File No. 33880

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF 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

APPELLANTS
(Appellants)

- and -

ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF MANITOBA

RESPONDENTS
(Respondents)

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PART I – STATEMENT OF FACTS

I. OVERVIEW

1. On July 15, 1870 Manitoba became Canada's fifth province. The *Manitoba Act, 1870*[1] was the constitutional instrument that accomplished this historic event. The purpose of the *Act* was to bring Manitoba peaceably into the Canadian federation in the face of Imperial withdrawal, divestiture by the Hudson's Bay Company, American expansionism and local unrest. This purpose was supported by individual statutory land grants to the children of existing Métis residents (s. 31 of the *Act*), as well as by recognition of existing land holdings, Métis and non-Métis alike (s. 32 of the *Act*). Ultimately the statutory requirements were fulfilled and indeed exceeded.[2]

2. More than 100 years later, the appellants commenced these proceedings. They now ask this Court to re-examine historical events retrospectively, including events preceding the enactment of ss. 31 and 32 and subsequent government actions taken to effect their implementation. As the trial judge found and the Manitoba Court of Appeal confirmed, the appellants' claims of breach of fiduciary duty are statute-barred. While the appellants contend that their fiduciary claims are exempt from limitations, accepting this proposition would undermine the principles that support the existence of limitation periods. The appellants offer no compelling reason to depart from the normal application of limitation laws. Considerations of fairness, the appropriate use of judicial and party resources and the proper role of the courts all suggest that this Court should decline to consider the substance of the appellants' statute-barred claims.

3. In any event, neither the land provisions in ss. 31 and 32 of the *Manitoba Act* nor the events surrounding their enactment resulted in the creation of a fiduciary relationship. The essential feature of all fiduciary relationships – an undertaking to act in the alleged beneficiary's best interest[3] – is absent. It is unnecessary to consider the issue of Aboriginal title in this case, as

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[1] *Manitoba Act, 1870*, 33 Vict, c 3, SC 1870, c 3, reprinted in RSC 1985, App II, No 8 [*Manitoba Act* or *Act*], Appellants' Legislation, tab 1, pp 1-10.
[2] Reasons for Judgment of the Court of Queen's Bench of Manitoba [MBQB Reasons], paras 254-257, 1210-1213, Appellants' Record [AR] vol I pp 88-89, vol II pp 197, 198; Reasons for Judgment of the Manitoba Court of Appeal [MBCA Reasons], para 163, AR vol III p 72.
[3] *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 30 [*Elder Advocates*].

neither the language of ss. 31 and 32 nor the evidentiary record support the contention that land was granted in recognition of a pre-existing Métis right or Aboriginal title. Sections 31 and 32 of the *Act*, properly interpreted, made statutory benefits available to certain classes of individuals. No express or implied undertaking to give preference to the interests of the Métis has been identified. Even assuming some form of fiduciary duty could be found, any obligations arising under ss. 31 and 32 were discharged. Section 31 provided that the land appropriated for the Métis was to be divided among individual recipients. This conformed with the Métis tradition of individual land-holding and with the wishes of the Red River Métis at the time. The sufficiency of the benefits received by the Red River Métis should not be judged on the basis of hindsight or the appellants' present-day view of what should have been provided.

4. The appellants also seek to impugn the validity of spent and repealed legislation. The trial judge found all of the impugned provincial enactments and all but the two admittedly invalid (and replaced) federal enactments to have been valid. On appeal, the appellants pursued their claims of invalidity against the provincial legislation only. The Manitoba Court of Appeal concluded that these claims were moot and that it should not exercise its discretion to determine the issue of validity. The latter conclusion was based on this Court's well-established jurisprudence and there is no reason for this Court to interfere with the Court of Appeal's exercise of discretion. Even if the Court opts to consider the validity of the impugned provincial enactments, resolution of the issue does not require the Court to consider whether the Métis or their lands fall under s. 91(24) of the *Constitution Act, 1867*.

5. Finally, while the standing of the individual appellants is not questioned, the Manitoba Métis Federation Inc. ("MMF") does not have standing. Subsections 31 and 32 of the *Manitoba Act* provided for grants to individual persons, not a collectivity. In any event, the MMF's membership is not representative of grantees under the *Act*. Direct standing is absent and there is no reason to interfere with the trial judge's discretionary decision to deny public-interest standing to the MMF.

II. RESPONDENT'S POSITION ON APPELLANTS' STATEMENT OF FACTS

6. Except where otherwise stated, the Attorney General of Canada ("Canada") accepts the statement of facts in Part I of the appellants' factum, though Canada does not accept the matters

of argument in paragraphs 24, 25 and 47-50 of the appellants' factum. Additionally, in some instances the appellants' characterization of the evidence is inconsistent with the findings of fact made in the courts below.[4] Additional relevant facts are set out below.

III. HISTORICAL FACTS

7. Much of the evidence presented at trial consisted of historical documents, described by the trial judge as voluminous; there were 56 trial exhibits and Exhibit 1 alone contained 2,068 documents. Mr. David Chartrand, president of the MMF, was the only witness called by the appellants. Canada called three expert witnesses (Drs. Gerhard Ens, Thomas Flanagan and Ms. Catherine MacDonald) and one lay witness (Mr. Brad Morrison). The Attorney General of Manitoba ("Manitoba") called one lay witness (Mr. Russell Davidson).[5] The evidence afforded the trial judge an unparalleled opportunity to examine the context surrounding the enactment and implementation of ss. 31 and 32 of the *Manitoba Act*.

8. After noting the need for caution in interpreting and relying on historical evidence,[6] the trial judge undertook a detailed examination of that evidence, including evidence about the ethnogenesis of the Métis from the 1820s onward as an integral part of the development of the Red River Settlement; the events of 1869-1870 surrounding the resistance to the transfer of the territory to Canada; the enactment of the *Manitoba Act*; and the implementation of ss. 31 and 32 of the *Act*.[7] The trial judge's detailed account of these events, summarized below, draws on the documentary evidence and was assisted by the experts' reports and testimony.[8]

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[4] These instances are at Appellants' Factum, paras 29, 33, 40, 43-44.
[5] MBQB Reasons, paras 8-14, AR vol I pp 7-10.
[6] MBQB Reasons, paras 19-22, AR vol I pp 12-14.
[7] MBQB Reasons, paras 27-342, AR vol I pp 15-119.
[8] Thomas Flanagan, *Historical Evidence in the Case of Manitoba Métis Federation v. the Queen* [Flanagan, *Historical Evidence*], AR vol XXV tab TE 18 pp 132-189; Gerhard Ens, *Settlement and Economy of the Red River Colony to 1870* [Ens, *Settlement and Economy*], AR vol XXV tab TE 14 pp 86-131; Gerhard Ens, *Migration and Persistence of the Red River Métis 1835-90* [Ens, *Migration and Persistence*], AR vol XXVII tab TE 35 pp 93-198; Thomas Flanagan & Gerhard Ens, *Métis Family Study,* AR vol XXVII tab TE 19 pp 1-68; Gerhard Ens, *Manitoba Métis Study - the Métis Land Grant and Persistence in Manitoba* [Ens, *Manitoba Métis Study*], AR vol XXVIII tab TE 36 pp 1-110; Stephen E. Patterson, *Land Grants for Loyalists,* AR vol XXVIII tab TE 44 pp 132-155; Catherine Macdonald, *Events of the Red River Resistance of 1869-70,* AR vol XXV tab TE 16 pp 132-189.

A. Origins of the Red River Métis

9. In 1811 the Hudson's Bay Company ("HBC") granted a tract of land in Rupert's Land to Lord Selkirk. The Red River Settlement developed on part of this land. Métis communities developed around the Red River Settlement after the merger of the two fur trade companies, the HBC and the North West Company, in 1821, as retired or surplus servants of the merged companies moved into the Settlement from distant posts in the north, west and south.[9]

10. In the 1830s and 1840s, the Red River Settlement was organized in parishes on river lots along the Red and Assiniboine Rivers.[10] From the time of the survey conducted by George Taylor in 1835, titles for most of the river lots in the "inner parishes" (the parishes near the centre of present-day Winnipeg) were recorded in the HBC's Land Register "B". Individual lots were bought and sold by the Red River Métis and these transactions could be recorded in Register "B".[11] Outside the limits of the Taylor survey, a tradition of land tenure developed based on occupation, which the HBC did not attempt to prevent.[12]

11. The parishes reached 24 in number, divided evenly along religious and linguistic lines. In 1870, the population of the Settlement comprised approximately 9,700 Métis, 1,600 Europeans and 560 Indians. The mixed-race population comprised approximately 5,700 French-Catholic Métis and 4,000 Anglo-Protestant Half-Breeds, as they were then known.[13]

12. The Métis were fully integrated in the governance of the Red River Settlement, which had well-developed legislative and judicial institutions. Legislative authority was exercised by the Council of Assiniboia, comprised of community representatives, many of whom were Métis. Local courts, presided over by the Recorder (or Chief Judge), exercised both civil and criminal jurisdiction. Métis residents participated in the legal system as jurors and magistrates. For

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[9] MBQB Reasons, paras 28-32, 37, 584, AR vol I pp 16, 17, 19, AR vol II p 5; Transcript, April 18, 2006, p 76 ln 1-p 77 ln 14, Respondent Attorney General of Canada's Record [AGCR] pp. 38-39.
[10] MBQB Reasons, para 31, AR vol I p 17
[11] MBQB Reasons, paras 34-35, AR vol I p 18.
[12] MBQB Reasons, para 36, AR vol I p 18 and paras 286-288, AR vol I pp 98-99, Minute of Council of Assiniboia dated February 27, 1860, AR vol VI, tab 1-0231 p 59.
[13] MBQB Reasons, paras 31, 32, 158, AR vol I pp 17, 56; Ens, *Settlement and Economy*, AR vol XXV tab TE 14 pp 92, 123-131.

example, Dr. John Bunn, a Métis, held a variety of governmental posts within the Settlement, and was the Recorder of the Court for a period of time.[14]

13. The growth and decline of the buffalo hunt had a significant impact on the Settlement. Originally, expeditions were mounted from the Settlement to hunt for bison meat for local use and for processing into pemmican to provision the fur traders. By the 1840s the market for buffalo robes had expanded, which led to longer expeditions and the "*hivernement*" – groups of hunters wintering on the plains of present-day Saskatchewan to harvest the buffalo robes in their prime. As the buffalo became increasingly distant from the Settlement, some hunters sold their lots and permanently settled in areas closer to the hunt. A series of crop failures in the 1860s, coupled with the decline of the buffalo robe market and the fur trade, led others to sell their lands in the Settlement and move on before 1870.[15]

B. Passage of the *Manitoba Act*

14. The Dominion of Canada was established in 1867. Faced with the rapid increase of western settlement in the United States and the American purchase of Alaska, the new Dominion sought to expand its authority westward. An extension of the Canadian frontier was anticipated by s. 146 of the *Constitution Act, 1867*. In furtherance of this, the Imperial government agreed to accept the surrender of the HBC's rights in Rupert's Land and the North-Western Territory and to transfer the administration and control of these territories to Canada. Canada agreed to pay the HBC £300,000 in compensation.[16]

15. By 1868 the residents of the Settlement had become aware of the intended transfer. Concerns arose among local people as to the possible impact of this union. These concerns were exacerbated by the unannounced arrival of road-building and surveying crews in 1868 and 1869 respectively.[17]

16. On July 29, 1869 William Dease and several other prominent French Métis called a public meeting at the court house. Dease argued that the compensation that Canada had agreed

[14] MBQB Reasons, paras 60, 532, AR vol I pp 25-26, 187-188; E.H. Oliver, *The Canadian North-West: It's Early Development and Legislative Records*, AR vol XXIII tab 1-2005 pp 26-27.
[15] MBQB Reasons, paras 43-50, AR vol I pp 21-23; Ens, *Migration and Persistence*, pp 8-19, AR vol XXVII tab TE 35 pp 104-115.
[16] MBQB Reasons, paras 51-54, 66, AR vol I pp 23-24, 27.
[17] MBQB Reasons, paras. 61-70, AR vol I pp 26-28.

to pay to the HBC ought to be paid to the people of the North-West as the real owners of the land. Other prominent Métis residents, including John Bruce and Louis Riel, opposed Dease's proposal and it was soundly defeated.[18]

17. In October 1869 a confrontation at St. Norbert between a survey crew and 16 French Métis, including Riel, resulted in the withdrawal of that crew and the political organization of the French Métis. The Red River Resistance arose as a result.[19]

18. In late 1869 Riel issued a public notice inviting the English parishes in the Settlement to send 12 representatives to meet with a similar number of representatives from the French parishes. The ensuing meetings gave rise to the Convention of 24, which adopted a list of rights (the first list of rights) stating the conditions upon which the people of Rupert's Land would enter into Confederation.[20]

19. In response to the unrest at Red River, Donald A. Smith, Chief Agent of the HBC at Montreal, attended the Settlement representing Prime Minister John A. Macdonald. Smith met with the community over two days in January 1870 to communicate Macdonald's position on the claims being made and his invitation to select and send "delegates of the residents of Red River" to Ottawa.[21]

20. Following this meeting, the Convention of 24 was expanded into the Convention of 40 (20 French and 20 English representatives). The Convention of 40 met between January 25 and February 10, 1870 to develop an amended list of rights. During the ensuing debates, the dominant Métis leadership expressly disavowed advancing any claims on the basis of Indian heritage; rather, they claimed as "civilized men", as differentiated, in the then-prevalent view, from Indians. One of the Métis representatives, George Flett, expressed his views in a passage quoted by the trial judge:

> For my part, I am a Half-Breed but far be it from me to press any land claims I might have as against the poor Indian of the country (hear, hear). Let the Indian

[18] MBQB Reasons, para 66, AR vol I p 27.
[19] MBQB Reasons, paras 70-75, AR vol I pp 28-29.
[20] MBQB Reasons, paras 75-76, 82-83, AR vol I pp 29, 31-32; Macdonald, *Events of the Red River Resistance of 1869-70*, p 2, AR vol XXV tab TE 16, p 133.
[21] MBQB Reasons, paras 87-89, AR vol I pp 33, 34.

