the land by way of lottery. But this ignores the fact, acknowledged by Scott C.J.M. at para. 88, that on April 28, 1871 the new Legislature stated that the location of the land should "be optional with the parties to whom it is given" – a far cry from random selection .

Record Vol., Tab & Exhibit 1-0554, p. 63

142. Moreover, the legislature, which still had a majority of Métis and their supporters, tried once again. As related by the Court of Appeal in **Reasons, Record Vol. III-IV,** paras. 100 – 102, on February 8, 1872, the Legislative Council and Assembly of Manitoba sent an address to the Governor General expressing concern about the delay, exacerbated by the fact that new settlers were being allowed to take up land in the meantime. The Legislative Council and Assembly also requested that they be 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, 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 and there is no explanation as to why such a delay occurred.

143. There is, of course, an element of unreality about all this. It is important to bear in mind what was happening in the province at the time. According to Professor Ens, "there were serious incidents of physical altercations and abuse on the part of the Wolseley expedition soldiers towards some of the Métis population". **Reasons, Record Vol. III-IV,** para. 89. Moreover, there was an attitude of linguistic and religious intolerance of the new settlers arriving from Canada, as well as the Wolseley soldiers, toward the Métis. Prof. Ens described it as a "reign of terror" and stated that "virtual mob rule" prevailed in Winnipeg in 1871-72. Professor Ens also said, at **Record Vol. XXVII, Tab & Exhibit TE 35,** p. 25, footnote 37, that "there were, in fact, a number of deaths and scores of attacks and beatings attributed to the soldiers in Winnipeg". Lieutenant Governor Archibald, in a letter to Macdonald on October 9, 1871, referred to "a frightful spirit of bigotry among a small but noisy section of our people".

Reasons, Record Vol. III-IV, para. 95

144. Moreover, it is not as if the distribution of the children's grant actually proceeded at once, and there had been a discussion about whether the lots were too big to enable them to be grouped or whether the Métis families had complained sufficiently about the federal government's decision to proceed with random selection rather than in accordance with the wishes of the Métis. The allotment was not completed for ten years. No one even knew the location of his or her lot for seven to ten years. And the grants were not available for a further lengthy period after allotment. By that time the continual delays in distributing the land had changed the whole picture. The lottery scheme and the delays which followed completely undermined the scheme for settlement of the children's land.

145. The Appellants say that the decision to preclude the distribution of land on the basis of benefit to the families for settlement was contrary to the purpose of s. 31 and constituted a breach of the Crown's fiduciary duty. However, in the alternative, even if the decision in 1871 to distribute by

random selection was not a breach of fiduciary obligation, the Appellants say that the great delay that followed, to which the Appellants now turn, was by itself such a breach.

F. BREACH OF FIDUCIARY DUTY: THE GREAT DELAY

146. The Appellants submit that s. 31 necessarily implied that the grants to the children were to be distributed without delay. This was certainly true if the children were to have a "head start".

147. Scott C.J.M. pointed out, at **Reasons, Record Vol. III-IV,** para. 108, that on December 6, 1872 the Secretary of State advised the new Lieutenant Governor, Alexander Morris, 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". [Emphasis added.]

Record Vol. XV, Tab & Exhibit 1-0755

148. Nonetheless, as the trial judge found, **Trial Reasons, Record Vol. I-III,** para. 458(1), "...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..". [Emphasis added]. Scott C.J.M. himself, in dealing with what he described as the Appellants' "overarching complaint," found that there was "great delay –much of it unexplained". [Emphasis added.]

Reasons, Record Vol. III-IV, para. 654; see also para. 579

149. In fact the delay extended over more than 15 years. The allotments were not completed until 1880, the patents until much later, and, of course, 993 children did not receive any land but were, starting in 1885, given scrip instead. The Appellants will here review the "great delay" as found by the trial judge and the Court of Appeal.

150. Lieutenant Governor Archibald recommended in his letter of December 27, 1870, in the teeth of the language of s. 31, that all 10,000 Métis, including the heads of families, should share in the grant. The Crown, in *OIC April 25, 1871*, imprudently and without regard to the plain wording

of s. 31, included the heads of families, thereby diluting the grant to the 7,000 children. Scott C.J.M. found, at **Reasons, Record Vol. III-IV,** para. 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. [Emphasis added.]

151. The delay caused by this mistake was indeed adverse - it led to the cancellation of the allotment of 140-acre lots that had taken place and meant that the second allotment limited to the children did not commence until after *OIC April 3, 1873* was enacted to delete heads of families from the grant. The second allotment, this time limited to the 7,000 (actually 7,368) children, based on the 1870 census, was for lots of 190 acres. Lieutenant Governor Morris commenced drawing 190-acre allotments on August 16, 1873.

Reasons, Record Vol. III-IV, para. 113; **Record Vol. XVI, Tab & Exhibit 1-0898**

152. At this point, although there had been draws, the location of the individual allotments had not been made public. At the first allotment, however, the heads of families had participated. And, although all they had was a prospective right to an unknown 140-acre lot, there had been some traffic in these as well as in children's allotments because the heads of families who were over twenty-one considered that they had the right to sell their "lots" as well as those of their children.

153. Scott C.J.M. wrote, at **Reasons, Record Vol. III-IV,** para. 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.

154. On March 8, 1873 the Manitoba Legislature passed the *Half-Breed Land Grant Protection Act*, S.M. 1873, c.44, providing that vendors would have the right to repudiate sales of allotments. The preamble recited that:

> ...very many persons entitled to participate in the said grant in evident ignorance of the value of their individual shares have agreed severally to sell their right to the same to speculators receiving therefore only a trifling consideration. [Emphasis added.]

Reasons, Record Vol. III-IV, para. 119; **Record Vol. XVI, Tab & Exhibit 1-0843**

155. In the absence of any express federal measure to prevent sales before grant similar to the provisions of *OIC April 25, 1871* which expressly provided that "all assignments and transfers" of pre-emption land and homesteads are "null and void", the local Legislature had acted. Canada did not disallow the *Act*, and it came into force in 1874.[15]

156. Macdonald had been re-elected in 1872. But in November, 1873, Macdonald's government fell over the Pacific Scandal. Alexander Mackenzie, the Liberal Leader of the Opposition, became Prime Minister the following day. He won a general election in early 1874. The Liberals remained in office until November, 1878 when Macdonald and the Conservatives were returned to office.

157. With Mackenzie in office there was no discernible progress with respect to the allotments until early 1875, and then only after questions were asked in Parliament about the delay, petitions were received from a number of parishes in Manitoba and an address was forwarded to the Governor General from the provincial government. Scott C.J.M. found at **Reasons, Record Vol. III-IV,** para. 126 that "There is no explanation why it took the new government over a year to address the continuing delays in moving ahead with the allotments".

158. As delay continued into 1875 the Métis' frustration grew. Petitions were sent to Ottawa from a number of parishes. One of these, for example, dated February 23, 1875, from South St. Andrews, was sent to David Laird, Minister of the Interior:

> 2. That nearly five years have elapsed since the passing of said *Act* and there is not yet one Half-breed in the Province in possession of one acre of said lands or deriving any benefit therefrom.
>
> ...
>
> 5. That a feeling of very great dissatisfaction and uneasiness exists amongst the Half-breeds of this Division and in the Province generally, owing to the great length of time that has elapsed since the Grant was made, and as yet they see no prospect of early

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[15] The Appellants say that the *Act* was unconstitutional in that by dealing with transactions in Dominion Lands prior to patent, the province trenched on section 91(1A) of the *Constitution Act, 1867*, i.e., federal lands, and by singling out half-breeds and their lands it trenched on section 91(24). The Appellants, however, are not challenging the *vires* of the *Act*, since it did not undermine the scheme of distribution.

possession, and also because they see daily, and are unable to prevent the plundering of timber from those lands. [Emphasis added.]

Reasons, Record Vol. III-IV, para. 123; **Trial Reasons, Record Vol. I-III,** para. 227; **Record Vol. XVII, Tab & Exhibit 1-1041**; also see similar petitions at **Record Vol. XVII, Tab & Exhibits 1-1034; 1-1039; 1-1040; 1-1043**

159. Lieutenant Governor Morris wanted to publish the lists for each parish (indicating the location of each child's lot) as the draws occurred. Morris's proposal was that the land should vest on allotment and could then be sold. But Colonel J.S. Dennis, Surveyor General, Dominion Lands Branch, believed this would aid and abet speculators and the proposal was not followed at that time.

Reasons, Record Vol. III-IV, para. 122 ; **Trial Reasons, Record Vol. I-III,** paras. 221 -223 ; **Record Vol. XVI, Tab & Exhibits 1-0930; 1-0936; 1-0953; 1-0935**

160. *Order in Council April 26, 1875* provided, *inter alia* that persons for whom allotments had been drawn would be required to appear before commissioners appointed for the purpose in order to establish their identity and entitlement to receive a patent under s. 31. The task of taking applications by allottees for patents was assigned to a commission known as the Machar-Ryan Commission. Under the Order in Council, once the commissioners had returned their assessment of the claims to the Dominion Lands Office, "the patent should issue forthwith to the party so entitled, and to the others respectively, as the return might show them to arrive at the necessary age". [Emphasis added.]

Reasons, Record Vol. III-IV, paras. 125–127; **Trial Reasons, Record Vol. I-III,** paras. 228–230; **Record Vol. XVII, Tab & Exhibit 1-1058**

161. The commissioners compiled returns which were approved in January 1876 by Colonel Dennis and David Laird, Minister of the Interior, as the authoritative list.

Reasons, Record Vol. III-IV, para. 127

162. By early 1876, therefore, the second allotment was complete. Patents could issue to the children whose applications had been approved by Machar and Ryan and who were at least 18 years of age, and thereafter to children as they attained that age. According to *OIC April 26, 1875*, at that

point patents should have issued "forthwith". However the Crown did not comply with its own order in council.

163. But, at least the framers' intention that there should be no sales to speculators was acknowledged by *OIC March 23, 1876* which made it clear that assignments before patents would not be recognized. To recognize them, *OIC March 23, 1876* stated, would not "be in the interests of the persons for whose benefit the lands were appropriated".[16]

Reasons, Record Vol. III-IV, para. 130; **Record Vol. XVIII, Tab & Exhibit 1-1171**

164. Had the Crown at this stage actually carried out the provisions of *OIC April 26, 1875* the impact of the delay on the realization of the Métis children's rights would have been mitigated to some extent. Of course, owing to random selection, the possibilities for settlement by the children on the allotted lands would have been greatly diminished. But the great majority of the patents, more than 5,000, would have been issued, or prepared for issuance upon the children reaching 18 years. No special provincial laws singling out Métis children and their lands, enabling sales before grant, or facilitating sales by minors had been passed at this stage. Nonetheless, such an outcome would still have borne little resemblance to the scheme provided for in the Act and explained to the House by Macdonald and Cartier.

165. But as Scott C.J.M. wrote at **Reasons, Record Vol. III-IV,** para. 128, "this was still not the end of the delays". To this point the scheme had been prejudiced by random selection and by delay. But these further delays would occur together with a failure by the Crown to prevent sales before grant, sales before majority and a failure to provide land to all the children.

166. In August 1876, some seven or eight months after the time at which the patents should have issued "forthwith", Donald Codd, the Dominion Lands Agent in Winnipeg, expressed the view

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[16] *OIC March 23, 1876* must be considered in tandem with *OIC December 4, 1893*, which rescinded *OIC March 23, 1876*. The preamble *to OIC December 4, 1893* reads (referring to *OIC March 23, 1876*):

> 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 entirely passed. [Emphasis added.]

that instead of there being about 7,000 children, there were unlikely to be more than 5,314. He proposed increasing this estimate to 5,833 children which would, when divided into 1.4 million acres, result in allotments of exactly 240 acres, or a quarter-section and a half, a much more convenient size for the Dominion Lands Office, he said, than 190 acres. **Reasons, Record Vol. III-IV,** para. 132; **Record Vol. XVIII, Tab & Exhibit 1-1192.** His "estimate" was placed before the Cabinet, which adopted it, despite stating formally in *OIC September 7, 1876*[17] that "no satisfactory explanation appears of the difference between the numbers of children in the 1870 census, as compared to Codd's estimate".[Emphasis added.] This adjustment in the estimated number of children meant that the second allotment, now completed, had to be cancelled, thereby causing, as Scott C.J.M. wrote, "yet more delay".

Reasons, Record Vol. III-IV, para. 133. **Record Vol. XVIII, Tab & Exhibit 1-1200**

167. This "yet more delay" was caused by the failure of the Crown to follow its own law in the form of *OIC April 26, 1875*, which required patents to issue forthwith, and by the Crown's embrace of an estimate of the number of children that was contrary to everything that had been previously known, and for which no satisfactory explanation had been provided, but which was more "convenient" to the Dominion Lands Office.

168. Scott C.J.M., however, at **Reasons, Record Vol. III-IV,** para. 159, not content to accept the Crown's own verdict that there was "no satisfactory explanation", defended the decision to cancel the second allotment on the ground that "the accuracy of the 1870 census is by no means certain". The only support that Scott C.J.M. offers for this finding is at **Reasons, Record Vol. III-IV,** para. 80, based on Prof. Flanagan's opinion in his "Historical Evidence", **Record Vol. XXVI, Tab & Exhibit TE 18.** On cross-examination, however, Dr. Flanagan admitted that he had based this view on a 1954 article written by Herbert Douglas Kemp, and that Kemp had actually not expressed the view which Prof. Flanagan attributed to him as to the adequacy of the census. Moreover Prof. Flanagan "...didn't go back to the census forms to attempt to form my

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[17] *OIC September 7, 1876* contained the following paragraph:

> That no satisfactory explanation appears of the difference between the numbers of children as approximately obtained from the [1870] Census, and the actual number of claimants, as above, believed to represent the whole element for which the grant was intended.

own opinion about whether it was inadequate" (**Record Vol. V, Trial Transcript**, vol. 12, May 1, 2006, pages 90 to 95, in particular page 93 line 34 to page 94 line 1.) In light of this cross examination, the trial judge did not rely on Dr. Flanagan's evidence on this point, or rule that the 1870 census was inadequate. It is submitted that it was a palpable and overriding error for the Court of Appeal to do so, particularly in light of the weight that Scott C.J.M. gave to the putative inadequacy of the census in dismissing concerns about the Crown's embrace of Codd's inaccurate estimate. See also **Reasons, Record Vol. III-IV,** para. 628.

169. Indeed, Scott C.J.M. at **Reasons, Record Vol. III-IV**, para. 148, points out that A.M. Burgess, Deputy Minister of the Interior, concluded in 1885 that Codd's error arose from the fact that Codd had failed to fully take into account "the transitory *[sic]* nature of Métis families, many of whom would have been absent from the province during the Machar/Ryan commission hearings". But no prudent fiduciary could fail to take the lifestyle of the Métis into account.

170. From whatever angle it is examined, Codd's recalculation – one embraced by the Cabinet – was one which no prudent fiduciary would have made, or persisted in.

171. So now a third allotment had to be undertaken. It was not completed until 1880, four years later, despite complaints and reassurances that the allotment was proceeding "as rapidly as possible".

Reasons, Record Vol. III-IV, paras. 134, 141

172. Sir John A. Macdonald, in his speech of July 16, 1885 quoted by Scott C.J.M. at **Reasons, Record Vol. III-IV,** para. 380, described the situation as he found it on his return to office in 1878:

> … when the present Government returned to office, in 1878, they found that the half-breeds of St. Boniface, St. Norbert, St. François Xavier, Baie St. Paul, and St. Agathe, containing more than one-half of the half-breed population, amongst whom the reserved lands were to be distributed, had not only not received their patents, but the allotments had not even been made. [Emphasis added.]

Record Vol. XXII, Tab & Exhibit 1-1678, p. 3114

173. Moreover, even after allotment, there were further lengthy unexplained delays before grant. As Prof. Flanagan, quoted by Scott C.J.M. at **Reasons, Record Vol. III-IV**, para. 160, said:

> Depending on administrative difficulties, weeks, months, or years might elapse between the Lieutenant Governor's certification [of the allotments] and the Department's approval of the grant. Thus, most grants for St. Boniface/St. Vital and St. François-Xavier/Baie St. Paul were dated 1881, even though the drawing for the former parishes had been completed in 1878 and for the latter parishes in 1880. [Emphasis added.]

174. The concern that speculation would nonetheless frustrate the federal purpose led to the proposal by David Mills, Minister of the Interior, to change the scheme altogether. On January 22, 1877 Colonel Dennis wrote a lengthy letter, on Mills' behalf, to Archbishop Taché. The Minister, said Dennis, had received information that:

> ...owing to the designs of Speculators the Majority of Claims of Half Breed Children, as the same mature, will pass from the owners for comparatively a mere nominal consideration.
>
> ... the probable practical operation of the Grant as proposed, will (for the reason already given) fall very far short of realizing the benefit to the claimants which was contemplated, and there remains also the serious objection to the scheme, above alluded to, that is to say, the locking up for years of the greater portion of the lands. [Emphasis added.]

Trial Reasons, Record Vol. I-III, para. 244; **Record Vol. XVIII, Tab & Exhibit 1-1236**

175. The Minister therefore proposed that Parliament should enact a measure for the commutation of the claim of each child by providing a fixed cash payment instead of land.