> claims be what they may, they will not detract from our just claims. We have taken the position and ask the rights of civilized men. As to the poor Indian, let him by all means have all he can get. He needs it and if our assistance still aid him in getting it, let us cheerfully give it (cheers).[22]

21. On the basis of this and other evidence, the trial judge concluded that "the evidence in this case is overwhelming that the Métis were not Indians. They did not consider themselves to be Indians. They saw themselves, and wanted to be seen, as civilized and fully enfranchised citizens." The Red River Métis viewed the Indians as inferior. They did not regard themselves as Indians and were not so regarded by others.[23]

22. In its final days the Convention of 40 adopted an amended list of rights (the second list) and agreed to form a Provisional Government and to send three delegates to Ottawa. The delegates selected were Abbé N.-J. Ritchot, local judge John Black, and local businessman Alfred Scott. The trial judge noted that:

> … Ritchot was chosen because of his connection to the French community, Black, because of his connection to the English community, and Alfred Scott, because of his connection to the Americans living in the Settlement. They were neither aboriginals nor representatives of an aboriginal band or people per se. Rather, they were representatives of the Settlement and its residents.[24]

23. A third list of rights was developed by the Provisional Government. The third list and a letter of instruction were provided to all of the delegates. The third list was still not the final list as a different list, with two additional demands, was carried by Ritchot. Among other things, these lists of rights sought provincial control over public lands and protection for private land holdings, language, religion and denominational schools. None of the four lists spoke in terms of Métis or Aboriginal rights and none made any provision for a children's land grant. The letter of instruction expressly stated that the delegates had no authority to bind the people of Red River; they were obliged to bring back any proposals for community approval.[25]

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[22] MBQB Reasons, paras 89-91, 607, AR vol I p 34, vol II p 13; Minutes of Convention of 40, AR vol VIII tab 1-0386 pp 46-48.
[23] MBQB Reasons, paras 595-611, esp. 600, 601, AR vol II, pp 7-15.
[24] MBQB Reasons, paras 91, 95, 531, AR vol I, pp 34-35, 187.
[25] MBQB Reasons, paras 83, 91, 95-98, 506-508, AR vol 1 pp 32, 34-35, 177-178; Exhibit 1-0344, AR vol VII tab 1-0344 p 99; Exhibit 1-0394, AR vol VIII tab 1-0394 pp 189-191; Exhibit 1-0422, AR vol IX tab 1-0422, p 112; Exhibit 1-0424, AR vol IX tab 1-0424, pp 121-131; Exhibit 1-0431, AR vol IX tab 1-0431, pp 151-152.

24. Discussions between the Red River delegates and the government representatives, notably Sir John A. Macdonald and Sir George-Étienne Cartier, began in Ottawa on April 25, 1870. In the course of these discussions, it became apparent that Canada would not give the new province administration and control of the public lands. The trial judge noted that the government's reasons for retaining federal control of the land included the need to satisfy the rights of the HBC under the terms of transfer, the need to make provision for the rights of the Indians, and the need to complete a national railway.[26]

25. It was only when the fact that Canada would retain the public lands was made clear to the Red River delegates that the idea of the children's land grant emerged, albeit in very general terms.[27] The ensuing discussion involved the idea of additional compensation for the Métis, over and above their claims as settlers, based on some kind of inherited Indian claim,[28] although Ritchot later conceded the uncertain nature of this basis for the claim when he reported back to the Assembly at Red River on June 24, 1870.[29] In any event, the children's land grant was proposed as an alternative to provincial control. The amount of the grant and its administration then came under discussion between the delegates and the Ministers.[30]

26. Based on a detailed review of the evidence, the trial judge found that "Canada never agreed to place any of the lands in the new province under the jurisdiction, authority or control of the local legislature"[31] at any time during the discussion leading to passage of the *Manitoba Act*. In their statement of facts, the appellants contend that this is a palpable and overriding error.[32] In assessing the evidence on this point, it must be remembered that Hansard at the time was not necessarily a verbatim record.[33] The trial judge had regard to each of the extracts relied on by the appellants in support of their assertion[34] and considered these extracts in their full context, including the fact that, like the *Act* as passed, the first printed version of the bill placed before

[26] MBQB Reasons, paras 101-110, AR vol I pp 37-40.
[27] MBQB Reasons, para 111, AR vol I p 40.
[28] Morton's translation of Ritchot's journal [Ritchot's Journal], AR vol VI tab 1-0005 p 33.
[29] MBQB Reasons, para 649, AR vol II pp 30-31; MBCA Reasons, para 78, AR vol III pp 43-44; Exhibit 1-0512, AR vol XII tab 1-0512 p 28.
[30] MBQB Reasons, paras 112-114, AR vol I pp 41-42.
[31] MBQB Reasons, paras 113-116, 118, 487- 510, quote at para 491, AR vol I p 41-43, 172-178.
[32] Appellants' Factum, paras 24, 25.
[33] MBCA Reasons, para 17, AR vol III p 17; Transcript, April 25, 2006, p 25 line 22– p 26, line 22, AGCR pp 41-42.
[34] Appellants' Factum, paras 20-23, 26; MBQB Reasons, paras 113-116, 118, 487-490, AR vol I p 41-43, 172-173.

Parliament on May 4, 1870 retained Dominion administration and control over the land grant.[35] As found by the trial judge, in context, the words emphasized by the appellants in the writings of Ritchot and Macdonald recorded the proposal made by the delegates, not an agreement between the delegates and Macdonald and Cartier.[36] On review, the Manitoba Court of Appeal observed that the evidence strongly supports the trial judge's conclusion.[37]

27. The Métis land grant was vigorously debated in Parliament. There was strong animosity on the part of some members toward Riel and his allies, especially due to the insurrection and the killing of Thomas Scott. Members of the Opposition insisted that the grant was too generous to people who were involved in an act of rebellion against Canada. Members also objected that the Métis had no claim to Indian title. In response, Cartier urged that the land question was important and that something should be given to the Red River settlers in exchange for Dominion control of the lands.[38] In providing a rationale for the Métis grant, Macdonald and Cartier did speak of an inherited Indian claim. Later, in 1885, Macdonald characterized this rationale as a political expedient to gain acceptance for the Bill.[39] Shortly after passage of the *Manitoba Act*, Lieutenant-Governor Adams Archibald, in a report dated December 27, 1870, expressed difficulty in understanding the phrase "Indian title" in s. 31, noting that the Indian heritage of the Red River Métis hailed not from the vicinity of Red River itself, but from remote areas over all of the North-West.[40] Based on all the evidence, the trial judge found as fact that the reference to "Indian title" was a political expedient used to obtain passage of the *Act*.[41]

28. Macdonald's government ultimately achieved passage of the *Manitoba Act* by satisfying the Opposition of the need to enact measures that would provide stable government in Red River and secure sovereignty over the North-West. The *Manitoba Act* came into force on July 15, 1870. Section 31 provided for a land grant of 1.4 million acres "for the benefit of the families of

[35] MBQB Reasons, paras 126-130 AR vol I pp 45-47; Draft of Bill, Ex 1-0474, AGCR pp 113-114.
[36] MBQB Reasons, paras 500-506, AR vol I p 175-177.
[37] MBCA Reasons, paras 65, 171, 238(e), 239, 240, AR vol III, pp 39, 75, 97, 98.
[38] MBQB Reasons, paras 115-120, 127-138, 649-656, esp. 137, AR vol I pp 42-49, AR vol II pp 26-43; Hansard, AR vol XI tab 1-0467 p 77.
[39] MBQB Reasons, para 649, AR vol II p 31.
[40] MBQB Reasons, para 584, AR vol II pp 4, 5; Archibald's Report to the Secretary of State for the Provinces, AR vol XII tab 1-0548 p 123.
[41] MBQB Reasons, paras 649-656, AR vol II pp 26-34.

the half-breed residents," and section 32 provided for the recognition of existing occupancies. Section 31 of the *Act* provided:

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

Both sections are reproduced in Part VII below.

C. Selection of the Tracts of Land for Section 31 Grants

29. Before any land could be granted to entitled individuals, the first step in implementing s. 31 was necessarily the identification of the tracts of land to make up the specified acreage. This was one of the many substantial tasks initially assigned to Archibald as the first Lieutenant Governor of Manitoba. Archibald's recommendations as to the system of survey and the mode for dealing with the s. 31 grants were largely adopted in an Order in Council dated April 25, 1871, which provided *inter alia* for a survey of the land into townships and sections, and that "the Lieutenant Governor of Manitoba shall designate the Townships or parts of Townships in which the allotments to the half-breeds shall be made."[42] As the s. 31 lands were to come from the lands covered by the general survey, confirmation of the lands selected for this purpose could not occur until the survey was conducted.[43]

30. In the words of the trial judge, the new province "did not exist in a vacuum."[44] New immigrants began to arrive, which caused anxiety and unrest amongst the old residents and prompted members of the Legislative Assembly of Manitoba to write to Archibald. In response, on June 9, 1871, Archibald indicated that he would "adopt, as far as possible, the selections made

[42] MBQB Reasons, paras 152-170, 969, AR vol I pp 55-61, vol II p 130; Order in Council April 25, 1871, AR vol XIV tab 1-0608 pp 39-41.
[43] MBQB Reasons, para 988, AR vol II p 136; MBCA Reasons, para 640, AR vol IV pp 38-39; Order in Council April 15, 1872, AR vol XV tab 1-0701 p 26.
[44] MBQB Reasons, para 171, AR vol I p 61.

by the Half-breeds themselves" within the constraints of the survey system and the regulations made by the Governor in Council.[45] Additionally, Archibald and his successor, Alexander Morris, were obliged to see to the equitable distribution of access to wood and water, as between Métis and other settlers, to reserve the portion of land accorded to the HBC under the terms of transfer, and to take account of the higher value of lands adjacent to the proposed rail line.[46]

31. By letter dated March 22, 1872, Surveyor General Colonel John S. Dennis advised the Secretary of State for the Provinces that the surveys were sufficiently far advanced to permit the selection of lands for the half-breed grant. This led to a report from the Secretary of State to the Governor General and resulted in the passage of an Order in Council on April 15, 1872, which authorized the selection of lands to proceed. On July 17, 1872, Archibald was instructed to select the townships to be reserved. He immediately began the selection process and directed the Dominion Lands Agent, not to accept further homestead or pre-emption entries in the areas most likely to be reserved.[47]

32. After consultation with the Métis on a parish-by-parish basis, the selection of townships for all parishes was made by January 1873. Tracts were selected for the Métis of each parish from townships or parts of townships contiguous with or close to their parish of residence, from which individual allotments would be made. However, the tracts overlapped with an area at the back of the existing river lots known as the "outer two miles", in which many old settlers, including Métis, claimed rights of hay and common. This resulted in protests, and the selection was adjusted in August and September 1873 to exclude the outer two miles.[48]

33. The evidence before the trial judge included four maps showing the lands chosen by the Métis themselves prior to and following Archibald's letter of June 9, 1871, the townships selected by Archibald and Morris prior to September 1873, the townships as adjusted by the withdrawal of the outer two miles, and the townships from which the actual allotments came.

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[45] MBQB Reasons, para 171-174, AR vol I pp 61, 62.
[46] MBQB Reasons, paras 189-196, AR vol I pp 68-70.
[47] MBQB Reasons, paras 185-191, AR vol I pp 67-69; Order in Council April 15, 1872, AR vol XV tab 1-0608 pp 24-29; Letter: Archibald to Aikins, July 27, 1872, AR vol XV tab 1-0727 pp 69, 76-77.
[48] MBQB Reasons, paras 192-200, 204-207, 1000, 1057, 1210, AR vol I pp 65-73, vol II pp 139, 156, 197; Flanagan, *Historical Evidence*, AR vol XXVI tab TE 18 pp 9, 46-47; Ens, *Manitoba Métis Study*, pp 25-26, 41-49, 54-55, AR vol XXVIII tab TE 36 pp 27-28, 43-51, 56-57.

The trial judge found that, while there clearly was not a perfect match, the evidence demonstrated a willingness to accommodate the wishes of the parishes.[49]

D. Allotment of section 31 lands

34. On February 22, 1873, Lieutenant Governor Morris began the allotment process by drawing lots for the individual grants of 140 acres. The size of the allotment was premised on providing a grant to all Métis in the province, which the 1870 census had shown to be about 10,000 individuals. In April 1873, the federal government determined, with the concurrence of Métis representatives, that the heads of families were not entitled to a s. 31 grant. This meant that larger individual allotments would be required in order to distribute the entire 1.4 million acres. As a result, the 140-acre allotments were cancelled and Morris began a second allotment of 190 acres per person in August 1873. After confirming that the *Act* did not entitle the Métis heads of families to share in the s. 31 grant, Canada passed legislation which provided them an *ex gratia* grant of $160 scrip redeemable in Dominion lands.[50]

35. During this time, individuals were employing various methods to sell their interests in s. 31 lands. In an attempt to ensure that these individuals would not be taken advantage of, the Manitoba Legislature passed *The Half-breed Land Grant Protection Act*, which made any sales before patent, both before and after passage of the Act, voidable by the Métis vendor. Some Métis members of the Legislature themselves considered this Act to be an insult to people of Métis ancestry. Despite this, it was proclaimed in February 1874 and remained in force until 1877.[51]

36. After the second allotment began, disagreement arose between Morris and Dennis as to how to ensure that persons claiming to be entitled to receive a s. 31 patent were in fact so entitled. While these discussions continued, Macdonald's government fell and Sir Alexander Mackenzie became Prime Minister. Ultimately, the issue was dealt with by the passage of an Order in Council on April 26, 1875 which established a commission to receive and assess

[49] MBQB Reasons, paras 990, 1000, 1057 AR vol II pp 136-137, 139, 156; Map Book – ledger size (bound separately) General Maps 1-4, pp 3-10, AR vol XXVII tab TE 25 p 69.
[50] MBQB Reasons, paras 199-203, 1211, AR vol I pp 71-72, vol II p 198; Ritchot, Notes on Manitoba, AR vol XV tab 1-0834 p 156; *An Act respecting appropriation of certain Dominion lands in Manitoba*, AR vol XVII tab 1-1000 pp 35-40.
[51] MBQB Reasons, paras 209-216, AR vol I pp 74-77.

applications for the s. 31 grants and for the scrip to be offered to the heads of families. By a subsequent Order in Council, dated May 5, 1875, John Machar, an English-Canadian lawyer, and Matthew Ryan, a French-Canadian lawyer, were named as the commissioners.[52]

37. By the end of 1875, Machar and Ryan had prepared registers of the names of those entitled to grants under s. 31 and of Métis heads of families receiving scrip. These lists were approved in January 1876.[53] Machar and Ryan accepted 5,088 s. 31 claims. There was concern that the list might be incomplete, so Ryan and the Dominion Lands Agent, Donald Codd, were authorized to receive additional applications. An additional 226 claimants applied to Codd. Dennis expressed concern that the 190-acre allotments might be too large if too many applicants came forward. In response, Codd estimated that there would be no more than 5,814 applications in total and provided a rationale for this figure. The number was ultimately set at 5,833, which required an individual allotment size of 240 acres to exhaust the 1.4 million acres. On September 7, 1876 an Order in Council was issued to that effect. This resulted in the cancellation of the second allotment and necessitated a third allotment.[54]

38. On October 23, 1876, the Dominion Lands Agent sent a notice to the local newspapers stating that draws of 240-acre allotments would begin. These continued on a parish-by-parish basis until the allotment process was completed in February 1880.[55]

E. Patent of section 31 lands

39. In Ottawa, the Department of the Interior checked the allotments to confirm the eligibility of the recipients and the availability of the land. The Department of the Secretary of State then issued letters patent after approval by the Department of the Interior. Issuance of patents usually took one to two years after completion of the drawings for a parish. The first batch of patents arrived in Winnipeg on August 31, 1877 and the bulk of the patents were issued by 1881. A total

[52] MBQB Reasons, paras 228-229, AR vol I pp 80-81; Order in Council, April 26, 1875, AR vol XVII tab 1-1058 pp 155-158; Order in Council, May 5, 1875, AR vol XVII tab 1-1067 pp 162-163; Flanagan, *Historical Evidence*, pp 55-56, AR vol XXVI pp 55-56.
[53] MBQB Reasons, paras 217-230, AR vol I pp 77-81.
[54] MBQB Reasons, paras 231, 235-237, 1013-1031, AR vol I pp 81, 83, vol II pp 143-148; Letter: Codd to Dennis, August 10 1876, AR vol XVIII tab 1-1192 pp 24-31.
[55] MBQB Reasons, paras 238-239, AR vol I pp 84; Flanagan, *Historical Evidence*, p 58, AR vol XXVI tab TE 18 p 58.

of 6,034 grants issued in this manner to Métis children or their heirs, amounting to 1,448,160 acres.[56]

40. During this process, beginning in 1877, Canada permitted the publication of allotments prior to patent. Recipients were informed of the location of their allotments by means of large posters prepared for this purpose so that they could settle upon or otherwise deal with the specific tracts of land allotted to them.[57]

41. Over time it became apparent that the number of late applications had been underestimated, with the result that claims continued to be filed after more than 1.4 million acres had been allocated. Deputy Minister of the Interior A. M. Burgess recommended the issue of scrip redeemable in Dominion lands, at the rate of $1.00 per acre, to each Métis who had proved his or her entitlement under s. 31. The government accepted this advice and enacted an Order in Council to this effect on April 20, 1885. The Order in Council initially established May 1, 1886 as a deadline for filing s. 31 claims, but this deadline was amended and extended in practice on several occasions and claims were accepted until 1919. In the end, scrip for $240 was issued to 993 Métis children or their heirs, in addition to the distribution of the 1.4 million acres.[58]

F. Section 32

42. Section 32 of the *Manitoba Act* was enacted for the purpose of quieting titles in the new province. It provided for the recognition of existing land holdings: subsections (1) and (2) provided for confirmation by grant from the Crown of all land grants previously given to individual settlers from the HBC, whether in freehold or in estates less than freehold; subsection (3) provided that within the area where Indian title had been extinguished by the Selkirk Treaty in 1817, "titles by occupancy" would be converted into estates in freehold by grant from the Crown; and subsection (4) gave a right of pre-emption to all persons in "peaceable possession" of land in the areas of the province where Indian title was yet to be extinguished. Additionally,

[56] MBQB Reasons, paras 254, 1029, AR vol I p 88, vol II p 147; MBCA Reasons, para 160, 161, AR vol III p 71; Flanagan, *Historical Evidence*, pp 13 (para 40), 59, AR vol XXVI tab TE 18 pp 13, 59; N.O. Côté, *Administration and Sale of Dominion Lands Claims under the Manitoba Act*, Ex 1-2010 AGCR p 130.
[57] MBQB Reasons, paras 240-243, AR vol I 84-86.
[58] MBQB Reasons, paras 254-258, AR vol I pp 88-89; MBCA Reasons, para 626, AR vol II p 34; Flanagan, *Historical Evidence*, AR vol XXVI tab TE 18 p 64.

subsection 32(5) authorized the Governor General in Council to make provisions for ascertaining and adjusting the settlers' rights of hay and common.[59]

43. The federal government confirmed pre-1870 land holdings by performing a comprehensive survey (both of river lots and general Dominion Lands), issuing Crown patents under subsections 32(1) to 32(4) of the *Manitoba Act*, and providing a means to settle disputes between claimants. Crown grants were made wherever there was evidence of actual occupation of the land prior to the transfer of administration and control to Canada.[60] Ultimately, 2,565 patents were issued by 1886. A few additional patents were issued over the subsequent years, making a total of 2,750 when the register was closed in 1929.[61]

44. The history was more complicated with respect to "staked claims". There was debate about the degree of occupation or possession that should be required to establish entitlement to a patent, but these claims were considered and accommodated to a considerable degree. These more tenuous claims, many of which were staked out between the passage of the *Act* on May 12, 1870 and the transfer of administration and control on July 15, 1870, were settled with a combination of special grants and sales at concessionary prices. The register of special grants shows that 120 were made during the 1880s to satisfy these claims, with additional grants in later years. There was no evidence that delay in the issue of patents led to dispossession of Métis residents from their existing holdings.[62]

45. The government commuted the rights of hay and common provided for in subsection 32(5) by granting a portion of the outer two miles to each of the occupants of river lots in parishes where the hay privilege had been recognized by the laws of Assiniboia, and by granting scrip to all other recipients of *Manitoba Act* patents. A register of "commutation grants" kept by the Department of the Interior shows that it made 1,250 grants in the outer two miles in commutation of the hay privilege through the year 1927. Schedules kept by the

[59] MBQB Reasons, paras 1156-1162, AR vol II pp 185-187.
[60] MBQB Reasons, paras 1164, 1212, AR vol II pp 187, 198; Flanagan, *Historical Evidence,* AR vol XXVI tab TE 18 p 130; Ens, *Manitoba Métis Study,* AR vol XXVIII tab TE 36 pp 11-15.
[61] MBQB Reasons, paras 275-333, AR vol I pp 95-115; MBCA Reasons, para 161, AR vol III p 72; Flanagan, *Historical Evidence,* AR vol XXVI tab TE 18 p 122.
[62] MBCA Reasons, para 693, AR vol IV p 54; Flanagan, *Historical Evidence,* AR vol XXVI tab TE 18 p 135.

Department of the Interior show that 1,360 grants of hay scrip were made between 1876 and 1888. The Department continued to issue hay scrip as late as 1918.[63]

G. Facts Respecting Outcome

46. From an early stage in the selections and allotments, there was an active market in Métis lands. Large numbers of immigrants were expected to arrive in the new province, and many Métis families were receiving much more land than they could use.[64] Buyers and sellers employed legal devices such as assignments, mortgages and powers of attorney to transfer the rights to s. 31 grants.[65] The federal and provincial governments employed a number of legislative and policy measures to discourage speculation, including making sales voidable at the election of the Métis recipient, as discussed above at paragraph 35, and declining to recognize assignments for the purpose of delivery of patent. These measures were of limited effect.[66]

47. Some Métis members of the Manitoba Legislature resented any attempt to restrict their Métis property rights and regarded attempts to impose such restrictions as insulting.[67] Ritchot and Taché wanted conditions imposed to entail the land and prevent immediate sale. This was not acceptable to the Métis members of the Manitoba Legislature, or to the people on the ground.[68] There was debate as to whether conditions of settlement should be imposed, but such conditions would have been unworkable since many of the grantees were minors who would not be able to fulfil settlement obligations.[69] The trial judge concluded that it would have been practically impossible to prevent sales.[70]

48. While there were improvident sales, there were also sales at market prices, including sales at times when the market for land sales was high.[71] Prices spiked at different times in different parishes, but prices were generally at their highest during the Manitoba land boom in

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[63] MBQB Reasons, paras 334-342, AR vol I pp 115-119; Flanagan, *Historical Evidence*, AR vol XXVI tab TE 18 p 162.
[64] MBQB Reasons, para 44, AR vol I p 21; MBCA Reasons, paras 145, 149, 161, 633, AR vol III pp 66-68, 72 and vol IV p 36.
[65] MBQB Reasons, para 209, AR vol I p 74; MBCA Reasons, paras 118-121, 131, AR vol III pp 58-59, 62.
[66] MBQB Reasons, paras 1038, 1044-1045, AR vol II pp 150, 151-152; MBCA Reasons, para 575, AR vol IV p 20.
[67] MBQB Reasons, paras 214, 1039, AR vol I p 76 vol II p 150; MBCA Reasons, para 119, AR vol III pp 58-9.
[68] MBQB Reasons, paras 930-931, 938-940, AR vol II pp 120-121, 123-124.
[69] MBQB Reasons, paras 935-937, AR vol II pp 122-123.
[70] MBQB Reasons, para 1045, AR vol II p 152.
[71] MBQB Reasons, para 1057, AR vol II p 156; MBCA Reasons, paras 168, 652, AR vol III p 74 vol IV pp 41-42.

1880-1882.[72] Analysis of actual sale prices showed a median sale price of $200, at a time when workmen's wages in North America were in the range of $1.00-1.25 per day.[73] Significant buyers of Métis river lots included Ritchot and Taché, who had no reason to take advantage of the Métis or induce their departure.[74]

49. Many Métis sold and left the original boundaries of the "postage stamp" province, but many others kept their land and acquired more.[75] About 60% of the Métis families shown in the 1870 census were still in the province in 1881.[76] The 1885-1886 census showed 7,985 Métis in Manitoba.[77] In the statement of claim, the appellants say that the MMF represents 127,000 Manitoba Métis.[78]

50. The trial judge took note of the appellants' argument that delays in land selection and allotment led to early and improvident sales and departure.[79] He observed that s. 31 did not set a time limit for implementation; that

> a fledgling province had just come into existence, that it was remote from Ottawa[,] … that the Lieutenant Governor and ultimately the Manitoba Legislature had many issues to address and with which to deal in the establishment of the new province, that many of the Métis lived a somewhat nomadic life and that errors occurred which caused, or issues arose which justified, the implementation of changes leading up to the finalization of the size of the land grant and the resulting allocation of the lands.[80]

51. After extensive consideration of the evidence,[81] the trial judge was unable to accept the argument that delay caused the dispersal of the Red River Métis, concluding that "[u]ltimately, the Métis who were full citizens of Manitoba at the time made individual choices."[82] This is

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[72] Flanagan, *Historical Evidence*, p 86, AR vol XXVI tab TE 18 p 86; Flanagan & Ens, *Métis Family Study*, p 48, AR vol XXVII tab TE 19 p 48.
[73] Flanagan, *Historical Evidence*, p 87, AR vol XXVI tab TE 18 p 87.
[74] MBQB Reasons, paras 1048-1051, AR vol II pp 153-154.
[75] MBQB Reasons, para 1057, AR vol II p 156.
[76] Ens, *Manitoba Métis Study*, pp 54-55, AR vol XXVIII tab TE 36 pp 56-57.
[77] Ens, *Manitoba Métis Study*, p 2, fn 5, AR vol XXVIII p 4; Census for 1885-86, AR vol XXII tab 1-1713 p 155.
[78] Amended Statement of Claim, para 1, AR vol IV Tab F p 75.
[79] MBQB Reasons, paras 1052-1054, AR vol II pp 154-155.
[80] MBQB Reasons, para 1055, AR vol II p 155.
[81] MBQB Reasons, paras 1056-1058, 1149-1151, 1164-1165, 1178, 1181-1182, 1187, AR vol II pp 156-157, 182-183, 187, 190-193.
[82] MBQB Reasons, para 1058, AR vol II pp 156-157.

consistent with the expert evidence, which demonstrates that sellers were motivated by a variety of personal and economic factors, and that many Métis families remained in the province.[83]

IV. JUDICIAL HISTORY

A. Dumont v. Canada and Manitoba

52. This Court has already considered a preliminary issue in this case.[84] The original statement of claim in these proceedings was filed on April 15, 1981. The statement of claim was amended on August 26, 1981 and further amended on January 8, 1987.[85] The further amended statement of claim advanced a substantially narrower action, being limited to a claim for a declaration that certain statutory provisions were *ultra vires* the Parliament of Canada and the Legislature of Manitoba. No breaches of fiduciary duty were alleged at that time.[86]

53. Canada brought a motion to strike the appellants' statement of claim as it was then framed. The motion was dismissed by the MBQB but Canada's appeal and motion to strike was granted by the MBCA. The matter was then appealed to this Court.[87]

54. In a brief judgment, this Court noted that the test to be applied on such a motion is high (the outcome of the case must be "plain and obvious" or "beyond doubt"), and determined that the claim should not have been summarily dismissed. Rather, the Court stated, the issues "would appear to be better determined at trial where a proper factual base can be laid" and the declaratory relief sought "may" be granted if an appropriate case is made out.[88] The case was to proceed to trial, but no pronouncement was made as to how the trial judge should decide it.

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[83] Ens, *Manitoba Métis Study*, pp 54-55, AR vol XXVIII tab TE 36 pp 56-57; Ens, *Migration and Persistence*, pp 32-42, AR vol XXVII tab TE 35 pp 128-138; Flanagan, *Historical Evidence*, pp 5, 91, AR vol XXVI tab TE 18 pp 5, 91; MBCA Reasons, paras 145, 160-168, 575-578, 581-582, 633, AR vol III pp 66-7, 71-74 and vol IV pp 20-21, 22, 36.
[84] *Dumont v Canada (Attorney General)*, [1990] 1 SCR 279 [*Dumont*].
[85] Further Amended Statement of Claim, filed January 8, 1987, AGCR pp 2-17.
[86] *Ibid* at p 9 (see para 8) and p 17 (see para 14).
[87] *Dumont*, *supra* note 84.
[88] *Ibid*.