Trial Reasons, Record Vol. I-III, paras. 244, 246; **Record Vol. XVIII, Tab & Exhibit 1-1236**

176. When Taché replied on February 5, 1877 to Dennis' letter he agreed speculators would do all in their power to get as much of the land as they could, and at the lowest rate possible, and that their efforts should be checked. But he objected to any amendment to the *Act* which would enable minors to sell, and indicated that such an amendment would need to be made by the Imperial Parliament.[18]

Trial Reasons, Record Vol. I-III, paras. 245 - 248; **Record Vol. XVIII, Tab & Exhibit 1-1243**

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[18] In fact, Taché, in his reply to Mills' proposal that Parliament should enact a measure for the commutation of the claim of each child by providing a fixed cash payment instead of land, wrote:

> The *Manitoba Act* having received the sanction of an Imperial Act, its provisions cannot be re-adjusted by the Canadian Parliament, and I am very doubtful as to the willingness of the Imperial Parliament to enact for the disposal of lands set apart for minors.
>
> **Record Vol. XVIII, Tab & Exhibit 1-1243**

177. On March 14, 1877 Sir Richard Scott, Secretary of State, told the Senate:

> The Government were the guardians of these people, and it was their duty to see that they were protected in their rights to their properties....
>
> ... it was a subject attended with a great deal of embarrassment. There was no object in issuing patents to minors who could not make use of their property. It would be very unfortunate if the Province of Manitoba should remove the disability of minors to sell their lands, as it would open a way to a great deal of jobbery. The Government were the guardians of these people, and it was their duty to see that they were protected in their rights to their properties... [Emphasis added.]
>
> **Record Vol. XIX, Tab & Exhibit 1-1268**, p. 172

178. This was the last occasion on which the Crown acknowledged its obligation to carry out its fiduciary duty.

179. *OIC April 25, 1871* had stipulated that patents would only issue when a claimant reached the age of eighteen (though the age of majority was actually twenty-one), thus giving some protection to the interests of children below that age. But even that modicum of protection would now be stripped away. *OIC July 4, 1878,* was passed with "the object of facilitating the final disposal of the land grant to the children..." Now authority was given:

> ... for the issue forthwith of Patents to all claimants of Half-breed lands, irrespective of age or sex, whose claims may have been approved, such Patent to vest the lands in the several claimants, in fee simple, free of any conditions as to settlement, or otherwise, excepting as follows... [railway and road reservations and rights of way] [Emphasis added.]
>
> **Reasons, Record Vol. III-IV,** para. 149; **Record Vol. XIX, Tab & Exhibit 1-1363**

180. This was an instance not merely of neglect but of taking active steps to undermine the whole purpose of the grant. At this point, the federal Crown's policy ceased to be one of resisting (even half-heartedly) the drive to transfer Métis lands into non-Métis ownership and became one of promoting such transfers.[19]

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[19] Scott C.J.M., at para. 149, passes over *OIC July 4, 1878* by saying it was intended "to further expedite matters...". Yes, it was, but Scott C.J.M.'s is an innocuous way of describing a complete departure by the Crown from the policy it had hitherto purported to follow.

Manitoba's Legislation

181. The Appellants will here briefly describe the provincial legislation and the manner in which it facilitated the transfer of Métis children's land, in order to complete the narrative regarding the conversion of the scheme for settlement to a scheme for sale of the children's lands. The Appellants will, in dealing with the case against Manitoba, under heading "I", *infra*, discuss the constitutionality and operability of the provincial legislation. The point is that the provincial legislation undermined the s. 31 scheme. The federal government should have acted to prevent its coming into force.

182. The provincial legislature, beginning in 1877, passed a series of enactments designed to facilitate sales of the children's lands, regardless of whether the lands had actually been granted or the children had reached their majority.

183. On February 28, 1877 Manitoba passed *An Act to Amend the Act passed in the 37th year of Her Majesty's reign, entitled the Half-Breed Land Grant Protection Act,* S.M. 1877, c. 5, which, as of July 1, 1877 provided that:

> ...any sale for a valid consideration and duly made and executed by deed after the coming into force of this Act, by any Half-breed having legal right to a lot of land as such out of the one million four hundred thousand acres of land in the Province for Half-breeds appropriated by the Dominion of such lot, shall be held to be legal and effectual for all such purposes whatsoever and shall transfer to the purchaser the rights of the vendor thereto. [Emphasis added.]
>
> **Reasons, Record Vol. III-IV,** para. 140

184. This *Act* dealt solely with "Half-breeds" and their ability to sell or assign rights to lands described in s. 31 which were owned by the federal Crown and under the administration of the federal Crown. The *Act* did not refer to sale of allotments *per se* but in practice it was treated as authorizing such assignments: [**Record Vol. V, Trial transcript,** vol. 15, May 4, 2006, page 58,

line 1 to page 60, line 14; page 100, lines 5 – 20.]. Sales increased significantly after it came into force.

Reasons, Record Vol. III-IV, para. 149;
Record Vol. V, Trial transcript, vol. 15, May 4, 2006, page 62, lines 2–6

185. On February 8, 1878 the Legislature passed two statutes relating to infants: the first, *An Act Respecting Infants and their Estates S.M.1878,* 41 Vic., c. 7, the second, *An Act to Enable Certain Children of Half-Breed Heads of Families to Convey Their Lands S. M. 1878* 41 Vict., c. 20. The second statute singled out Métis children over the age of eighteen years and their s. 31 lands, denying them the same measure of protection that all other infants (i.e., persons under twenty-one) would enjoy under the first statute.

Reasons, Record Vol. III-IV, paras. 142–144

186. *An Act to amend the Act intituled: An Act to enable certain children of Half-breed heads of families to convey their land,* 43 Vic., c. 11 amended the 1878 legislation.

Record Vol. XIX, Tab & Exhibit 1-1416

187. *An Act respecting Half-Breed lands and quieting certain titles thereto* S.M. 1881, 44 Vic. c.19 applied only to Métis children's land. The Act provided that any deed of conveyance in respect of that land, whenever made, whether before allotment, after allotment or after patent would be effective to vest all of the rights of the child in the purchaser, including the right to receive the patent from the Crown.

Reasons, Record Vol.III-IV, para. 150; **Record,Vol.XX,Tab & Exhibit 1-1505**

188. The 1878 legislation had left it in the hands of judges of the Queen's Bench to determine whether infant lands held by children under eighteen should be sold. The administration of sales of infants' lands by the judges became the subject of a public inquiry at which evidence was also given in respect of sales by minors between eighteen and twenty-one.

Reasons, Record Vol. III-IV, paras. 151-153; **Record Vol. XX, Tab & Exhibit 1-1532**

189. At the Infant Lands Inquiry, Chief Justice Wood gave a written statement in respect to, among other things, the effect of the provincial legislation on sales by 18 to 20 year olds. He said that as a result of allowing these infants to sell their land without Court order, "one third of the whole grant to the half-breed has been swept away at from $40 to $100 for 240 acres of land" and "that daily sales are made under its provisions, as minor half-breeds become 18 years of age". :

Record Vol. XX, Tab & Exhibit 1-1539; See also Wood C.J.'s testimony at **Record Vol. XX, Tab & Exhibit 1-1532**, p. 59

190. Nonetheless, Manitoba continued with its step-by-step legislative program. On July 7, 1883 Manitoba passed *An Act to explain certain portions of the Half-Breed Lands Act*, S.M. 1883, c. 29, providing further retroactive "cures" for defective transfers where the child was illegitimate, orphaned or unmarried. **Record Vol. XXI, Tab & Exhibit 1-1589.** On April 9, 1884 Manitoba passed *An Act concerning Decrees and Orders on the Equity Side of the Court of Queen's Bench, Manitoba*, S.M. 1884, c. 8, retroactively validating all decrees or orders given on the Equity side of the Court by the Prothonotary, Registrar, or the Master.

Record Vol. XXI, Tab & Exhibit 1-1604

191. The series of provincial statutes culminated in 1885, with *An Act Relating to the Titles of Half-Breed Lands*, S.M. 1885, 48 Vict., c. 30 validating retroactively all transactions involving Métis infants lands patented, allotted or to be allotted notwithstanding any defect, irregularity or omission and declaring that all the proper parties had joined therein and that in every case the child whose land was transferred had been eighteen. And see Prof. Ens' article *Métis Lands in Manitoba*, **Record Vol. XXVIII, Tab & Exhibit TE 42,** p. 10.

Reasons, Record Vol. III-IV, para. 154

192. The effect of the provincial legislation was to enable or facilitate sales before grant, including sales by minors, resulting in speculators and others obtaining section 31 lands which ought to have been granted to the children.

Reasons, Record Vol. III-IV, para. 577

193. Scott C.J.M. described some of the devices employed to ensure that by the time a grant was registered in the name of a child, it passed immediately into other hands. He wrote, at **Reasons, Record Vol. III-IV,** paras. 166 and 167:

> 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.

194. On January 17, 1877, in response to a provincial request that public notice be given so that children of full age should be able to settle upon or sell the lands allotted to them prior to the issue of a grant, the federal government declined to enter into any discussion of the matter.

Reasons, Record Vol. III-IV, para. 137.

195. Manitoba was under no fiduciary duty to the Métis families and their children. But the dubious nature of the Province's legislation highlights the complete failure of the federal Crown to protect the best interests of the Métis families and their children. It should have advised the province that the legislation was unconstitutional, it could have required the Lieutenant Governor of Manitoba to reserve the bill or withhold assent (*Constitution Act,* 1867, s. 55, and see s. 90.) It could, after assent, have used its power of disallowance[20] under s. 90 of the *Constitution Act, 1867* to protect the interests of the Métis beneficiaries under s. 31. As a fiduciary, it had the duty

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[20] See the memorandum of Sir John A. Macdonald, approved by Cabinet on June 9, 1868 regarding the exercise by the federal Crown in the 19th century of the power of disallowing provincial legislation, cited by G.V. LaForest in a report for the Department of Justice in 1955 entitled "Disallowance and Reservation of Provincial Legislation". La Forest, at pages 24-25, sets out a memorandum from Sir John A. Macdonald, approved by cabinet on June 9, 1868, in which Sir John indicated, in the contest of disallowance, that the Minister of Justice should report any provincial Acts that the Minister considers:

1. As being altogether illegal or unconstitutional;
2. As illegal or unconstitutional in part;
3. In case of concurrent jurisdiction as clashing with the Legislation of the General Parliament;
4. As affecting the interests of the Dominion generally.

to use the legal authority it had at hand to protect the interests of the children. See *Blueberry River,* paras. 112 – 116, *supra.* But by the time of the passage of these provincial measures, the federal government had abandoned any pretence that it sought to carry out its fiduciary duty. The federal Crown stood idly by, thus compounding its failure to act as a fiduciary should have.

The Last 993 Children

196. By the early 1880s, acting on the mistaken estimate of 5,833 children, the Crown had allotted in 240-acre parcels all of the land set aside for the children's grant. It turned out, however, that Archibald's 1870 census had been more or less correct. There were indeed approximately 7,000 children, not 5,833. So 993 children were left out and never did receive their grants of land.

Reasons, Record Vol. III-IV, para. 146.

197. The Crown decided in 1885 that these 993 children were to receive scrip in lieu of land. **Reasons, Record Vol. III-IV,** para. 147. But instead of 240 acres, the scrip that each of the 993 received was in the form of a voucher entitling the holder to buy $240 worth of land from the Crown. In 1885, however, Crown land was selling from $2.00 to $2.50 an acre (**Record Vol. XXIV, Tab & Exhibit 1-2010**, page 20). At those prices $240 worth of scrip would only purchase 96 or 120 acres of Dominion Land. On the scrip market it was worth half its face value: **Reasons, Record Vol. III-IV**, para. 168. These children therefore received only one-quarter to one-half of the ostensible value of their scrip.

198. Section 31 provided that the 1.4 million acres "shall be granted to the said children respectively". Scott C.J.M. seemed to think that since the 1.4 million acres had been granted to <u>some</u> of the children that would suffice. He asked "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?" The Crown's policy, of course, during each of the three allotments, was to achieve precisely such an outcome. Scott C.J.M. then wrote "But the Metis children, <u>as a whole</u>, did receive 1.4 million acres". The Appellants submit that this could not qualify as fulfillment of the Crown's obligation under s. 31 that "the same shall be granted to the said children <u>respectively</u>". [Emphasis added.]

Reasons, Record Vol. III-IV, para. 627

199. Sir John A. Macdonald's speech to the House on July 16, 1885, brings the whole picture together: He reaffirmed that the object of s. 31 had been settlement, not speculation, and he stated that Canada had failed to carry out its obligations:

> 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.[21]

Reasons, Record Vol. III-IV, para. 117; **Record Vol. XXII, Tab & Exhibit 1-1678**, p. 3113

200. By the time the grants were finally issued in the names of the children the Métis had been, in Macdonald's phrase, "swamped by the influx of settlers". The Métis had become marginalized and were now, to a great extent, a landless minority. It may be that half the Métis population had left Manitoba by 1881: Ens, **Record Vol. XXVIII, Tab & Exhibit TE 36,** p. 55.[22] .

201. So a program which the trial judge and Court of Appeal characterized as one intended to give the Métis children a "head start," to enable them to become settlers, did not even allow them to get to the start line for ten years and more; even by the Crown's lights, its obligations to the children were not fulfilled until well after 1885 and, of course, for 993 children, not even then.

202. The trial judge and Scott C.J.M. referred often, e.g., **Trial Reasons, Record Vol. I-III**, para. 458, **Reasons, Record Vol. III-IV,** para. 659, to the difficulty of assessing the case at bar "through 2007 glasses". But it was (and is) unnecessary to use "2007 glasses". The Appellants' case was never based on viewing the situation in light of 2007 standards; it was always that the delay should be assessed through the "glasses" of the 1870s and 1880s.

203. It was obvious to all at the time that mistakenly including the "half breed heads of families" in the first allotment in 1871 had resulted in the cancellation of that allotment in 1873.

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[21] Macdonald's reference to "scrip and land" refers to the 1874 statute granting scrip to the Métis heads of families not included in s. 31.

[22] Ens concluded, on the basis of the sample of 105 families in the Métis Family Study, comprising 718 individuals, that "close to 50% of these individuals still resided in Manitoba in 1881" which means that close to 50% must have left Manitoba.

204. During the second allotment, Lieutenant Governor Morris was reported to be drawing the allotments at the rate of 60 per hour (**Reasons, Record Vol. III-IV,** para. 111). Thus the standards of the day confirm that at the rate that allotments were capable of being drawn in 1873, both the second and third allotments should have been completed in weeks. As it was, the second allotment seems to have taken approximately a year and a half (and was then cancelled), while the third allotment took over four years.

205. When pressed in the House for an explanation of the delay in completing the third allotment David Mills, the Minister of the Interior, responded, on March 11, 1878, merely that "the Lieut. Governor, being busily engaged, was only able to give a portion of his leisure to this work". [Emphasis added.] (**Reasons, Record Vol. III-IV,** para. 135; **Record Vol. XIX, Tab & Exhibit 1-1344**). This was as absurd an explanation in 1878 as it is today.

206. Moreover Scott C.J.M. acknowledged that during the 1870s there were numerous, ongoing complaints from the parishes and the Legislature about the delays. These people were not viewing the delays using 2007 glasses. (See e.g. **Reasons, Record Vol. III-IV,** paras. 100, 123, 134.) Nor were the members of the Senate who complained about the delay in 1877, leading Sir Richard Scott to acknowledge the "many embarrassments" in the passage identified at **Reasons, Record Vol. III-IV,** para. 141. Nor was Sir John A. Macdonald viewing the case through 2007 glasses in 1885 when he identified and listed the delays. There is thus compelling evidence that the delays were unnecessary and even egregious in accordance with the standards of the day. We have the evidence of statesmen of the time expressing their views at the time.

G. CANADA'S DEFENCE

207. The Crown did not seek to show that it carried out the plan for settlement by the children outlined to the House by Macdonald and Cartier. The Crown did not seek to show that it had provided a "head start".

208. The Crown's defence is that its obligation under s. 31 was fulfilled in that grants of land totalling slightly more than 1.4 million acres were finally made in the names of most of the children (except for 993). The Appellants have never contested the Crown's claim that all of the patents that were eventually issued were issued in the names of most of the children. The point is that they were distributed by random selection, at least seven and often ten years and more after the *Manitoba Act* was passed, indeed, after in a great many cases the children's entitlement had passed to others and, of course, 993 of the children did not receive land at all.

209. It is true that many Métis children sold their allotments or their grants, often before they reached the age of majority. But this willingness to sell only occurred after it became apparent that the Crown had no intention of defending Métis interests. Given the reign of terror, the linguistic and religious intolerance of new settlers arriving from Canada, bigotry and discrimination against the Métis, which occurred in the early 1870s (see **Reasons, Record Vol. III-IV,** at para. 95 and para. 244), coupled with the great delay in distributing the children's grant, as many as half the Métis had left Manitoba by 1880. Of course, by this time there may have been a measure of Métis desire to sell - what other choice did they have?

210. It is not clear whether Scott C.J.M. regarded it as the responsibility of the Appellants to explain what he called "the multitude of delays". The Appellants did in fact provide evidence as to why most of the delays occurred. Moreover, the Appellants say there was an obvious reason lying behind the delays, whether explained or unexplained: Once the Métis had agreed to lay down their arms, it was no longer a matter of urgency to deal with the children's grant. What was important was filling up the province with settlers, not proceeding with the distribution of the children's grant.

211. At **Reasons, Record Vol. III-IV,** para. 163 Scott C.J.M. quoted Prof. Flanagan:

> 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. [Emphasis added.]

212. Scott C.J.M. here appears to adopt the opinion of Prof. Flanagan that the Appellants were bound to prove intent (to which we will return under heading "H", *infra*).

213. Of course, if the Crown's obligation had nothing to do with giving the Métis children a real head start, nothing to do with giving them an opportunity to become settlers, if the Crown's only obligation was to conduct a process, extending over 15 years, to issue grants in the names of 6,000 of the 7,000 children then the Crown's obligation was fulfilled. This was the Crown's defence. If the Crown had made mistakes, if there had been continual delays, even if the Crown's whole object after 1878 was simply to hasten the transfer of the children's land to non-Métis ownership, the Crown's defence is that patents were ultimately issued in the names of the children (except, of course, for 993 children).

214. To regard this as a fulfillment of the Crown's duty is, to use the language of the Ontario Court of Appeal in *Lalonde v. Ontario*, (2001) 56 O.R. (3d) 505, "to prefer a narrow, literal compartmentalized interpretation to one that recognizes and reflects the intent of the legislation".

H. THE COURT OF APPEAL'S ERRORS REGARDING BREACH OF FIDUCIARY DUTY

i. Ruling on Breach without Finding that a Duty Existed

215. Scott C.J.M. summed up his ruling, at **Reasons, Record Vol. III-IV,** para. 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.

216. But Scott C.J.M. also said, at **Reasons, Record Vol. III-IV**, para. 509, that it was not necessary to determine whether the Métis had a cognizable interest in land sufficient to ground a fiduciary

duty (and therefore not necessary to determine whether there was a fiduciary duty) since he intended to go on to find there was no breach of any fiduciary duty.

217. The Appellants submit that the Court of Appeal was in no position to determine whether there was a breach of fiduciary duty in the case at bar because it never identified what the legal or practical interest was to which the fiduciary duty would attach, nor the content or the specific substance of the fiduciary's duty.

218. Because he laid down no benchmarks at the outset, Scott C.J.M. apparently judged each mistake, each delay, in isolation. To him each seemed by itself not to constitute a breach of fiduciary duty. But a breach of a duty to do what? A breach of what duty? For this reason, though Scott C.J.M. found as a fact that there was a great delay extending over more than 15 years and that serious mistakes were made, since he had no occasion to refer to the actual purpose of section 31 as laid down by the statute and the framers in 1870, he never considered the mistakes and the delay cumulatively.

ii. Requiring "Deliberate Ineptitude"

219. Scott C.J.M. wrote, at **Reasons, Record Vol. III-IV,** para. 656:

> With respect to those known events that contributed to the delay (prominent among them the cancellation of the first two allotments, the slow 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. [Emphasis added.]