B. The Trial Judgment

55. The appellants' statement of claim was further amended before trial, which substantially expanded and changed the fundamental issues before the trial judge.[89]

56. Following his extensive review of the evidentiary record (discussed above) the trial judge began his consideration of the issues with the question of the MMF's standing. He evaluated the appellants' assertion that standing had been determined in *Dumont* by applying the rules governing issue estoppel as established by this Court's decision in *Danyluk v. Ainsworth Technologies*.[90] He found that issue estoppel did not apply. Then, noting that the MMF's membership is not co-extensive with the descendants of those who were entitled to land grants under s. 31 and 32 of the *Manitoba Act*, the trial judge proceeded to assess standing based on the relevant jurisprudence, including *Labrador Métis Nation v. Newfoundland and Labrador*[91] and this Court's decision in *Canadian Council of Churches v. Canada*.[92] He concluded that the MMF was not an appropriate party.[93]

57. The trial judge next considered whether the appellants' action, which arises from events that occurred between 1869 and 1890, was barred by *The Limitation of Actions Act*. He rejected the appellants' assertion that no limitations legislation is applicable because their claim is a constitutional claim. He noted the need for caution in assessing the documentary evidence, particularly since no one can now testify about the events. He found that many of the individuals who were entitled to benefits were leaders of the Métis community and Catholic clergy who were active in the governance and life of the people of the province. They had knowledge of the purposes of ss. 31 and 32 of the *Manitoba Act*, of the expectations of the community, of how the legislation was being implemented, and of the rights of those entitled. They had also demonstrated a willingness to litigate in respect of other rights. However, there was little evidence of complaint and no contemporaneous litigation with respect to ss. 31 and 32 of the *Act*. In these circumstances, the trial judge concluded that *The Limitation of Actions Act* applied to bar

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[89] Amended Statement of Claim, AR vol IV pp 74-98; MBQB Reasons, para 383, AR vol I pp 130-131.
[90] *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44, [2001] 2 SCR 460 at paras 18-25, 33-37, 62-67; MBQB Reasons, paras 357-390, AR vol I pp 123-134.
[91] *Labrador Métis Nation v Newfoundland and Labrador (Minister of Transportation and Works)*, 2006 NLTD 119, 258 Nfld & PEIR 257 at paras 55-73.
[92] *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236 [*Council of Churches*].
[93] MBQB Reasons, paras 390-407, AR vol I pp 134-141.

the appellants' claim.[94] He further concluded that the claim also was barred by the equitable defence of laches and acquiescence.[95]

58. The trial judge nevertheless proceeded to evaluate the substance of the claim. He first assessed and rejected the appellants' contention that the result of the discussions between the Red River delegates and Macdonald and Cartier was a treaty, concluding that the result was not a treaty or agreement but the *Manitoba Act, 1870*, an Act of Parliament which is recognized as a constitutional instrument.[96]

59. In interpreting the *Manitoba Act*, the trial judge reviewed the applicable principles of constitutional interpretation, considering both the requirement to adopt a generous and purposive approach and the need to remain rooted in the language of the provision so as not to overshoot its purpose.[97]

60. Applying these principles, and having regard to the historical context, the trial judge considered the purpose and import of ss. 31 and 32 of the *Manitoba Act*. First, he found that ss. 31 and 32 were not intended to be minority rights provisions. Section 31 was intended to provide land grants, to be given on an individual basis, for the purpose of recognizing the role of the Métis in the Settlement both past and present. Section 32 was intended to provide a land grant to individuals who were landholders within the Settlement at the time of the transfer. He further found that there was no evidence to support any suggestion that either section was intended to create a continuing obligation. As well, he said, "the evidence does not support the existence of any purpose or intent on the part of Parliament to create or establish … a Métis enclave or land base".[98]

61. Continuing his analysis, the trial judge considered the status of the Métis in the Red River Settlement on July 15, 1870 and the legal principles governing the identification of a fiduciary

[94] MBQB Reasons, paras 408-448, 1208, 1213, esp. paras 445-447, AR vol I pp 142-157, AR vol II pp 197, 198.
[95] MBQB Reasons, paras 449-460, AR vol I pp 157-164.
[96] MBQB Reasons, paras 461-510, AR vol I pp 164-178.
[97] MBQB Reasons, paras 511-518, AR vol I pp 178-181, citing *inter alia*, *Reference re Manitoba Language Rights*, [1985] 1 SCR 721 at 752 and *R v Blais*, 2003 SCC 44, [2003] 2 SCR 236 at paras 16-18.
[98] MBQB Reasons, paras 534-550, 558, esp. paras 538, 544-546, AR vol I pp 189-192.

relationship. He concluded that s. 31 of the *Act* did not give rise to any Crown obligations of a fiduciary or trust-like nature.[99] He reached the same conclusion with respect to s. 32.[100]

62. The trial judge next assessed the constitutional validity of the provincial and federal enactments impugned by the appellants. After conducting a pith and substance analysis, he found that the impugned Manitoba statutes were a valid exercise of provincial powers under s. 92(13) [property and civil rights] or s. 92(14) [administration of justice] of the *Constitution Act, 1867*. He further found that, with the exception of two enactments (the deficiencies of which were remedied soon after they were passed), none of the impugned federal enactments were contrary to ss. 31 or 32 of the *Manitoba Act*. Moreover, there was no functional inconsistency between the federal enactments and the provincial legislation.[101]

63. Finally, the trial judge considered whether the public-law obligations arising under ss. 31 and 32 of the *Manitoba Act* were fulfilled. With respect to s. 31, he reiterated that its purpose was not to create a Métis land base.[102] He noted that there was evidence that Ritchot and Taché wanted the individual land grants to be entailed for some period, but that it was clear from the evidence that the Métis-dominated Manitoba Legislature and the people on the ground did not share that desire. On the evidence, he found that Canada's decision to not impose conditions of settlement was well-founded.[103]

64. The trial judge then engaged in a detailed review of the evidence in order to assess each of the appellants' more specific complaints concerning the implementation of s. 31. On the basis of the evidence, the trial judge concluded:

a. With respect to the selection of land, the evidence overall demonstrated Canada's willingness to accommodate the wishes of the parishes, and there was little, if any, evidence of complaint from the people at the time relative to the selection of the lands in question;[104]

[99] MBQB Reasons, paras 557- 661, esp. 561, 633, 661, AR vol I pp 194-200, AR vol II pp 1-35.
[100] MBQB Reasons, paras 562- 686, esp. 686, AR vol II pp 35-41.
[101] MBQB Reasons, paras 687-907, AR vol II pp 42-111.
[102] MBQB Reasons, paras 927-929, 946, AR vol II pp 117-120, 125.
[103] MBQB Reasons, paras 937-941, AR vol II pp 123-124.
[104] MBQB Reasons, paras 961-1000, esp. 1000, AR vol II pp 129-139.

b. With respect to the allotment of land, random allotment on a parish-by-parish basis was fair to all recipients and, there was little, if any, evidence of complaint about random selection from the people affected at the time. The *Act* clearly did not provide for or require allotment by family blocks, nor were family blocks a part of any of the discussions leading up to the *Act*. The difficulty in determining the size of the individual grants was a result of the fact that there was a finite amount of land to be granted and each recipient was to receive an equal share, so the target was a moving target. In the end, more than 1,400,000 acres was granted and 993 individuals remained entitled. These 993 grantees received scrip that gave them the right to select land. Section 33 of the *Act* gave Canada the authority to proceed in this way, since it authorized the Governor in Council to "settle and appoint the mode and form of Grants of Land from the Crown" and provided that any order in council made for that purpose was to have the same force and effect as if it were a portion of the *Act*. Again, the trial judge concluded that the evidence disclosed little, if any, contemporaneous complaint about the grant of supplementary scrip in lieu of land;[105]

c. With respect to sales before patent, Canada retained ownership of the land until patents were issued and did not issue patents in the name of assignees. However, beneficial interests in land were sold, for a variety of individual reasons, before patents were issued. The trial judge noted that while some sales were made to speculators and for improvident prices, there was also considerable evidence of sales at fair market prices;[106]

d. With respect to delay in implementing the land-grant scheme, the trial judge noted that while the evidence offered a variety of reasons for delay, the assessment of the evidence is difficult because the events occurred so long ago. He noted that s. 31 itself did not prescribe a time limit. Ultimately, the evidence showed that patents were issued to children within their respective parishes and largely concentrated around what had been the Settlement Belt. There were some sales at low prices, but also some at market value and at a time when the market for land sales was high.

[105] MBQB Reasons, paras 1001-1031, AR vol II pp 140-148.
[106] MBQB Reasons, paras 1032-1051, 1057, AR vol II pp 148-154, 156.

> Some Métis sold their land but many others kept their land and acquired more. The Métis, who were full citizens of Manitoba at the time, made individual choices and the trial judge concluded that the circumstances did not give rise to any basis for imposing any liability upon Canada for the results of those choices.[107]

65. The trial judge conducted a similarly detailed assessment of the appellants' complaints with respect to s. 32 and concluded that the Crown did not err in its implementation of this section.[108] In reaching this conclusion, he also made the following findings:

a. The purpose of s. 32 had nothing to do with the Aboriginality of the Métis. Rather, it was clearly stated in its opening words, "[f]or the quieting of titles, and assuring to the settlers in the Province the peaceable possession of the lands now held by them …";[109]

b. He rejected the appellants' argument that s. 32 was implemented in a manner contrary to the representations and assurances of the Ministers during the negotiations pre-dating the *Act*. As with section 31, he found that no agreement had been reached and no fiduciary obligation assumed;[110]

c. Noting that the appellants advanced no claim under subsections (1) and (2), except for delay, the bulk of his analysis focused on Canada's implementation of the remaining subsections. As for subsections (3) and (4), he agreed with the parties that the only difference between the two provisions was the status of the lands at the transfer of administration and control. While Indian title had been extinguished over the lands referenced in subsection (3) by the Selkirk Treaty, neither the HBC nor Canada could confirm title over lands referenced in subsection (4) until Indian title was similarly extinguished. Parliament clearly recognized that this would be accomplished in due

[107] MBQB Reasons, paras 1052-1058, AR vol II pp 154-157.
[108] MBQB Reasons, paras 1059-1188, AR vol II pp 157-193.
[109] MBQB Reasons, paras 1157, 1170, AR vol II pp 185-185, 188.
[110] MBQB Reasons, paras 1167-1169, AR vol II p 188.

course, and therefore provided for implementation in the usual way, by regulations of the Governor in Council;[111]

d. Canada was entitled to require some degree of occupation in order to establish peaceable possession under subsections (3) and (4), even if that meant showing "really valuable improvements", as required by direction of the Governor in Council beginning in about October 1877. This was well within the broad discretion given to the Crown, which was not legally bound by what had been the custom and usage of the country prior to the *Act*;[112]

e. Further, many of the staked claims arose between passage of the *Act* and July 15, 1870 when the transfer of administration and control was effected. The manner in which Canada dealt with and ultimately disposed of this category of claims was again a matter within the discretion of the Governor in Council;[113]

f. With respect to the rights of hay and common under subsection 32(5), the trial judge found on the evidence presented that the hay privilege did not uniformly obtain throughout the Settlement, and only attached to lots within the inner parishes. In any event, he found that Canada's ultimate mode of ascertaining and adjusting those rights by grants of land or scrip was fully within the Crown's discretion under the subsection as well as s. 33 of the *Act*;[114]

g. Finally, with respect to delay, he recognized that implementation took a considerable amount of time, but felt it would be dangerous to pass judgment on that issue so late in the day, and without the benefit of an explanation from those on the ground at the time. He recognized that the documents tell a story, but not a complete story. Noting

[111] MBQB Reasons, paras 1158-1164, AR vol II pp 186-187.
[112] MBQB Reasons, paras 1172-1179, AR vol II pp 189-191. In any event, the trial judge made an earlier finding of fact that the Council of Assiniboia also required occupation in order to recognize a claim to land outside the Selkirk Treaty areas: MBQB Reasons, para 288, AR vol I p 99.
[113] MBQB Reasons, paras 1180-1182, AR vol II pp 191-192.
[114] MBQB Reasons, paras 1183-1186, AR vol II pp 192-193.

that the bureaucracy was much smaller in those days, and technology lacking, he found it inappropriate to pass judgment on matters that arose 125 years ago.[115]

C. The Manitoba Court of Appeal

66. In a unanimous decision by a panel of 5 judges, the Court of Appeal dismissed the appellants' appeal. The Court of Appeal largely adopted the trial judge's findings of fact, holding that, with very few exceptions, "there was evidence, in many instances overwhelming evidence, to support the trial judge's conclusions with respect to the context and purpose of s. 31 of the *Act*, as well as the inferences that he drew from them."[116] The Court of Appeal also largely adopted the trial judge's legal assessment and conclusions. Two distinctions are worthy of note.

67. First, with respect to the appellants' challenge to the *vires* of spent and repealed provincial legislation, the Court of Appeal applied the doctrine of mootness, which was not considered by the trial judge. After finding that the challenge to the impugned legislation was moot, the Court of Appeal declined to exercise its discretion to address the constitutional issue, stating that in its view the appellants were essentially seeking a private reference and it would not be in keeping with the court's proper role to decide the issue.[117] As to the claim of breach of fiduciary duty, the Court of Appeal confirmed the trial judge's conclusion that the claim was statute-barred.[118]

68. Notwithstanding its conclusion that the proceedings were barred, the Court of Appeal considered it desirable to address the other issues raised by the claim (apart from the constitutional question) because of their importance and because extensive submissions had been made both at trial and before the Court of Appeal. In the view of the Court of Appeal it was "in the interests of justice that the court, to the extent that we are able to do so, provide our opinion with respect to these issues."[119]

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[115] MBQB Reasons, paras 1187-1188, AR vol II p 193.
[116] MBCA Reasons, para 238, AR vol III pp 76-77.
[117] MBCA Reasons, paras 350-375, AR vol III pp 142-151.
[118] MBCA Reasons, paras 269-307, AR vol III pp 108-123.
[119] MBCA Reasons, para 376, 381, AR vol III pp 152, 154.

69. In assessing the substance of the appellants' fiduciary claims with respect to s. 31, unlike the trial judge, the Court of Appeal found it unnecessary to decide whether there was a sufficient cognizable interest over which Canada had discretionary control to ground a fiduciary duty.[120] However, the Court of Appeal ultimately upheld the trial judge's conclusion that the appellants failed to prove any breach of duty.[121] With respect to s. 32, the Court of Appeal agreed that there was no fiduciary duty and no breach of the requirements of the *Manitoba Act*.[122] Consequently, the appeal was dismissed with costs.

[120] MBCA Reasons, paras 376-509, esp. 509, 510-534, AR vol III pp 152-200, AR vol IV pp 1-7.
[121] MBCA Reasons, paras 562-668, AR vol IV pp 17-47.
[122] MBCA Reasons, paras 669-737, AR vol IV pp 47-70.

PART II - RESPONDENT'S POSITION ON QUESTIONS IN ISSUE

70. Canada says the following with respect to the issues raised by the appellants:

a. **Limitations:** all of the appellants' fiduciary-duty claims are barred by limitations and laches, and consideration of the merits of these claims is unnecessary and unwarranted;

b. **Mootness:** the appellants' claims in relation to the validity of spent or repealed legislation are moot and no grounds for deciding these claims have been established;

c. **Fiduciary duty and minority protection:** if it is necessary to consider these issues, the appellants have not demonstrated any basis for concluding that a fiduciary obligation was imposed upon the Crown by ss. 31 and 32 of the *Manitoba Act*, or that these sections gave rise to rights and obligations beyond those which they expressly provided. In any event, under s. 31, consideration of the question of Aboriginal title as it may apply to the Métis is unnecessary;

d. **Honour of the Crown:** the honour of the Crown did not give rise to substantive obligations to implement ss. 31 and 32 of the *Manitoba Act* in a particular manner;

e. **Provincial legislation:** if it is necessary to consider this issue, the provincial legislation impugned by the appellants was *intra vires* and operative;

f. **Implementation:** the provisions of ss. 31 and 32 of the *Manitoba Act* were implemented in a manner that was consistent with the purposes of the *Act* and within the discretion that the *Act* afforded to the Governor in Council;

g. **Standing:** the Manitoba Métis Federation Inc. does not have standing in this action.

PART III - ARGUMENT

I. APPELLANTS' FIDUCIARY CLAIMS ARE BARRED BY LIMITATIONS AND LACHES

71. The appellants' fiduciary claims are barred by limitations and laches. The appellants' claims in relation to the validity of spent or repealed legislation are moot. In seeking declaratory relief, the appellants seek to achieve indirectly what they cannot achieve directly. The entire appeal should be dismissed on these bases.

72. Upon concluding that a claim for relief is barred by a statutory or equitable limitation, a court should give careful consideration to the circumstances before proceeding to consider the substantive issues and provide what amounts to an advisory opinion. In the rare situation where a court is called upon to consider whether rendering an opinion is appropriate notwithstanding a statutory or equitable bar, the purposes underpinning limitations statutes indicate that fairness to the defendant is a critical consideration. The appropriate use of judicial and party resources and the proper role of the court are additional relevant criteria. Here, no principled basis has been identified on which the Court should proceed to consider the merits of the fiduciary claims.

A. The Fiduciary Claims are Statute-barred

73. The appellants' claims alleging breaches of fiduciary duties in respect of ss. 31 and 32 of the *Manitoba Act* are statute-barred. The events relevant to the appellants' claims occurred between 1869 and, at the very latest, 1890.[123] The Red River residents of the time and their leaders knew their rights under ss. 31 and 32 of the *Manitoba Act*, knew how the sections were being implemented, and were consulted with at many junctures during the relevant time period. They had also demonstrated their willingness to litigate in respect of other rights under the *Act*.[124] No litigation ensued with respect to ss. 31 or 32 of the *Act* until April 15, 1981 – over 90 years later – when the appellants' action was commenced. In Manitoba, a 6-year statutory limitation period has been continuously applicable to actions based upon any equitable ground of relief since the Legislature enacted Manitoba's first limitations legislation in 1931.[125] *The*

[123] MBQB Reasons, para 408, AR vol I p 142; MBCA Reasons, para 270, AR vol III p 108
[124] MBQB Reasons, paras 445-46, AR vol I p 152; MBCA Reasons, para 293, AR vol III pp 118-19
[125] *The Limitation of Actions Act*, SM 1931, c 30, s 3(1)(i); *The Limitation of Actions Act*, RSM 1940, c 121, s 3(1)(h); *The Limitation of Actions Act*, RSM 1970, c L150, s 3(1)(i); MBCA Reasons, para 287, AR vol III p 116.

Limitation of Actions Act applies to actions against Canada by virtue of s. 32 of the *Crown Liability and Proceedings Act*.[126]

74. The fiduciary claims in this action are patently statute-barred unless the applicable limitation period can be extended on the basis of discoverability principles. After detailed consideration of the evidence and thorough analysis of the legal issues, the trial judge concluded that the principle of discoverability did not justify an extension and that all aspects of the appellants' claims alleging breach of fiduciary duties in respect of ss. 31 and 32 of the *Manitoba Act* were statute-barred.[127] The MBCA unanimously agreed.[128]

75. The appellants do not take issue with the factual findings or the interpretation and manner in which *The Limitation of Actions Act* was applied by the Courts below. Rather, they broadly assert that because they seek declarations with respect to "constitutionally-mandated fiduciary dut[ies]", their fiduciary claims are not subject to statutory limitations.[129] This assertion is based on an overly expansive and unsustainable interpretation of this Court's decision in *Ravndahl v. Saskatchewan*.[130] There are no sound policy reasons for excluding the appellants' fiduciary claims from the normal application of *The Limitation of Actions Act*.

76. The constitutional question stated by this Court in *Ravndahl* asked whether the relevant limitation act was "constitutionally inapplicable" to the appellant's claims for personal relief in an action alleging that certain legislation was of no force or effect to the extent that it violated the *Charter*.[131] The Court answered the question in the negative and confirmed that the appellant's claims for personal relief were statute-barred.[132] *Ravndahl* was an application and extension of this Court's decision in *Kingstreet Investments Ltd v. New Brunswick (Finance)*[133] where, in a non-*Charter* context, the Court held that limitations are applicable to personal remedies that flow from the striking down of an unconstitutional statute.[134] This Court's decisions in *Ravndahl* and

[126] RSC 1985, c C-50; first enacted in the *Crown Liability Act*, SC 1952-53, c 30, s. 19 in a slightly different form.
[127] MBQB Reasons, paras 408-448, esp 447, 448, AR vol I pp 142-157.
[128] MBCA Reasons, paras 283-293, AR vol III pp 117-115.
[129] Appellants' Factum, paras 285-289.
[130] *Ravndahl v Saskatchewan*, 2009 SCC 7, [2009] 1 SCR 181.
[131] *Ibid* at para 2.
[132] *Ibid* at paras 17, 28.
[133] *Kingstreet Investments Ltd v New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 SCR 3.
[134] *Ibid* at paras 59-60.

Kingstreet demonstrate that there is no broad constitutional exception to the applicability of statutory limitation periods.

77. It is well settled that limitation periods cannot apply to bar the availability of a declaration of invalidity under ss. 52(1) of the *Constitution Act, 1982*. As this Court stated in *Air Canada v. Attorney General of British Columbia*,[135] it is a "well established principle that neither Parliament nor a legislature can preclude a determination of the constitutional validity of legislation." This is because such actions challenge the constitutional validity of *laws*.[136] As long as constitutionally suspect laws remain in force, they cannot be rendered immune from constitutional challenge by the effluxion of time.

78. In this case, however, the appellants' fiduciary claims largely impugn government *actions*. They take issue with the manner in which the discretion conferred by ss. 31 and 32 of the *Manitoba Act* was exercised. Although the appellants' focus is on government action, they seek to invoke the "constitutional exception" by saying that the declarations they seek are not personal remedies. The appellants' proposition should be rejected. There is no reason to depart from the normal application of limitations law to their fiduciary claims. Indeed, there are good reasons for refusing to do so.

79. First, the appellants' effort to characterize their fiduciary claims as being constitutionally entrenched, and thereby somehow shielded from limitations, is unsustainable. Assuming that there can be any basis from which a fiduciary duty could be found to have arisen, it cannot be from ss. 31 and 32 of the *Manitoba Act*. The constitutional obligation was to grant 1.4 million acres to be divided among the individual children of Métis heads of families (a figure which was ultimately exceeded) and to confirm existing land titles and occupancies held by individual settlers. All of the constitutional requirements were fulfilled. The alleged fiduciary duties with respect to how and when the grants were to be made would have had to arise from undertakings to implement these provisions in a certain manner. Any such undertakings would have been extraneous to the obligations arising from the *Act* itself. These fiduciary claims lack any constitutional dimension and are subject to statutory limitations in the normal course.

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[135] *Air Canada v British Columbia (AG)*, [1986] 2 SCR 539 at 543.
[136] *R v Ferguson*, 2008 SCC 6, [2008] 1 SCR 96 at paras 35, 59, 61.

80. Second, even assuming that constitutionally mandated fiduciary duties could be established, *The Limitation of Actions Act* would remain applicable. The legal policy reasons that underlie statutes of limitations are well-known, well-accepted and fully applicable to the appellants' fiduciary claim. As this Court recently reiterated in *Canada (Attorney General) v. Lameman*,[137]

> The policy behind limitation periods is to strike a balance between protecting the defendant's entitlement, after a time, to organize his affairs without fearing a suit, and treating the plaintiff fairly with regard to his circumstances. This policy applies as much to Aboriginal claims as to other claims, as stated a para. 121 of *Wewaykum*:
>
> > Witnesses are no longer available, historical documents are lost and difficult to contextualize, and expectations of fair practices change. Evolving standards of conduct and new standards of liability eventually make it unfair to judge actions of the past by the standards of today.

81. The appellants' fiduciary claims "differ in kind and in quality"[138] from claims for a declaration of constitutional invalidity. As noted above, the appellants' fiduciary claims impugn the actions of government agents. The whole claim is with respect to long-past and completed transactions. As in *Lameman*, "the facts are shrouded in the mists of time."[139] The appellants' claims are exactly the type of case to which limitations are appropriately applied.

82. Although the appellants do not seek a personal remedy, this Court's conclusion in *Ravndahl* that limitations *apply* to claims for a personal remedy is not support for the converse proposition that limitations do not apply in the absence of a claim for a personal remedy. Allowing claimants to frame proceedings as a claim for a declaration in order to obtain a remedy in respect of matters that would otherwise be barred by a limitation period subverts the principles that support the existence of limitations. Accepting the appellants' position would open the door to the use of declaratory relief as a means to circumvent limitation periods; to seek to achieve indirectly what cannot be achieved directly.

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[137] *Canada (Attorney General) v Lameman*, 2008 SCC 14, [2008] 1 SCR 372 at para 13 [*Lameman*].
[138] *Canadian Union of Public Employees v Saskatchewan School Boards Assn.*, 2009 SKQB 332 at paras 41, 49.
[139] *Lameman*, *supra* note 137 at para 2; MBQB Reasons, paras 19-25, 427-430, 458(1) and 1028, AR vol I pp 11-15, 149-150, 161-162, vol II p 147; MBCA Reasons, paras 15-18, AR vol III pp 26-27.

83. Concerning the appellants' assertion that it is the Court's duty to rule on constitutional matters,[140] a reasonably long limitation period, such as the six-year period at issue in *Kingstreet*, *Ravndahl* and here, is sufficient to satisfy the requirement that the opportunity for constitutional challenge needs to be available.[141]

84. Finally, no present rights are directly engaged by this litigation. Instead, the appellants' explicitly-stated purpose is to obtain declarations that would assist them in potential future land claim negotiations.[142] After thorough consideration, the trial judge concluded that this was not an appropriate case in which to exercise the court's discretion to grant declaratory relief.[143] If any exception from the normal application of statutory limitations is to be considered, it should only be in a case in which the declarations sought are with respect to present, existing rights, and would resolve a live dispute between the parties.[144] This is not such a case.

B. The Fiduciary Claims are Barred by Laches and Acquiescence

85. The appellants' claims for declarations of breach of fiduciary duties invoke the principles of equity.[145] "Equity has developed a number of defences that are available to a defendant facing an equitable claim",[146] which may apply even if a claim is not barred by statute. If this Court concludes that the appellants' fiduciary claims are not statute-barred, they are still precluded by laches and acquiescence.[147]

86. The trial judge applied this Court's settled jurisprudence to the particular facts of this case and explicitly considered the question of "justice between the parties."[148] He found that there was "grossly unreasonable delay" in commencing an action in respect of the benefits provided under ss. 31 and 32 of the *Manitoba Act* and that the delay "resulted in circumstances that make the prosecution of this action unreasonable." He concluded that the equitable defences

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[140] Appellants' Factum, paras 285, 289.
[141] Dianne Pothier, "Not So Simple After All: A comment on *Ravndahl v. Saskatchewan*" (2009-2010) 41 Ottawa LRev 139-160 at para 17.
[142] MBQB Reasons, para 1, AR vol I p 6; MBCA Reasons, para 26, AR vol III pp 99-100.
[143] MBQB Reasons, paras 1189-1197, AR vol II pp 390-391; MBCA Reasons, paras 246-250, AR vol III pp 99-101.
[144] *Solosky v The Queen*, [1980] 1 SCR 821 at 830-833; *Cheslatta Carrier Nation v British Columbia*, 2000 BCCA 539, 193 DLR (4th) 344 at paras 11, 16; Manitoba Law Reform Commission, Report #123, *Limitations*, July 2010, pp 31-35; Lazar Sarna, *The Law of Declaratory Judgments*, 3d ed (Toronto: Thomson Canada Limited, 2007) at 2.
[145] *Hongkong Bank of Canada v Wheeler Holdings Ltd*, [1993] 1 SCR 167 at 191-192.
[146] *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245 at para 108 [*Wewaykum*].
[147] *Ibid*; *The Limitation of Actions Act*, CCSM c L150, s 59; *M(K)v M(H)*, [1992] 3 SCR 6 at 70.
[148] *M(K)v M(H)*, *ibid* at 77-78.

of laches and acquiescence were applicable and properly afforded a defence against the appellants' claims.[149] In regard to the appellants' fiduciary claims, there is no basis on which this Court should disturb the trial decision.

87. The appellants' assertion that laches does not apply to their fiduciary claims against Canada because, in their view, this Court's decision in *Ontario Hydro v. Ontario (Labour Relations Board)*[150] applies,[151] was considered and rejected by the MBCA.[152] As noted above, the appellants' claim is focused on long-past government actions. The constitutional division of powers issue in *Ontario Hydro* was entirely different and has no bearing on the appellants' fiduciary claims.

C. Consideration of the Merits of the Claim is Unnecessary and Unwarranted

88. Assuming that the appellants' fiduciary claims are barred by limitations or laches, Canada submits that this Court should decline to consider the substance of those claims. In aid of this position, Canada relies on three mutually supportive values: fairness, the appropriate use of judicial and party resources, and the proper role of the courts.

89. Opining on the substance of the appellants' fiduciary claims risks defeating the sound policy reasons behind limitation periods, which would be fundamentally unfair. Proceeding to consider the claims forces the defendant, in this case the Crown, to respond to allegations made on the basis of a documentary record alone, without witnesses to the events who could explain the facts or fill in the gaps. Assessing this century-old documentary record against modern legal standards compounds the potential for unfairness.

90. In general, the degree of unfairness may vary depending on the nature of the claim and on what a court intends to say about the substance of the barred claim. Where, as here, the claim is highly dependent on findings of fact with respect to events long in the past, the potential for unfairness is heightened.

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[149] MBQB Reasons, paras 449-460, esp. paras 454, 458, 460, AR vol I pp 157-164; *M(K) v M(H)*, *ibid* at 76-79; *Wewaykum*, *supra* note 146 at para 111.
[150] *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327 [*Ontario Hydro*].
[151] Appellants' Factum, paras 291-292.
[152] MBCA Reasons, para 348, AR vol III p 142.