220. Even though Scott C.J.M. earlier acknowledged that the Appellants did not have to prove bad faith (see **Reasons, Record Vol. III-IV,** para. 538 and para. 556) it is apparent in this concluding paragraph that he did require such proof. [23] He found that mistakes were made to which

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[23] Scott C.J.M. also seemed to require bad faith in para. 630:

inattention or carelessness had contributed. Such inattention or carelessness is inconsistent with the ordinary prudence required of a fiduciary. Scott C.J.M.'s added requirement of deliberateness makes it clear that he had in effect abandoned his earlier view that bad faith was not required. Moreover, requiring inept or careless conduct also to be "deliberate" before a fiduciary is found to have breached his obligations, is contrary to this court's jurisprudence. In *K.L.B. v. British Columbia*, [2003] 2 S.C.R. 403 McLachlin C.J.C., citing *Guerin, Blueberry* and *Wewaykum*, referred to:

> ...the fiduciary obligations of the Crown toward aboriginal peoples, which have been held to include a requirement of using due diligence in advancing particular interests of aboriginal people. [Emphasis added.]

221. Scott C.J.M. perhaps had *Wewaykum v. Canada* [2002] 4 S.C.R. 425 in mind. There Binnie J. for the Court stated that in the case of Aboriginal peoples the fiduciary remedy had arisen owing to the fact that "the degree of economic, social and proprietary control and discretion asserted by the Crown...left aboriginal populations vulnerable to the risks of government misconduct or ineptitude" [Emphasis added]. Binnie J. did not, however, require "deliberate ineptitude".

iii. Relying on the Crown's Unique Role as a Fiduciary

222. Scott C.J.M. discussed what he called the "the Crown's unique role as fiduciary" at **Reasons, Record Vol. III-IV,** para. 553 *et seq*. He cited *Haida Nation v. B.C.*, [2004] 3 S.C.R. 511, 2004 SCC 73, in which McLachlin C.J.C. at para. 55, explained that "the content of the Crown's fiduciary duty may vary to take into account the Crown's other, broader obligations".[24]

> In all of the circumstances, I conclude that Canada did not breach its fiduciary obligations when it provided 993 eligible beneficiaries under s. 31 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. [Emphasis added.]

[24] It is true that in carrying out public law duties requiring the exercise of discretion, the Crown may claim to wear many hats, but the fiduciary duty owed by the Crown to Aboriginal peoples is not a public law duty, but one *sui generis*, *Wewaykum*, *supra*, at p. 385. See also *Alberta v. Elder Advocates*, *supra*, at para. 38.

223. The Appellants submit that any "other, broader obligations" had already been taken into account in 1870. The peaceful entry of the new province into Confederation, the acquisition of Rupert's Land and the North-Western Territory, the fourfold expansion of the country - all of these had been accommodated in the successful outcome of the negotiations, the passage of the *Manitoba Act* and the Imperial Order in Council transferring Rupert's Land and the North-Western Territory to Canada.

224. As for the railway project, it had already been taken care of by maintaining federal ownership of public lands. It will be recalled that Cartier told the House on May 9, 1870 that in the negotiations with Father Ritchot the federal government had insisted on federal control of public lands in order "to construct a railway through Red River. **Record Vol. XI, Tab & Exhibit 1-0467**, p. 1446.

225. The Crown's fiduciary duty, as it stood in 1870, could not thereafter be shirked on the ground that other interests had now to be served by delaying the distribution of the children's grant or opening up the grant so as to facilitate its transfer to non-Métis ownership.

226. Scott C.J.M. did not indicate what obligations of the Crown had supervened, to require consideration of the Crown's "unique role as fiduciary". He ignored the fact that none of the mistakes that were made, such as including the adults in the first allotment, miscalculating the number of children after the second allotment, and none of the delays, were attributed to or referable to any competing interest or interests, nor did the Crown seek to match any of the mistakes or delays to any competing interest or interests that it was obliged to serve.

I. MANITOBA: CONSTITUTIONALITY AND OPERABILITY OF PROVINCIAL LEGISLATION

227. The Appellants argued in the courts below that Manitoba, in order to facilitate the transfer of s. 31 lands to non-Métis ownership, passed the series of unconstitutional measures described above.

228. None of the impugned provincial legislation was of general application. It singled out Métis children (some of whom by this time had reached their majority) and the lands reserved for them under s. 31. As such, it dealt, in pith and substance, with matters of exclusive federal jurisdiction under subsections 91(1) and (24) of the *Constitution Act, 1867* and was therefore *ultra vires*. In the alternative, if it was valid provincial legislation, under the doctrine of federal paramountcy it was inoperative.

i. Section 91(1) of the *Constitution Act, 1867*

229. Parliament had exclusive legislative power, under s. 91(1) (now s. 91(1A)) of the *Constitution Act, 1867* over "the public debt and property". This included lands owned and administered by Canada under section 30 of the *Manitoba Act.*

See Hogg, *Constitutional Law*, vol. 1, para. 29.2, page. 29.2 to p. 29.2-1

230. Section 31 provided that the 1.4 million acres "shall be granted to the said children respectively". The children, and no one else, were to receive the fee simple interest in the lands; their right to the land was not to be alienable prior to grant.

231. The rights of a proprietor with respect to the 1.4 million acres of ungranted lands, so long as it remained ungranted, were held exclusively by the federal government.

See *St. Catherine's Milling v. The Queen,* (1888) 14 App. Cas. 46, at p. 56;
Also see *Ontario Mining v. Seybold*, [1903] A.C. 73, at p. 79,
A.G. Can. v. Western Higbie, [1945] 3 D.L.R. 1, at p. 42-43,
Spooner Oils v. Turner Valley Gas Conservation Board, [1933] S.C.R. 629

232. The trial judge accepted Manitoba's argument in respect of constitutionality, based primarily on the Manitoba Court of Appeal decision in *Re Mathers* (1891), 7 M. R. 434 to the effect that allotted but ungranted s. 31 lands were subject to provincial taxation. See in particular **Trial Reasons, Record Vol. I-III**, paragraphs 786 – 794; 804 – 805. The Court of Appeal did not address the arguments.

233. But this was to confuse the power of the Province to tax a property interest with the power to make laws in respect of that interest. In *Mathers* the Manitoba Court of Appeal ruled only that a

tax on the beneficial interest in land that had been allotted but not granted under section 31 was not contrary to s. 125 of the *Constitution Act, 1867* forbidding the taxation of federal property.

234. *Mathers* did not refer to s. 91(1) or s. 92(5) (the equivalent provision under the heads of provincial power) of the *Constitution Act, 1867*. It did not hold that the province had authority to legislate in relation to property held by the Crown in right of Canada for a specified constitutional purpose. It did not hold that the Province could pass laws providing generally for the sale by allottees of their interest in their properties, or laws providing for the enforcement against the Crown of their right to a patent.

235. Although the Province may have been able to tax the beneficial interest in s. 31 lands prior to patent, it could not thereby enact that the legal title should vest in someone other than the child. It could not bring about a result different from that required by s. 31 – it could not interfere with the carrying out of a federal scheme.

236. Undertakings such as banks, railroads, or telecommunications companies may be subject to provincial taxation: *Bank of Toronto v. Lambe* (1887) 12 App. Cas. 575 (PC). This does not mean that they are generally subject to provincial legislation: *Alberta Banks Taxation Reference* [1939] A.C. 117 (PC).

237. The trial judge referred to other cases. They do not, however, determine the question of jurisdiction. The cases cited by the trial judge merely establish that provinces can, in general, notwithstanding s. 125 of the *Constitution Act, 1867,* tax or authorize taxes on interests in land, the legal title to which remains in the federal Crown.[25]

ii. Section 91(24) of the *Constitution Act, 1867*

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[25] The interests of the appellants in *Calgary and Edmonton Land Co. v. A.G. Alberta* [1911] 45 S.C.R. 170 (SCC) (vol. 1, tab 18), which were found to be subject to provincial taxation, existed under a different statutory scheme, which did not include a constitutional obligation to grant the land to particular parties. Those in *Smith v. Rural Municipality of Vermilion Hills* [1914] 49 S.C.R. 563 (SCC) (vol. VI, tab 71); aff'd [1916] 2 A.C. 569, concerned leases and the taxes recoverable as personal debts. *A.G. British Columbia v A.G. Canada* 1989 14 A.C. 295 (PC) (vol. 1, tab 2) concerned the question whether the wording of a conveyance of railway lands in British Columbia included precious minerals.

238. The Appellants are not asking this court to determine whether, generally speaking, the Métis are "Indians" under s. 91(24) (a question left open by this Court in *R. v. Blais*, as Scott C.J.M. pointed out at **Reasons, Record Vol. III-IV**, para. 36). Rather they advance the more limited proposition that, for the purposes of s. 31, the Métis children and the lands reserved for them qualified under s. 91(24) as "Indians and Lands reserved for the Indians" such that provincial legislation that singled out those children and their lands was *ultra vires* the Province. Once the grants were made to the children – but not until then – s. 91(24) would no longer apply to these lands.

239. The word "Indian" in section 91(24) is broader in meaning than the definition of "Indian" in the *Indian Act.* For example, the Inuit are "Indians" within the meaning of section 91(24), and are therefore subject to federal jurisdiction: *Re Eskimos* [1939] S.C.R. 104 (SCC), but they are not included within the definition of "Indians" under the provisions of the *Indian Act.*

240. Part of the core federal jurisdiction under section 91(24) is the exclusive authority to extinguish Aboriginal title.

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 at para. 173

241. When Canada acquired Rupert's Land and the North-western Territories, part of its responsibility was to deal with the Aboriginal title of the Indians, the Métis and the Inuit. The Aboriginal title of the Indians was dealt with through the numbered treaties on the prairies and more recently, since the 1970s, in the land claims agreements reached in the Yukon and the Northwest Territories. The Aboriginal title of the Inuit was not dealt with until the James Bay and Northern Québec Agreement of 1975, the Nunavut Land Claims Agreement of 1993, and the Labrador Inuit Land Claims Agreement of 2005.

242. The Appellants submit that the acknowledgement by Parliament of the "Indian Title" of the Métis children demonstrates that, at least for purposes of s. 31 and its implementation, the Métis children and the lands reserved for them qualified as "Indians, and Lands reserved for the Indians" respectively, and it obviates any need for the sort of analysis undertaken by the Supreme Court in *Re Eskimos* [1939] S.C.R. 104 and *R. v. Blais.*

243. The Appellants say the *Manitoba Act* itself and the speeches of Macdonald and Cartier indicate clearly that, for purposes of s. 31, the case comes within the four corners of s. 91(24):

> Section 31:
>
> "...towards the extinguishment of *Indian Title*".
>
> Macdonald, May 4, 1870:
>
> "Those clauses...go toward extinguishing the Indian Title".
>
> "If those half-breeds were not pure-blooded Indians, they were their descendants....Those half-breeds had a strong claim to the lands in consequence of their extraction..."
>
> "The conditions had to be made in that Parliament who would show that care and anxiety for the interest of those tribes..."
>
> Cartier, May 9, 1870:
>
> "...any inhabitant of the Red River country having Indian blood in his veins, was considered to be an Indian".

244. Macdonald and Cartier were the principal framers of the *Constitution Act, 1867* and the *Manitoba Act, 1870*. They clearly understood that so far as their Aboriginal title and its settlement were concerned, the Métis children were Indians under s. 91(24) and the s. 31 lands were lands reserved for the Indians under s. 91(24).

245. Scott C.J.M. wrote, at **Reasons, Record Vol. III-IV**, para. 665, that as he had "already concluded that this issue is moot, it is not strictly necessary to consider this matter further" and, without giving reasons, said merely that he was "far from persuaded that Manitoba's impugned legislation was constitutionally invalid". And he gave no consideration whatsoever to the Appellants' submission as to the paramountcy of federal legislation.

iii. Paramountcy

246. In the alternative, the Appellants say that if the impugned provincial legislation was *intra vires*, the legislation was nonetheless inoperative to the extent that it conflicted with valid federal legislation or otherwise frustrated the purpose of the federal legislation.

247. The law governing paramountcy and interjurisdictional immunity has most recently been discussed by the Supreme Court in *Canadian Western Bank v. Alberta,* [2007] 2 S.C.R. 3, 2007 SCC 22 (vol. II, tab 20) and *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] 2 S.C.R. 86, 2007 SCC 23 (vol. I, tab 16). In the former decision the majority described the doctrine thus, at para. 73:

> The Court thus acknowledged that the impossibility of complying with two enactments is not the sole sign of incompatibility. The fact that a provincial law is incompatible with the purpose of a federal law will also be sufficient to trigger the application of the doctrine of federal paramountcy. This point was recently reaffirmed in *Mangat* and in *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13.

248. In the case at bar the federal purpose was clear, the land was to be granted to the children, held by them until the age of majority, and it was not to be sold for the benefit of speculators. It was impossible simultaneously to comply with federal enactments and the impugned provincial enactments, and the effect of the latter was to frustrate the purpose of the former.

249. For example, the 1877 Manitoba statute, **Record Vol. XIX, Tab & Exhibit 1-1261,** vesting the land on allotment in order to facilitate sales purported to apply provincial laws governing sales to allotments prior to patent, treated allotted interests as real estate regardless of whether the allottee had died, and provided that "any … sale shall be held to be legal and effectual for all such purposes whatsoever and shall transfer to the purchaser the rights of the vendor thereto".

250. According to this Act, a purchaser would acquire the legal rights of the vendor to receive the patent. Canada could not refuse to recognize a deed that was "legal and effectual for all purposes whatsoever". If Canada could refuse to recognize the deed under *OIC March 23, 1876*, it was because the right of the vendor to receive the patent had not been transferred. Simultaneous compliance was impossible.

251. *OIC March 23, 1876* expressly stated its purpose, namely, to discourage the operation of speculators. This purpose was frustrated by the 1877 provincial statute, as well as by the ensuing statute enabling certain half-breed infants to sell without the normal protections offered by the *Infants Act*, and by the various other statutes which simplified sales, and retroactively cured defective instruments.

J. SECTION 32

252. Section 32 deals with the existing properties owned or occupied by the settlers in what was to be the new province. While it was not restricted in its operation to Métis, it must be recalled that 85% of the population was Métis and so they were by far the majority of persons affected by the provisions of that section. One of the greatest fears of the Métis, leading to the Resistance, was that they would lose their lands, since most of their land holdings were not evidenced by any sort of documentation.

Reasons, Record Vol. III-IV, paras. 676, 679; **Trial Reasons, Record Vol. I-III**, paras. 261, 664 - 668

253. Subsections 32(1) and (2) provided that all persons holding grants in freehold or leasehold interests granted by the Hudson's Bay Company would receive Crown grants. These applied primarily in the old parishes which had been surveyed, and therefore there was some documentary record of the settlers' interests.

254. The main problem arose in respect of subsections 32(3) and (4) which dealt with lands concerning which there was no documentation. Both within and outside the Settlement Belt individuals took up lands, marked them out by lines, fence posts, ploughing, stakes or otherwise, and treated them as their own. It was often a gradual process. They established their possession of lands without necessarily constructing houses, barns or fences. These methods of taking possession were recognized in the Settlement. As Dr. Flanagan noted, people took possession of lands by a gradual process of increasing use by themselves and their families before "actually living" on them.

Record Vol. V, Transcript, vol. 12, May 1, 2006, at p. 11, line 1 to p. 13, line 14 and **Record Vol. XXVI, Tab & Exhibit TE 18,** pp. 30-31.

255. The Métis and other settlers were justifiably concerned that Canada would not recognize this mode of possession and that they would lose their land to the influx of new settlers. Representatives of the Crown addressed this fear. They repeatedly assured the residents that all rights to property, however acquired, would be respected, and that a liberal policy would be followed.

Reasons, Record Vol. III-IV, paras. 77, 678–679; **Trial Reasons, Record Vol. I-III**, paras. 262–269; 669–674.

256. Despite the assurances of liberality given to the people, for almost a decade and a half after 1869, 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).

Trial Reasons, Record Vol. I-III, paras. 275–325

257. Only after extraordinary delay and the departure of many of the original claimants did Canada in 1882 and 1883 finally adopt a test that accorded with what had been the usages of the country.

Trial Reasons, Record Vol. I-III, paras. 325-326

258. The trial judge referred, at **Trial Reasons, Record Vol. I-III,** paragraph 1172, to Dennis's letter to Laird, March 4, 1876 describing the procedures for considering applications under section 32. Dennis said that the Agent at the Dominion Lands office would compare the statement of the applicant with the HBC Register, the report of the Dominion Land Surveyor, and:

> … If the Agent is satisfied on comparing an application with all the evidence connected therewith as above that the applicant is entitled to a patent, he forwards the application to this Office recommending the same accordingly. On the other hand, if there appears, on all the facts submitted, <u>any doubt, however slight</u>, in the mind of the Agent as to the applicant being the owner of the land, the claim is withheld to be published on <u>the list of disputed claims to be investigated by the Commissioner appointed for that purpose</u>. [Emphasis added]

Record Vol. XVIII, Tab & Exhibit 1-1166

259. However, the Crown then specifically denied the Commission the authority to rule on such disputes.

Reasons, Record Vol. III-IV, para. 683; **Trial Reasons, Record Vol. I-III**, paras. 277–279, 285, 291.