91. Another consideration is the appropriate use of judicial and party resources. Claims barred by the operation of *The Limitation of Actions Act* are doomed to fail.[153] Proceeding to consider those claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system.[154] Even following a full trial, judicial economy may favour restraint.[155] "This Court has said on numerous occasions that it should not decide issues of law that are not necessary to a resolution of an appeal."[156]

92. Under the third consideration, a court should ask whether it is appropriate in the circumstances to provide what amounts to an advisory opinion. The same juridical value was identified by this Court in *Borowski v. Canada (Attorney General)* as the third criterion for determining when to decide a moot issue. It calls upon the Court to "be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch."[157]

93. Absent any existing rights at stake, claims such as this one engage courts and judges in political controversies, resulting in what Dr. Ran Hirschl describes as the "judicialization of politics."[158] In his view, questions such as:

> … a polity's coming to terms with its often less than admirable past, reflect primarily deep moral or political dilemmas, not judicial ones. As such, they ought – at least as a matter of principle – to be contemplated and decided by the populace itself, through its elected and accountable representatives. Adjudicating such matters is an inherently and substantively political exercise that extends beyond the application of rights provisions or basic procedural justice norms to various public policy realms.[159]

94. On the basis of these factors, Canada submits that this Court should refrain from providing an advisory opinion on the appellants' fiduciary claim. The appellants are seeking a

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[153] *Lameman*, *supra* note 137 at para 12.
[154] *Lameman*, *supra* note 137 at para 10.
[155] The burden here included over 300 pages of obiter reasons from the trial judge, a lengthy appeal hearing due to consideration of all of the issues, and 110 pages of obiter reasons from the MBCA.
[156] *Phillips v Nova Scotia*, [1995] 2 SCR 97 at paras 6-13; *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3 at paras 300-302.
[157] *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 362 [*Borowski*].
[158] Ran Hirschl, "The New Constitutionalism and the Judicialization of Pure Politics Worldwide" (2006) 75 No 2 *Fordham Law Review* 721.
[159] *Ibid* at 727-728.

legal assessment of events far in the past, and in the absence of any present rights in issue. In effect, they are asking this Court to function as a Royal Commission. They have openly expressed the objective of using this litigation for the extra-judicial purpose of obtaining a platform for negotiation. Allowing this risks intruding on the right of the executive to commission an inquiry or to freely negotiate resolutions of historical grievances unfettered by judicial opinion provided in the face of a statutory bar. A related concern is the extent to which consideration of the fiduciary claims in this case may signal the Court's willingness to do so in other cases despite an applicable limitations period, with the undesirable effect of encouraging litigation before negotiation.

II. REMAINDER OF APPELLANTS' CLAIMS ARE MOOT

95. The remainder of the appellants' claims attempt to impugn the validity of spent or repealed legislation, and thus are moot. These claims, as framed and argued at trial, originally (and unsuccessfully) targeted both federal and provincial legislation. On appeal, the appellants no longer impugned the validity of federal legislation and they have not done so in this Court. With respect to the impugned provincial legislation, the Manitoba Court of Appeal concluded that these claims were moot and that it should not exercise its discretion to decide the moot issues.[160] This provided a complete answer to the appellants' claims against the province. In this regard, Canada simply states that the appellants have failed to identify any basis on which this Court should interfere with the Court of Appeal's exercise of discretion.

96. Contrary to the appellants' assertion, this issue is not *res judicata* as a result of this Court's decision in *Dumont*.[161] The issue in *Dumont* was whether Canada's motion to strike should be granted. This Court determined that it was not plain and obvious that the action as it was then framed would fail, and that the action should therefore proceed to trial. While this Court stated that a court may exercise its discretion to grant declaratory relief in aid of extra-judicial claims in appropriate cases, it did not opine on whether this was such a case.

97. Although the appellants no longer impugn federal legislation, to the extent that they advance a modification of the third *Borowski* criterion relevant to a Court's consideration of

[160] MBCA Reasons, para 368, AR vol III p 150.
[161] *Dumont*, *supra* note 84.

whether to hear a moot appeal, the appellants' articulation of the test should be rejected. Specifically, the appellants express the third criterion as whether "an important public issue will be resolved."[162] In *Borowski*, however, this Court was explicit: "the mere presence of an issue of national importance in an appeal which is otherwise moot is insufficient."[163] As described above at paragraph 92, the third *Borowski* criterion is the need for the Court to be sensitive to its role as the adjudicative branch in our political framework. In *Doucet-Boudreau v. Nova Scotia*,[164] this Court affirmed and applied the *Borowski* criteria. The appellants have not provided any rationale for a revision of these criteria, which Canada says should be maintained.

III. NO FIDUCIARY DUTY OR BREACH HAS BEEN DEMONSTRATED

98. The appellants have not, in any event, demonstrated a basis for concluding that a fiduciary obligation was imposed upon the Crown by ss. 31 and 32 of the *Manitoba Act* or otherwise. The *Act* was an instrument of public law, and the land provisions in ss. 31 and 32 provided a means for achieving its public purposes: establishing a new province and resolving the interrelation of a multitude of public and private interests. The *Act* provided for land grants to individual Métis residents, but Canada did not undertake to give exclusive preference to the interests of Métis grantees or to administer land on their behalf. The administration and implementation of the land grant scheme conformed with the requirements of the *Manitoba Act*.

A. Purposive Interpretation Must be Realistic

99. The appellants urge this Court to apply principles of constitutional interpretation relating to minorities and Aboriginal peoples. Although the courts below found that the Red River Métis were distinct from Indians, one of these principles is that statutes relating to Indians are to be liberally construed, and doubtful expressions in such statutes resolved in favour of the Indians.[165] In the absence of ambiguity, however, the plain language of the statute must prevail; even a purposive interpretation must respect the meaning of the words chosen by Parliament.[166]

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[162] Appellants' Factum, para 63.
[163] *Borowski*, *supra* note 157 at 362.
[164] *Doucet-Boudreau v Nova Scotia*, 2003 SCC 62, [2003] 3 SCR 3 at para 18.
[165] *Nowegijick v The Queen*, [1983] 1 SCR 29 at 36.
[166] *St Mary's Indian Band v Cranbrook (City)*, [1997] 2 SCR 678 at para 29; *Bastien Estate v. Canada*, 2011 SCC 38 at paras 25, 27.

100. Moreover, as exemplified in this Court's jurisprudence regarding treaty interpretation, any purposive interpretation of a legal instrument must be realistic, and reconcile the text of the instrument with the intentions of its framers.[167] "The bottom line is the Court's obligation to 'choose from the various possible interpretations of the common intention [at the time the treaty was made] the one which best reconciles the [First Nation] interests and those of the Crown.'"[168] To imply a promise in the face of Parliament's expression of the opposite intention would be to engage in the kind of "results-oriented" reasoning that this Court has described as inappropriate.[169]

101. Even assuming that these principles apply with full force to the Métis and in the present context, there is nothing in the language of s. 31 to support the existence of an undertaking by the Crown to hold or manage land for the benefit of the Métis, or to preclude alienation. The purpose of the land grant provided for by s. 31 was to give each of the descendants of the Métis settlers in the new province a parcel of land, leaving the recipient free to choose whether to settle, exchange or sell. To preclude sales by individuals who chose not to settle would have ignored the existing history of private Métis land ownership and the wishes of the Métis themselves, and would have been at odds with the language of s. 31, which simply provided that conditions of settlement could be established. Where Parliament intended to require settlement it made statutory land grants subject to explicit residence and cultivation obligations.[170] No such conditions were required by s. 31. The appellants are asking the Court to invent new obligations entirely foreign to the original purpose of the provision at issue. This is inappropriate; the analysis must be anchored in the historical context and in the actual language of the *Act*.[171]

B. The Issue of Aboriginal Title Need Not be Considered

102. There is no need to delve into the complex and untested question of Aboriginal title as it applies to the Métis of the Red River Settlement, or to Métis people generally, to determine the issues in this appeal. Rather, if the Court finds it necessary to decide the merits of the appellants'

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[167] *R v Sioui*, [1990] 1 SCR 1025 at 1069; *R. v. Marshall*, [1999] 3 SCR 456.
[168] *R v Marshall*, *ibid* at para 14, as quoted in *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 at para 28 [*Mikisew*].
[169] *Gladstone v Canada (Attorney General)*, 2005 SCC 21, [2005] 1 SCR 325 at para 24 [*Gladstone*].
[170] For example, *An Act respecting the Public Lands of the Dominion*, SC 1872, c23, ss 33(10), 33(11), 33(15).
[171] *R. v Blais*, *supra* note 97 at para 40; *British Columbia (Attorney General) v Canada (Attorney General): An Act Respecting the Vancouver Island Railway (Re)*, [1994] 2 SCR 41 at 93-94.

claim, this case falls to be decided on the wording of s. 31 of the *Manitoba Act*, the findings of fact relative to the Métis of the Red River Settlement, and fiduciary law as it applies to those findings of fact and the statutory provisions. Aboriginal title as it may apply in the Métis context is properly left for a case where it squarely arises on a proper evidentiary record and requires a decision. This is not that case.

103. The appellants rely on the opening words of s. 31 of the *Manitoba Act*, "it is expedient, towards the extinguishment of the Indian Title to the lands in the Province," in support of their fiduciary duty claim, but they do not specifically assert that the Métis of the Red River Settlement have Aboriginal title, and certainly do not seek relief in regard to Aboriginal title.[172] They rely solely on the statutory language as a short-cut to assert that the Métis once had an interest in land sufficient to support a cognizable Aboriginal interest that, in turn, gave rise to a fiduciary duty. That argument will be dealt with more fully below. For now, that argument is not sufficient to involve this Court in the challenge of determining whether the Métis once held an Aboriginal interest to the lands in the Settlement that would meet the tests in *Delgamuukw v. British Columbia*[173] and in *R v. Marshall; R v. Bernard*.[174]

104. Neither the language of s. 31 nor the evidentiary record support the conclusion that land was granted in recognition of a pre-existing Métis right or claim to Aboriginal title. The opening words simply provide context for Parliament's decision to make grants of land to the children of Métis as a class of residents in the area. The generalized statutory language does not relieve the appellants of having to prove Aboriginal title on proper pleadings and evidence, which they have declined to attempt. Moreover, Parliament may refer to and settle a controversy (over Indian title in this case) without conceding or recognizing the validity of a claim.

105. Further, this Court has articulated a test for Aboriginal title.[175] The appellants bear the onus of meeting that test; pertinent evidence about such factors as occupation and exclusivity must be presented. There is none of that here. The evidentiary record and findings of fact at trial clearly established that the Métis of the Red River Settlement did not meet the test for physical

[172] Appellants' Factum, paras 51, 298.
[173] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*].
[174] *R. v Marshall; R. v Bernard*, 2005 SCC 43, [2005] 2 SCR 220 [*Marshall; Bernard*].
[175] *Ibid*.

occupation and exclusivity or effective control, either at the time of sovereignty[176] or under the trial judge's test of "imposition of British control".[177] Instead, the evidence established that a significant Métis presence at the Red River Settlement evolved under British sovereignty and Hudson's Bay Company governance.[178] The Métis did not have prior existence, nor were their patterns of land holding different from Europeans in the Settlement.

106. Moreover, the evidentiary record shows on balance that land was provided to the children of the Métis in order to compensate a large and important class of residents for Canada's retention of the administration and control of public lands in the new province.[179] It was not Parliament's intent to anchor the Métis to the ground in Manitoba, but to facilitate the orderly settlement of Rupert's Land and the North-Western Territory and the construction of the transcontinental railroad. The reference to expediency towards the extinguishment of the Indian title in s. 31 refers to the quieting of claims by Indians, but the Métis of the Red River Settlement derived their Indian ancestry from all over the North-West, particularly the Hudson's Bay area, not from Indians indigenous to Red River.[180] The language of s. 31 does not support a finding of Aboriginal title or a lesser cognizable Aboriginal interest. The language merely signals the objective of clearing any possible claims to any share of Indian title, in order to prepare for governance of the new province. Moreover, the competing ideas of a grant to a Métis collective versus individual grants were discussed before the enactment of s. 31, and s. 31 embodies a clear decision for the latter.[181]

C. Sections 31 and 32 of the *Manitoba Act* are not Minority-Protection Provisions

107. The appellants seek to apply the jurisprudence regarding the language and denominational-school provisions of ss. 22 and 23 of the *Manitoba Act* to the interpretation of ss. 31 and 32. This effort is misplaced. As discussed above, the central purpose of ss. 31 and 32 was to prepare for the organization of a new province by settling questions of title to land and

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[176] *Delgamuukw*, *supra* note 173 at para 142; *Marshall; Bernard*, *supra* note 174 at paras 55-57.
[177] MBQB Reasons, para 577, AR vol II p 3.
[178] Ens, *Settlement and Economy*, pp 1-4, AR vol XXV tab TE 14 pp 90-93; Transcript, April 18, 2006, p 69 line 19-p 77 line 33, AGCR 31-39; MBQB Reasons, paras 28-31, AR vol I pp 16-17.
[179] Appellants' Factum, paras 19, 31; Ritchot's Journal, pp 140-143, AR vol VI tab 1-0005 pp 33-34.
[180] Archibald, December 27, 1870, p 2, AR vol XII tab 1-0548 p 131; Transcript, April 18, 2006, p 76 line 1-p 77 line 14, AGCR pp 38-39.
[181] Ritchot's Journal, pp 141-142, AR vol VI tab 1-0005 pp 33-34; Northcote's Diary, p 97, AR vol IX tab 1-0436 p 167; Minutes of Convention of 40, AR vol VIII tab 1-0386 pp 46-48.

making grants of land to persons already settled in the province. Sections 31 and 32 are not concerned with issues of language, culture or religion.

D. No Fiduciary Duty Arises

108. Not all dealings between the Crown and Aboriginal peoples give rise to fiduciary duties. Where a fiduciary duty arises, it arises from the nature of a particular transaction, not simply from the status of the party involved.[182] Aboriginal ancestry alone is not sufficient to engage fiduciary obligations. It is necessary to identify a sufficiently specific cognizable Aboriginal interest, and an assumption of discretionary control on the part of the Crown in relation to that interest in a way that invokes a responsibility "in the nature of a private law duty."[183]

109. Fiduciary principles are engaged when discretionary control over property that constitutes a cognizable Aboriginal interest is ceded to the Crown to be administered for the exclusive benefit of Aboriginal peoples, or when the Crown undertakes to exercise discretionary control in the management of property for the benefit of Aboriginal peoples.[184] This is not what occurred here. The Métis did not hold land collectively. The *Manitoba Act* did not confer benefits to be held in common, nor did the Crown assume discretionary control over the management and administration of the land. The only interest involved here is a statutory benefit made available to members of a class of individuals (not to the Métis collectively) pursuant to s. 31 of the *Manitoba Act.* Eligibility for benefits, without more, does not constitute an interest capable of attracting a fiduciary duty.[185] The appellants argue that the Métis exchanged Aboriginal rights for statutory entitlements under the *Act*, so that the same principles apply as if the land had been surrendered. However, they have not established that the Métis of Red River had any claim or entitlement to Aboriginal title.[186]

110. Even if it were assumed that prior to July 15, 1870 the Métis had a sufficiently specific cognizable Aboriginal interest less than title, this interest would bear no resemblance to Aboriginal title or reserve land interests: the lands already occupied by Métis residents were not

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[182] *Gladstone*, *supra* note 169 at para 23; *Wewaykum*, *supra* note 146 at para 83.
[183] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at para 18 [*Haida*]; *Wewaykum*, *supra* note 146 at para 85.
[184] *Guerin v The Queen*, [1984] 2 SCR 335 at 385 [*Guerin*]; *Wewaykum*, *supra* note 146 at paras 74, 81, 85.
[185] *Elder Advocates*, *supra* note 3 at paras 51-52; *Hislop v Canada (Attorney General)* (2003), 234 DLR (4th) 465 at para 124 (Ont SCJ); *Gorecki v Canada (Attorney General)* (2006), 265 DLR (4th) 206, at para 6 (Ont CA).
[186] See paras 102-106 above.

set apart for the use and benefit of the Métis as a group in the manner of Indian reserves, and the Métis did not hold land in common; rather, they occupied plots on an individual basis. Before 1870, individual Métis settlers could and did sell the land on which they lived.[187] Moreover, in the representations they made to the government, after some debate, the Métis themselves decided to assert their claims of right on the basis that they were "civilized men" and British subjects, not on the basis that they were an Aboriginal people.[188]

111. In order to give rise to a fiduciary obligation, the interest affected must be a specific private-law interest to which a person has a pre-existing, distinct and complete legal entitlement.[189] The entitlement must not be contingent upon future government action. Section 31 established the broad contours of a statutory scheme for the conveyance of land to eligible individuals, and left the details to be enacted by subsequent legislation. The establishment and administration of such a scheme of statutory benefits engages public-law duties, but it does not create a fiduciary obligation, particularly when the administration of the scheme involves the exercise of legislative authority.[190]

112. The existence of an undertaking to act exclusively in the best interests of the beneficiary with respect to a specific interest is the *sine qua non* of all fiduciary relationships.[191] The existence of a discretionary power to affect the legal or practical interests of another party is a necessary but not sufficient condition for a fiduciary relationship. Such power must be coupled with an undertaking of loyalty to act in the best interests of that other party.