260. During the negotiations with Macdonald and Cartier in 1970, Ritchot had been at pains to explain the manner in which possession of lands was taken. On January 15, 1881, in the face of more than 10 years during which Canada had insisted on a high level of improvements, a level that was not in accordance with the usages of the country, Ritchot wrote a letter to Macdonald in which he repeated those explanations, outlining the fact that the manner of taking possession was specifically drawn to Macdonald's and Cartier's attention in 1870, and stressed:

> The Delegates have fully explained to the Hon. Ministers the manner in which these lands were taken and the purpose for so doing, and they positively said that these lands were not inhabited, but marked only by posts, lines, ploughing, little houses or otherwise and that this manner of taking lands in the country had been respected.
> ...
> Was it, then, the intention of the Hon. Ministers, seeing our good faith or our inexperience with matters of that kind, to deceive and thus dispossess us of a few hundred acres of land which we would never have consented to abandon to the Government, for we know too well that those who possess them attached more importance thereto than those on which they were residing? [Emphasis added]

Reasons, Record Vol. III-IV, para. 689; **Trial Reasons, Record Vol. I-III**, para. 319; **Record Vol. XX, Tab & Exhibit 1-1485.**

261. Only after Ritchot's letter of January 15, 1881 and after the matter had once again became the subject of controversy in Parliament, did George W. Burbidge, Deputy Minister of Justice, write to Alexander M. Burgess, Secretary, Department of the Interior, on May 4, 1883 stating that it was difficult to define the exact meaning of the words "occupancy" and "peaceable possession", but that if lots were

> ... fenced in, surveyed or marked out by bounds, and that the parties were using their respective lots as wood lots, and exercising acts of ownership each over the whole of his lot, and that no other persons were cutting wood or otherwise using the lots and that there is no adverse claim, in my opinion the parties would be entitled to the patents. [Emphasis in original]

Trial Reasons, Record Vol. I-III, para. 326

262. This was a more liberal interpretation than had been applied during the previous decade, under which many such claims had been described as not worthy of consideration, or had been replaced with scrip, or the granting of preemption rights, under which the claimants had to purchase their lands. But by this date, 13 years after the enactment of the *Manitoba Act*, half the Métis had left the province and the claims were held by purchasers of their interests.

Record Vol. XXVI, Tab & Exhibit TE 18, page 142;
Record Vol. XXVIII, Tab & Exhibit TE 36, p. 55.

263. The point is that, according to Canada's evidence, 1340 of 2750 section 32 claims, or almost half, were not patented until 1882 and thereafter. As the claims under subsections 32(1) and (2) were the least controversial, this gives an indication of the number of claims under subsections 32(3) and (4) that were delayed for an egregious period of time, until a more liberal policy was undertaken.

Canada's Written Argument at Trial, Appendix "A" Statement of Material Facts paragraphs 237–238, based on **Record Vol. XXVI, Tab & Exhibit TE 18,** pages 12, 121-122; **Record Vol. XVII, Tab & Exhibits 1-1036; 1-1696** and **1-1725**

264. The trial Judge rejected the Appellants' claims in respect of section 32(3) and (4) on the basis that the interpretation and implementation of that section was wholly within the unfettered discretion of the federal Government. He said, at para. 1167:

> [1167] Clearly, representations and assurances were given both prior to the negotiations which led to passage of the Act and during those discussions. But as I have already concluded, there was no agreement reached. There was an Act of Parliament, the Act. That which may have proceeded [sic] was clearly subsumed by the Act and the purpose and meaning of section 32 must be determined from the language of the Act and the section itself. [Emphasis added]

See also **Reasons, Record Vol. III-IV**, para. 694,

265. But this is contrary to the principles of interpretation set forth in *R. v. Blais,* at paragraphs 16 and 17, which specifically require that the context and purpose must be taken into account in interpreting section 32. If the assurances are "subsumed by the *Act,*" the context and purpose are drained of significance.

266. The trial judge held, at **Trial Reasons, Record Vol. III-IV,** paras. 1178 and 1179, that the government's discretion was absolute and not constrained in any way by the facts as to how land was possessed, as described by Flanagan and others. The Appellants agree that some degree of occupation was necessary – but that that degree was what was described by Dr. Flanagan as being in accordance with the customs of the country. That is, 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.

267. In respect of the egregious delay in fulfilling section 32, the trial judge held:

> [1187] .... There is no question that the implementation of section 32 took a considerable period of time. In some respects, as I said in respect of section 31, it is difficult to understand why such a delay occurred. However, it is my view that without evidence from those on the ground at the time involved in the implementation of section 32 and at this late date it would be dangerous to reach any conclusion on that subject. While it is true that the documents tell a story, they do not tell a complete story. By that I mean it would have been exceedingly helpful, and without it, in my view, risky to reach a conclusion on the issue of delay without receiving evidence which might explain the delay. Obviously, the world is very different today than it was at the time. The bureaucracy is much larger than it was then. Technology is much improved. The speed with which things are capable of being done is much greater. In my view, it is not appropriate to pass judgment on this issue in 2007 in respect of matters that occurred 125 years ago.

268. But the evidence is clear that the delay was caused by the imposition of an illiberal policy, as well as a general lack of attention. It was considered to be egregious by the people at the time. See **Reasons, Record Vol. III-IV,** para. 688. Even Deputy Minister of the Interior William Burgess said that he was "every day grieved and heartily sick when I think of the disgraceful delay which is taking place in issuing patents to poor settlers on the Red River". **Record Vol. XXI, Tab & Exhibit 1-1596.**[26] Once the government adopted a more liberal policy, thirteen years after the enactment of the *Manitoba Act*, the bulk of the remaining claims were settled in approximately two years.

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[26] Scott C.J.M. relates this quote erroneously to the delays in respect of s. 31 at **Reasons, Record Vol. III-IV,** para. 160. As can be seen from both **Record Vol. XXVI, Tab & Exhibit TE 18** at page 122 and **Record Vol. XXI, Tab & Exhibit 1-1596** itself, Burgess was referring to the delay in issuing s. 32 patents.

269. The Court of Appeal did not consider whether, even if s. 32 does not include a fiduciary duty, the proper interpretation of s. 32 in accordance with its purpose and context, required the Crown to proceed diligently in a timely fashion, and precluded it from imposing tests for establishing possession or occupation that were not in accordance with the customs and usages of the country. Moreover did the Crown's decision to refer claims in which there was "even the slightest doubt" to a Commission, when no such Commission was ever empowered to rule on the claims, constitute compliance with the section? The Court of Appeal did not rule.

270. But the Appellants argue that s. 32 did create a fiduciary obligation on the Crown.

271. The Court of Appeal upheld the trial judge's decision that Canada did not owe a fiduciary duty under s. 32. A crucial reason put forward by the Court of Appeal for this is that, even though Métis comprised 85% of the group with rights under s. 32, the fact that a small number of non-Métis also had rights under that section means that no Crown-Aboriginal fiduciary duty could attach.

Reasons, Record Vol. III-IV, paras. 717–719.

272. The Appellants say with respect that this reasoning is in error. First, it would in effect leave the Métis in a worse position as a result of their statesmanship, during the negotiation of Manitoba's entry into Confederation, in seeking to protect the rights of all members of the Red River Settlement rather than just their own. It ignores the collective interest of the Métis in realizing the benefits of the land promises in which the scheme was to assure the protection of families' existing land holdings while augmenting those holdings with the land provided to the children under s. 31. The inclusion of protection for non-Métis as a part of the bargain does not alter the fact that, as Canada's negotiating partners, the Métis were nonetheless negotiating as an Aboriginal people.

273. In any event, even if s. 32 does not give rise to a *per se* fiduciary duty as an instance of the Crown-Aboriginal relationship, the Appellants say that it constitutes one of the special and limited circumstances in which an *ad hoc* fiduciary duty arose.

274. In *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, this Court set out the basis for determining when an *ad hoc* fiduciary duty can arise, particularly in circumstances in which the Crown is said to be a fiduciary. McLachlin C.J. for the Court outlined the general requirements for imposition of a fiduciary duty at paras. 27 to 35 and summarized at para. 36:

> [36] In summary, for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame:* (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

275. *Vulnerability:* There is no dispute that the persons with rights under section 32, especially those under s. 32(3) and (4) were vulnerable in respect of their land holdings as result of the lack of documentation of their interests. Canada assumed a complete discretion with respect to the administration of the section and fulfilling the promises that had been made to those settlers in return for their agreement to join Confederation. It dictated the criteria to be used in determining possession, the methods of application and evaluation of claims, and the existence, or non-existence, of means to resolve conflicts between the claimants and the Crown.

276. *An Undertaking to act in the Best Interests of the Beneficiaries:* The Crown, both by virtue of the preamble to s. 32 and through the various assurances given during the Resistance, the negotiations, and thereafter, clearly undertook to ensure that the holders of interests under s. 32 would be protected in their ownership of the land. This required acting in the best interests of those beneficiaries.

277. As this Court said in *Alberta v. Elder Advocates (supra)* at para. 45:

> If the undertaking is alleged to flow from a statute, the language in the legislation must clearly support it… The mere grant to a public authority of discretionary power to affect a person's interest does not suffice. A thorough examination of the provisions in issue is mandatory… [Emphasis added.]

The Appellants say that this thorough examination must include the purpose and context of s. 32, as set out above, including the fact that s. 32 was a crucial part of the provisions that induced the

Métis to end the Resistance and enter into Canada. This examination reveals a "strong correspondence" with traditional categories of fiduciary relationship.

See *Alberta v. Elder Advocates (supra)* at paras. 46 to 48.

278. *A defined class of persons vulnerable to the fiduciary's control:* s. 32 was a unique provision enacted in respect of a specific class of persons – defined as "settlers in the province in peaceable possession of lands now held by them" – the vast majority of whom were Métis. The size of the class was somewhere between 2750 (the number of s. 32 grants ultimately made) and 5000 (the approximate number of adults in the province in 1870). It was not a law of general application as was, for example, the law governing new settlers and their pre-emption and homesteading rights. The outcome of the negotiations to consent to the transfer of the land to Canada was on the basis of the repeated assurances by the Crown and its representatives that the existing landholdings of the defined class of people would be protected against all others and a liberal policy pursued. The Crown undertook what was in effect a private law duty in respect of the beneficiaries' land, to which it had taken the underlying title, and the beneficiaries in turn became vulnerable to the Crown's discretion in administering s. 32. The assurances at the very least gave rise to the need for the promises to be kept in accordance with 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.