113. There are three features that mark the type of undertaking that will evidence a fiduciary relationship in which the Crown is a party. First, while an undertaking may be express or implied, the existence and character of the undertaking must be informed by norms relevant to the particular relationship.[192] Where it is alleged that the Crown is a fiduciary, an undertaking cannot be implied simply from the implementation of legislative and policy initiatives that have

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[187] MBQB Reasons, paras 590-592, AR vol II p 6; MBCA Reasons paras 27, 33-34, AR vol III pp 29, 31.
[188] MBQB Reasons, para 66, AR vol I p 27 and paras 600-610, AR vol II pp 11-15; MBCA Reasons, para 40, AR vol III p 33 and para 61, AR vol III, p 38; Macdonald, *Report on the Events of the Red River Resistance of 1869-70*, pp 20-21, AR vol XXV, tab TE 16, pp 151-152; Ens, *Prologue to the Red River Resistance: Pre-liminal Politics and the Triumph of Riel*, AR vol XXVIII tab TE 41; Minutes of Convention of 40, AR vol VIII tab 1-0386 pp 46-48.
[189] *Guerin*, *supra* note 184 at 383-384.
[190] *Elder Advocates*, *supra* note 3 at para 62.
[191] *Galambos v Perez*, 2009 SCC 48, [2009] 3 SCR 247 at paras 66, 69, 75-77, 83-84 [*Galambos*].
[192] *Ibid* at para 79.

the potential to affect other parties' interests.[193] This kind of activity encompasses almost all government action, and it should be governed by public law.

114. Second, the undertaking must be directly associated with the identified interest.[194] Undertakings not so connected are more likely to reflect the implementation of public-law initiatives which confer discretionary power. Careful scrutiny of the statute is essential in assessing whether there is a sufficient connection between the undertaking and the interest.[195] The connection between the undertaking and the interest must be such that it is clear that the government has assumed direct control over the specific private interest that is at issue. The mere exercise of governmental legal power to make discretionary decisions affecting individuals is insufficient to ground a fiduciary relationship.

115. Finally, there must be an identifiable subordination of the interests of all others to those of the affected party. The jurisprudence regarding fiduciary relationships emphasizes that the essence of the undertaking must be loyalty. It requires that the fiduciary relinquish self-interest and act exclusively in the interest of the other party. [196]

116. It is only where government has a degree of control over a private interest that is equivalent or analogous to direct administration of that interest on behalf of another party that a fiduciary relationship can be said to arise. The type of control that arises from the ordinary exercise of statutory powers, especially in relation to statutory benefits, is not sufficient.[197] "Otherwise, fiduciary obligations would arise in most day-to-day government functions making general action for the public good difficult or almost impossible."[198]

117. The fact that the government has the legal right to exercise unilateral discretion is insufficient, in itself, to give rise to a fiduciary obligation. Governments very commonly have the legal right to exercise such discretion, and adequate protection for the interests potentially

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[193] *Elder Advocates, supra* note 3 at para 44.
[194] *Guerin, supra* note 184 at 383-384.
[195] *Elder Advocates, supra* note 3 at para 45; *Authorson v Canada (Attorney General)* (2002), 58 OR (3d) 417 at para 73; rev. on other grounds, 2003 SCC 39, [2003] 1 SCR 40.
[196] *Hodgkinson v Simms*, [1994] 3 SCR 355 at para 33; *Galambos, supra* note 191 at paras 66, 76, 80; *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9, [2009] 1 SCR 222 at para 125 [*Ermineskin*]; *Elder Advocates, supra* note 3 at paras 43-44.
[197] *Elder Advocates, supra* note 3 at para 53.
[198] *Ibid*.

affected is furnished by public law, which requires that statutory discretion be exercised lawfully and reasonably, and that decisions fall within a range of possible, acceptable outcomes that are defensible on the facts and the law.[199]

118. No express undertaking to give exclusive preference to the interests of the Métis was given here, nor has any basis been identified for concluding that an undertaking should be implied. The existence of an exclusive duty would be incompatible with the Crown's role in establishing a new province, a role in which the Crown had discretionary power over a wide variety of private and public interests and the responsibility to determine the appropriate weight to be given to each of those interests. In passing the *Manitoba Act*, Parliament was concerned not only with the establishment of a new province, but with preparing for the admission of the whole of Rupert's Land and the North-Western Territory into the Dominion and the settlement of the West.[200]

119. The appellants argue that the mention of "children of the half-breed heads of families" in s. 31 imposes a fiduciary obligation on the Crown to protect the interests of minors. This is misconceived. The word "children" simply identifies the individuals eligible for the grant: the Métis sons and daughters who were not themselves heads of families, as made clear by federal legislation in 1873.[201] This is reinforced by the opening words of s. 31, which describe the land appropriation as being "for the benefit of the families of the half-breed residents" ("*au bénéfice des familles des Métis résidants*"). In any event, there is no general fiduciary obligation for the government to act in the best interests of children.[202] Here, protection for the interests of minors was provided by their parents and by the courts.

120. The appellants also say that the Governor in Council had a fiduciary obligation to exercise the power of disallowance in relation to provincial legislation affecting Métis land grants. However, even if it is assumed that the provincial legislation was *ultra vires*, no such obligation can exist. The exercise of the power of disallowance is entirely reserved to the

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[199] *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47; *Canada (Attorney General) v TeleZone* Inc, 2010 SCC 62 at para 24.
[200] *Manitoba Act, 1870*, preamble, Appellants' Legislation, tab 1 p 1.
[201] MBQB Reasons, para 632, AR vol II pp 20-21; *An Act to remove doubts as to the construction of section 31 of the Act 33 Victoria, chapter 3, and to amend section 108 of the Dominion Lands Act*, SC 1873, c 38, s 1, AR vol XVI tab 1-0875 p 60.
[202] *KLB v British Columbia*, 2003 SCC 51, [2003] 2 SCR 403 at para 40. [*KLB*]

discretion of the Governor in Council and the exercise of that discretion does not give rise to justiciable issues.[203]

121. The "heart of the fiduciary obligation" is a relationship in which a "person who has ceded power trusts the person to whom power is ceded to exercise the power with loyalty and care."[204] Thus, as the Chief Justice has observed, '[t]he traditional focus of breach of fiduciary duty is a breach of trust, with the attendant emphasis on disloyalty and promotion of one's own or others' interests at the expense of the beneficiary's interests."[205] As a result, "[a] claim for breach of fiduciary duty may only be founded on breaches of the specific obligations imposed because the relationship is one characterized as fiduciary."[206]

122. Since the central feature of a fiduciary relationship is the fiduciary's undertaking of loyalty, the resulting obligation is not breached unless there has been a violation of that obligation of loyalty, through some action that puts the fiduciary's self-interest or the interests of another party ahead of the interests of the beneficiary.[207]

123. If this Court were to conclude, however, that a fiduciary duty could be found on the facts of this case, the content of that fiduciary duty would have to be determined with regard to the nature and importance of the interests sought to be protected,[208] as well as the Crown's other, broader obligations.[209] As this Court has observed, "[t]he Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting."[210] Further, any assessment of the Crown's discharge of its fiduciary obligations must be undertaken with due regard for the context of the times – not through a modern lens,[211] and not with the benefit of hindsight.[212] In these circumstances, if the Crown did have an obligation, it was simply an obligation to act in good faith. Here, the trial judge made an explicit finding that there

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[203] *Reference re Powers of Disallowance and Reservation*, [1938] SCR 71 at 72-73, 78, 79, 82, 86, 95-96, 99; *Ontario Hydro*, *supra* note 150 at para 71.
[204] *Blueberry River Indian Band v Canada*, [1995] 4 SCR 344 at 371-372 [*Blueberry River*].
[205] *KLB*, *supra* note 202 at para 48.
[206] *Galambos*, *supra* note 191 at para 37.
[207] *Blackwater v Plint*, 2005 SCC 58, [2005] 3 SCR 3 at para 57; *CA v Critchley* (1998), 166 DLR (4th) 475 at paras 77-87.
[208] *Wewaykum*, *supra* note 146, at para 86.
[209] *Haida*, *supra* note 183 at para 18.
[210] *Wewaykum*, *supra* note 146 at para 96.
[211] *Wewaykum*, *supra* note 146 at para 97.
[212] *Blueberry River*, *supra* note 204 at para 51; *Ermineskin*, *supra* note 196 at para 139.

was no bad faith or fraud. None was even alleged.[213] Moreover, even if the Crown did have an obligation of loyalty to the Métis, the evidence does not establish that Canada systematically put its own interests or the interests of other parties ahead of Métis interests. Indeed, Canada's representatives endeavoured to accommodate the views of the Métis as far as possible.[214] There is little evidence of contemporaneous complaint by the Métis that Canada put other interests ahead of theirs, or that Canada struck the wrong balance among competing interests.

E. The Honour of the Crown Does Not Impose an Independent Obligation

124. There is no principled basis on which to accept the novel proposition that the honour of the Crown, isolated from the context of treaty interpretation or from circumstances giving rise to a fiduciary obligation or a modern-day duty to consult, can operate as a source of substantive rights such as the appellants claim here.

125. As this Court has emphasized, the honour of the Crown is always at stake in its dealings with Aboriginal people. In certain circumstances, this principle can rise to specific obligations which this Court has articulated and defined and which the Court of Appeal recognized.[215] It must be assumed that the Crown intends to fulfil its promises, but the honour of the Crown cannot create an implied promise or undertaking where the circumstances demonstrate an express contrary intention, nor can general assurances be transformed into precise requirements according to modern sensibilities. Here, the honour of the Crown did not give rise to substantive obligations to make grants in family blocks, to issue patents within a limited time, or to preserve land from alienation.

126. Moreover, since conditions such as restraints on alienation or preservation of family blocks could only have been effected by enacting legislation, the claim that the Crown had an obligation in this regard amounts to a claim that the Crown was obliged to enact legislation in a certain way. But the question of whether Parliament should pass a particular law is not a

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[213] MBQB Reasons, paras 1208-1209, AR vol II p 197.
[214] MBQB Reasons, para 1000, AR vol II p 139; Archibald Letter, August 12, 1872, AR vol XV tab 1-730 pp 84, 87.
[215] *R v Badger*, [1996] 1 SCR 771 at para 41; *Haida*, *supra* note 183 at paras 16-25; *Mikisew*, *supra* note 168; see also *Stoney Band v Canada*, 2005 FCA 15; 249 DLR (4th) 274 at paras 13-18; MBCA Reasons, paras 404-428, AR vol III pp 161-170.

justiciable question, and a claim that Parliament has or had an obligation to enact particular legislation is not sustainable.[216]

F. The Obligations Arising under the *Manitoba Act* Were Discharged

127. Sections 31 and 32 were not intended to preserve an integral Métis land base and cannot be construed as having created an obligation to do so. Parliament's purpose was to provide individual Métis residents with land on which to settle, if they chose. Sections 31 and 32 gave the Governor in Council a wide discretion to determine the manner in which land grants would be provided and administered. This discretion was exercised in good faith and in conformity with the *Act.*

128. In making the distribution of land provided for by s. 31, the Crown was not obliged to impose a restraint on alienation and indeed would have been heavily criticized if this had been attempted.[217] In 1870 the Métis already had a history of private land-holding, which included buying and selling land. They expected to remain able to exercise this individual autonomy. Many recipients of s. 31 grants did choose to sell their land. This was not a breach of the Crown's obligations to them, but simply an indication that the grants were surplus to their needs, or that they did not wish to remain at Red River and preferred to liquidate their holdings and move to land that was readily available elsewhere in the northwest.

129. The grants were allocated by random allotment within the boundaries of each parish. This was a fair and objective way to divide the lands available. It would have been impossible to allot land to each of several children that was contiguous to the land held by their parents without trenching upon the lands required to fulfil the same obligation to other neighbouring families.[218] In any case, it was open to grantees to negotiate the sale or exchange of their allotted parcels in order to obtain land at a location they found more suitable, if they wished to do so.

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[216] *Re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 785.
[217] MBQB Reasons, para 214, AR vol I p 76 and para 1039, AR vol II p 150; MBCA Reasons, para 632, AR vol IV p 36; Debates in Manitoba Legislature, AR vol XV tab 1-0838 pp 186-187; various petitions or addresses at AR vol XVII, tab 1-1034, 1-1039, 1-1040, 1-1041, 1-1043 and at AR vol XVIII tab 1-1220 and 1-1255.
[218] MBQB Reasons, para 1006, AR vol II pp 141-142; MBCA Reasons, paras 622-623, AR vol IV pp 32-33; General Map #4, AR vol XXVII tab TE 28; Map Book – ledger size, Detail Map for T10-R1-WPM, p 35, AR vol XXVII tab TE 25 p 69.