See *Alberta v. Elder Advocates (supra)* at para. 49
Ross River Dena Council Band v. Canada [2002] 2 S.C.R. 816 at para. 65

279. *A legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control:* Scott C.J.M. wrote at **Reasons, Record Vol. III-IV**:

> 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 [by Scott C.J.M.]). I agree that those entitled to the benefit of s. 32 were not owed fiduciary obligations in its administration.
>
> ...

> 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. [Emphasis added.]

280. However, with respect, the finding that persons under s. 32 "did not hold an independent property interest" is contradicted by the Court of Appeal's own earlier findings, as well as those of the trial judge.

281. For example, in the Court's **Reasons, Record Vol. III-IV**, Scott C.J.M. states:

> 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)). [Emphasis added.]
>
> 717 ... As the preamble to s. 32 states, its purpose was to regularize existing property rights and entitlements. [Emphasis added.]

282. It is not clear what is meant in this context by the Courts' phrase "an independent property interest" (unless it is a reference to Aboriginal title) but, the Appellants submit, what is clear is that the beneficiaries of s. 32 did have pre-existing property interests, be they by grant, lease or a right to occupation and possession, that had been recognized in the settlement, had been subject to purchase and sale, and which were to be protected by s. 32. And a possessory right is surely a property interest in land.

283. In *Alberta v. Elder Advocates (supra)* the Court addressed the nature of the interests that could be subject to a fiduciary duty on the part of the Crown:

> [51] .... It is not enough that the alleged fiduciary's acts impact generally on a person's well-being, property or security. The interest affected must be a specific *private law* interest to which the person has a pre-existing distinct and complete legal entitlement. Examples of sufficient interests include property rights, interests akin to property rights, and the type of fundamental human or personal interest that is implicated when the state assumes guardianship of a child or incompetent person. The entitlement must not be contingent on future government action. ...In other circumstances, a statute that creates a complete legal entitlement might also give rise to a fiduciary duty on the part of government in relation to administering the interest.
>
> [52] Access to a benefit scheme without more will not constitute an interest capable of attracting a fiduciary duty. Although the receipt of a statutory benefit may affect a person's financial welfare, absent evidence that the legislature intended otherwise, the entitlement is a creation of public law and is subject to the government's public law obligations in the administration of the scheme. [Emphasis added.]

284. The Appellants say that the interest of the beneficiaries under s. 32 was a "significant legal or practical interest". The rights to possession of the lands in question constituted a specific *private law* interest to which the beneficiaries had a pre-existing distinct and complete legal entitlement – that is their interest pre-existed the vesting of the land in Canada. They were at the very least "interests akin to property rights". The interests were not "contingent on future government action", rather s. 32 created "a complete legal entitlement". Only the administration of the section remained to be done, the right to the property was fully recognized. However, until the patent was issued, the land was subject to the Crown's complete administration and control. With respect, the Courts below erred by treating s. 32 as though it were merely some sort of benefits scheme. The evidence and the Courts' own rulings show that it was much more than that.

K. LIMITATIONS

285. The Appellants argue that, since they are seeking a declaration that the federal Crown did not fulfill a constitutionally-mandated fiduciary duty, their action is not statute-barred.[27]

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[27] *Re Manitoba Language Rights* case and the *Mahe* case do not expressly deal with limitations, but they make absolutely plain the Court's duty in constitutional cases to rule on unconstitutional measures.

286. The Appellants rely on *Ravndahl v. Saskatchewan* [2009] 1 S.C.R. 181. In that case the Court held that a claim for a declaration that legislation is *ultra vires* was not statute-barred. The Court made it clear that the key is the nature of the remedy being sought. McLachlin C.J.C. stated:

> [16] Personal claims for constitutional relief are claims brought as an individual *qua* individual for a personal remedy. As will be discussed below, personal claims in this sense must be distinguished from claims which may enure to affected persons generally under an action for a declaration that a law is unconstitutional.
> ...
>
> [25] The Court of Appeal unanimously upheld the appellant's right to maintain her claims for a declaration under s. 52 of the *Constitution Act, 1982* that the impugned legislative provisions were unconstitutional insofar as they operated on discriminatory grounds.
>
> [26] It will be for the trial judge to determine whether a declaration of invalidity should be granted, and if so, what remedies if any should be granted. Because the appellant's personal claims are statute-barred, any remedies flowing from s. 52 would not be personal remedies, but would be remedies from which the appellant, as an affected person, might benefit.

287. The Court of Appeal correctly held at **Reasons, Record Vol. III-IV,** para. 318 that the declarations regarding constitutional invalidity sought by the Appellants in the case at bar are not subject to any statutory limitation periods. Scott C.J.M. specifically upheld the trial judge's ruling that:

> ... 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.

288. But Scott C.J.M. also ruled at **Reasons, Record Vol. III-IV,** para. 293 that the Appellants' claim for breach of fiduciary duty is statute-barred. In coming to this conclusion, Scott C.J.M. failed to consider that a claim for a declaration that the Crown has breached a constitutionally-mandated fiduciary duty, is not a personal remedy.

289. The Appellants earlier referred to the statement by the Court in the *Secession Reference,* at para. 72, "that all government action [must] comply with the Constitution". In the case at bar the Crown did not comply with s. 31 or s. 32 of the *Manitoba Act.* The Appellants submit that the

exercise by the Crown of the discretion confided by those sections, had to be "adapted to conform to constitutional imperatives," and that its exercise "was not in conformity with the dictates of the Constitution". See La Forest J. in *Air Canada v. A.G. B.C.*, *supra*, at p. 545–546. It was an *ultra vires* exercise of discretion by the Crown, in breach of a fiduciary obligation incorporated in the Constitution.

L. LACHES

290. Scott C.J.M. dealt, at **Reasons, Record Vol. III-IV,** paras. 319 ff., with the question whether the doctrine of laches can bar constitutional claims.

291. He cited *Ontario Hydro v. Ontario (LRB)* [1993] 3 S.C.R. 327 in which Lamer C.J.C. held, at p. 357, 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.

292. Scott C.J.M. held, at **Reasons, Record Vol. III-IV,** para. 347, that *Ontario Hydro* applied to the Appellants' claims against Manitoba. But he held, at para. 348, that *Ontario Hydro* did not necessarily apply to the Appellants' claim against Canada. He said that the Appellants "primarily seek a declaratory ruling regarding the interpretation of certain constitutional provisions". In fact the Appellants argued that the Crown was burdened with a constitutionally entrenched fiduciary obligation and that it had failed to carry out its mandate, thereby acting unconstitutionally. The Appellants submit that the case at bar falls within the *Ontario Hydro* principle.

293. In any event, La Forest J. held in *M.(K.) v. M.(H.)* [1992] 3 S.C.R. 6, at p. 77-78, that it is a question ultimately of "justice between the parties."

M. DECLARATORY RELIEF

294. The Court of Appeal upheld the view of the trial judge that, declaratory relief being discretionary, no such relief should be granted: para. 250. Since they both held that no fiduciary obligation and no breach had been established, there was in fact no occasion to consider whether to exercise their discretion. The Appellants submit that if it is established that there was a fiduciary obligation and a breach of fiduciary obligation, this Court has discretion to grant the declarations sought.

295. It is fitting that the case at bar, arising out of a historic encounter on the plains, should come to this Court. Was the passage of s. 31 and s. 32 a mere "political expedient" or was it a constitutionally entrenched fiduciary obligation, part of a "historic compromise", included in the *Manitoba Act* for the protection and advancement of the Métis community in Manitoba, in keeping with what this Court in the *Secession Reference* described as Canada's long tradition of protection for minorities?

296. The Appellants submit the appeal should be allowed.

PART IV – SUBMISSIONS ON COSTS

297. The Appellants ask for costs throughout.

PART V - ORDER SOUGHT

298. The Appellants seek an Order setting aside the judgments below and granting the following declarations:

a) A declaration that the federal Crown was in breach of its constitutional obligations to the Métis.
b) A declaration that under s. 31 of the *Manitoba Act*, 1870 the federal Crown had a fiduciary obligation to the Métis and their 7,000 children to promptly and prudently administer 1.4 million acres of land to be set aside for the said children for the benefit of the families of the Métis residents.

c) A declaration that the federal Crown was in breach of its fiduciary duty to the Métis and their children.

d) A declaration that under s. 32 of the *Manitoba Act* the federal Crown had a fiduciary obligation to the settlers holding land along the banks of the Red River, the Assiniboia River and elsewhere in Manitoba to act in their best interests.

e) A declaration that the federal Crown was in breach of its fiduciary duty to the settlers.

f) A declaration that the federal Crown did not implement the land provisions of the *Manitoba Act* (sections 31 and 32) in accordance with the Honour of the Crown.

g) A declaration that the impugned legislation passed by Manitoba was *ultra vires* and therefore unconstitutional, or otherwise inoperative by virtue of the doctrine of paramountcy.

299. The Appellants seek on order of costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Thomas R. Berger, Q.C. James R. Aldridge, Q.C. Harley I. Schachter

August 2, 2011
Vancouver, B.C.

PART VI - TABLE OF AUTHORITIES

Tabs Cases **Para. in Memorandum of Argument**

Texts

PART VII - LEGISLATION

Para. in Factum

Provincial Statutes