130. While the process of allotment and issuance of patents involved some delay, this was to some extent inevitable. It was practical and necessary to await the completion of surveys so that parcels could be properly ascertained and identified. The effect of delay in the issue of patents was mitigated by the government's publication of allotments in 1877, which allowed recipients to settle on their allotted lands while awaiting patent, or to sell them for a rational market price.[219]

131. In any case there is no reason to assume a causal connection between delays in implementation and the movement of Métis people from the Red River Settlement to other locations in the northwest. The record demonstrates that for a number of personal and economic reasons, Métis people were selling their land and moving north and west both before 1870 and in the years immediately following, when delay clearly was not a factor.[220] The appellants contend that dispersal was the result of delay, but they do so in the absence of any context or comparison, for example, with the rate of movement or resettlement for other population groups during the period of western expansion in North America.[221]

132. Moreover, it is far from self-evident that delays always operated to the disadvantage of grantees. Many of the highest sale prices were obtained in the early 1880s when land values rose sharply.[222]

133. The appropriate remedy for failure to perform a public-law obligation is generally performance of the obligation. If the obligation was to issue patents within a limited time, the remedy is to have the patents issued. This was done. If delays occasioned consequential losses to particular individuals, any claim for damages could properly be asserted only by those individuals, subject to limitations and laches. As for the other complaints now raised by the

[219] Flanagan, *Historical Evidence*, p 61, AR XXVI tab TE 18 p 61.
[220] Flanagan, *Historical Evidence*, p 5, AR XXVI tab TE 18 p 5; Ens, *Manitoba Métis Study*, pp 13-16 and 49-54, AR vol XXVIII tab TE 36 pp 15-18 and 51-56; see para 51 above.
[221] Paterson, *Land Grants for Loyalists*, pp 22-23, AR vol XXVIII tab TE 44 pp 153-154; Flanagan, *Historical Evidence* p 5, AR vol XXVI tab TE 18 p 5.
[222] Flanagan/Ens, *Métis Family Study*, pp 23-26 and 47-49, AR vol XXVII tab TE 19 pp. 23-26 and 47-49; Flanagan, *Historical Evidence*, pp 86-87, AR XXVI tab TE 18 pp 86-87.

appellants, including random allotment, sales by minors and sales prior to patent, there is little if any evidence of complaint about these matters by individuals affected at the time.[223]

134. The Crown was justified in requiring meaningful evidence of occupation in determining entitlement under subsections 32(3) and 32(4). The general purpose of s. 32 was to quiet titles and to assure existing residents of the new province the quiet enjoyment of the lands they already occupied. To achieve that purpose, the government was properly concerned with requiring that settlers provide objective evidence of improvements that demonstrated a *bona fide* intention of occupation. Here again, while there is evidence of some complaint by affected individuals and their leaders, the complaints were not widespread and were ultimately resolved by a combination of special grants and sales at concessionary prices.[224]

135. In the result, the implementation of the *Manitoba Act* was effected in a manner consistent with its purposes, and well within the discretion afforded to the Governor in Council by ss. 31 and 32. The sufficiency of the benefits received by the Métis under the *Act* should not be determined on the basis of hindsight, or of the appellants' present-day contentions as to what would have met their current desires.

IV. THE APPLICABLE FEDERAL AND PROVINCIAL LEGISLATION WAS VALID

136. At trial, the appellants unsuccessfully sought to impugn the validity of federal and provincial legislation. In this Court, as in the Court of Appeal, the appellants no longer impugn the validity of federal legislation, but seek a declaration that legislation passed by Manitoba was *ultra vires* the province or inoperative by virtue of the doctrine of paramountcy. In asserting this, the appellants mischaracterize the constitutional foundation for the federal and provincial legislation. It is, therefore, incumbent on the Attorney General to make submissions to clarify the constitutional underpinnings of the *Manitoba Act* and ancillary legislation.

137. The *Manitoba Act* was a key element in Canada's nation-building. It was enacted pursuant to s. 146 of the *Constitution Act, 1867*, and later given its own constitutional force. Canada's intention in acquiring Rupert's Land and the North-Western Territory from the

[223] MBQB Reasons, paras 986, 1000, 1009, 1030, 1040 and 1213, AR vol II pp 135, 139, 142, 148, 150 and 198.
[224] MBQB Reasons, paras 1212-1213, AR vol II p 198.

Hudson's Bay Company was to expand and create a country from sea to sea to sea. Manitoba and the *Manitoba Act* were pivotal to achieving that vision.

138. There is no doubt that Parliament had the authority to enact this legislation in its effort at nation-building. The *Manitoba Act* specifically deals with the creation of a new province. The *Constitution Act, 1867*, s. 146, provides that Rupert's Land and the North-Western Territory, or either of them, may be admitted into the Union (Canada) on Address from the Houses of Parliament of Canada. The validity of the *Manitoba Act* was expressly confirmed by section 5 of the *Constitution Act, 1871*.[225]

139. It is entirely unnecessary in this case to consider whether the Métis or their lands fall under ss. 91(1A) or 91(24) of the *Constitution Act, 1867* because neither provision is the source of legislative authority for section 31 of the *Manitoba Act*.

140. The federal legislation ancillary to the *Manitoba Act* constituted valid implementation of the terms of the *Act*. This ancillary legislation is listed in paragraphs 49, 51 and 52 of the Amended Statement of Claim.[226] With two exceptions noted in the next paragraph, the impugned enactments fall within the discretion given to Parliament and the Governor in Council to carry out the provisions of ss. 31 and 32 of the *Act*. Indeed, by virtue of s. 33 of the *Manitoba Act*, this ancillary legislation was given the same force and effect as if it were a portion of the *Act*.

141. The two exceptions are the Order in Council of April 25, 1871, and S.C. 1874 c. 20 (*An Act respecting the appropriation of certain Dominion Lands in Manitoba*). These errors were quickly remedied with valid legislation and, furthermore, are now spent.

142. The Order in Council of April 25, 1871 was invalid to the limited extent that it allowed the heads of families themselves (rather than the children of heads of families only) to participate in the grant of 1.4 million acres, but this was rectified by the Order in Council of April 3, 1873 and S.C. 1873 c. 38 (*An Act to remove doubts as to the construction of section 31 of the Act 33 Victoria, chapter 3, and to amend section 108 of the Dominion Lands Act*).

[225] Appellants' Legislation, tab 3 p 20.
[226] AR vol IV pp 94-96.

143. The 1874 *Act* was invalid only to the extent that it required individuals to show they were in possession of their lands by March 8, 1869, instead of July 15, 1870. Again, this was corrected by S.C. 1875 c. 52 (*An Act to amend "An Act respecting the appropriation of certain Lands in Manitoba"*).

144. The Court of Appeal[227] and the trial judge[228] dealt with these provisions and correctly found that the invalid aspects were moot, inconsequential, or both.

145. The trial judge dealt with the various attacks by the appellants on the constitutionality of the remaining ancillary federal legislation.[229] He properly rejected their arguments, finding that all of the impugned legislation was passed as contemplated by the *Manitoba Act* for the purpose of administering and implementing that which ss. 31 and 32 provided. The Court of Appeal did not disturb these findings. The appellants evidently now accept the constitutional validity of the federal legislation, focusing instead on whether the Crown's alleged fiduciary obligation was met thereby.

146. In regard to the appellants' challenge to provincial legislation as *ultra vires* or inoperative, Canada agrees with the submissions of Manitoba. The impugned provincial legislation was a valid exercise of legislative power over property and civil rights and did not conflict with the *Manitoba Act* or trench on federal legislative jurisdiction. On this, the appellants have placed considerable weight on alleged assurances by Macdonald and Cartier prior to passage of the *Act* that there would be a measure of local control. For this reason as well, they have no cause to then complain when valid provincial legislation was passed.

V. THE MMF DOES NOT HAVE STANDING IN THIS ACTION

147. The MMF is a modern creation. It cannot have direct standing in this action. The MMF asserts standing on the basis of its present-day role as the collective representative of the Métis people of Manitoba.[230] However, as the trial judge found, the appellants' attempt to frame this case as a claim of a collective nature is "fundamentally flawed" because it is "underpinned by a

[227] MBCA Reasons, paras 351-353 and 368-375, AR vol III pp 143-144 and 150-151.
[228] MBQB Reasons, paras 854-855, AR vol II pp 94-95.
[229] *Ibid*, paras 856 et seq, AR vol II pp 96-102.
[230] Appellants' Factum, para 53.

factual reality that is individual."[231] The benefits provided by ss. 31 and 32 of the *Manitoba Act* enured to individual persons, not collectives or corporate entities.

148. Even if a collective interest were found to have existed, the MMF would not be a proper representative of that interest in the particular circumstances of this case. The rights-holders entitled to grants under ss. 31 and 32 of the *Manitoba Act* were an enumerated group of individuals who were resident in the province in 1870. The MMF's membership is not co-extensive with descendants of grantees under the *Act*. Rather, its membership includes persons who are not descended from the Red River Métis and does not include all of those who are so descended.[232] While the MMF has been recognized by the governments of Manitoba and Canada as the proper representative of the Métis in Manitoba for a number of purposes today, the important political role fulfilled by the MMF does not translate into legal standing in this litigation.[233]

149. This Court has already accepted that the Métis possess current collective rights in some contexts,[234] and it may well be that that a Métis organization like the MMF would be an appropriate party to consult and, if necessary, litigate, with respect to those rights.[235] However, the context here is different. Denying standing to the MMF in the particular context of this case will not undermine the potential for a Métis organization to advance a collective Métis rights claim in appropriate circumstances.

150. The MMF could only obtain standing in this case as a public interest litigant. Public interest standing may be granted in exceptional cases. The parameters for the exercise of judicial discretion in granting public interest standing have been well settled since this Court's decision in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration).*[236] The third aspect of the test is whether there is another reasonable and effective way to bring the matter before the Court (i.e. necessity). The fundamental purpose of granting public interest standing is to "prevent the immunization of legislation or public acts from any challenge. The

[231] MBQB Reasons, paras 1196, 1197, AR vol II p 195.
[232] MBQB Reasons, para 347, AR vol I p 120; Transcript, April 5, 2006, p 90 line 27-p 98 line 30, AGCR pp 21-29.
[233] MBQB Reasons, para 355, AR vol I p 122.
[234] *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207.
[235] *Labrador Métis Nation v Newfoundland and Labrador (Minister of Transportation and Works)*, 2007 NLCA 75, 272 Nfld & PEIR 178 at paras 46-49.
[236] *Council of Churches, supra* note 92 at 252-254.

granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant."[237]

151. The trial judge considered the above requirement to be particularly apt in this case, noting that "not only is there another reasonable and effective way of [bringing the claim forward] other than by [the] MMF, the obvious fact is that it has been done."[238] Consequently, he denied the MMF standing in the action.[239]

152. The decision of whether to grant standing is discretionary.[240] This Court has instructed that an appellate court should only interfere with a discretionary decision where "it finds that the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts."[241] The approach adopted by the trial judge is entirely consistent with this Court's jurisprudence and no errors of fact have been alleged. The MBCA found no basis to interfere with the trial judge's exercise of discretion to deny standing to the MMF.[242] This Court should reach the same conclusion.

[237] *Ibid* at 252-253.
[238] MBQB Reasons, para 405, AR vol I p 141.
[239] MBQB Reasons, para 407, AR vol I p 141.
[240] *Council of Churches*, *supra* note 92 at 252-253.
[241] *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371 at para 43.
[242] MBCA Reasons, para 268, AR vol III p 107.

PART IV – SUBMISSIONS CONCERNING COSTS

153. If the appeal is dismissed, Canada requests that this Court grant an order awarding the costs of this appeal to the Crown. The general principle is that a successful party is entitled to his or her costs, and this Court has reiterated that there should be very good reasons for departing from this principle.[243] Aboriginal rights litigation is no different, as shown by the award of costs by this Court in many Aboriginal cases.[244]

PART V – NATURE OF ORDER SOUGHT

154. The respondent requests that this Court dismiss the appeal with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Winnipeg, in the Province of Manitoba, this 23rd day of September, 2011.

_____	_____
Mark Kindrachuk, Q.C.	Mitchell Taylor, Q.C.
_____	_____
Sharlene Telles-Langdon	Paul Anderson

_____
Cary Clark

of Counsel for the Respondent, the Attorney General of Canada

[243] *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 SCR 38 at para 34.
[244] See for example: *Wewaykum*, *supra* note 146 at para 138; *Ermineskin*, *supra* note 196 at para 203; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103 at para 206.

PART VI - TABLE OF AUTHORITIES

Jurisprudence	**Para in Argument**
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St Mary's Indian Band v Cranbrook (City), [1997] 2 SCR 678	99

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Wewaykum Indian Band v Canada, 2002 SCC 79, [2002] 4 SCR 245	85, 86, 108, 109, 123, 153

Secondary Materials

Ran Hirschl, "The New Constitutionalism and the Judicialization of Pure Politics Worldwide" (2006) 75 No 2 *Fordham Law Review* 721	93
Manitoba Law Reform Commission, Report #123, *Limitations*, July 2010	84
Dianne Pothier, "Not So Simple After All: A comment on *Ravndahl v. Saskatchewan*" (2009-2010) 41 Ottawa LRev 139-160	83
Lazar Sarna, *The Law of Declaratory Judgments*, 3d ed (Toronto: Thomson Canada Limited, 2007)	84

PART VII - LEGISLATION

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Limitation of Actions Act, SM 1931, c 30, s 3(1)(i)	73
Limitation of Actions Act, SM 1940, c 121, s 3(1)(h)	73
Limitation of Actions Act, RSM 1970, c L150, s 3(1)	73
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Manitoba Act 1870, 33 Vict, c 3, SC 1870, c 3, reprinted in RSC 1985, App II, No 8, ss 31 and 32	1 and throughout

PART VII

LEGISLATION

CHAPTER 30

An Act respecting the Limitation of Actions.

[*Assented to April 9th, 1931*]

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows.

SHORT TITLE

1. This Act may be cited as "The Limitation of Actions Act, 1931" Short title

INTERPRETATION Interpretation

2. In this Act, unless the context otherwise requires, RSO 1927 c 106 s 1

(*a*) "Action" includes any civil proceeding and any action or other proceeding by or against the Crown; "Action"

(*b*) "Assurance" means any transfer, deed or instrument, other than a will, by which land may be conveyed or transferred: "Assurance"

(*c*) "Disability" means disability arising from infancy or unsoundness of mind; "Disability"

(*d*) "Heirs" includes the persons entitled beneficially to the real estate of a deceased intestate; "Heirs"

(*e*) "Land" includes all corporeal hereditaments, and any share, estate or interest in any of them; "Land"

(*f*) "Proceeding" includes action, entry, distress and sale proceedings under an order of a court or under a power of sale contained in a mortgage or charge or conferred by statute; "Proceeding"

(*g*) "Rent" means a rent service or rent reserved upon a demise; "Rent"

(*h*) "Rent charge" includes all annuities and periodical sums of money charged upon or payable out of land. "Rent charge"

PART I.

LIMITATION PERIODS

Limitations

3. (1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned:

Penal actions 31 Eliz, c 5 s 5

(*a*) actions for penalties imposed by any statute brought by any informer suing for himself alone or for the Crown as well as himself, or by any person authorized to sue for the same, not being the person aggrieved, within one year after the cause of action arose;

Actions for penalties Imp Act 1833 42 s 3 (e)

(*b*) actions for penalties, damages or sums of money in the nature of penalties given by any statute to the Crown or the person aggrieved, or partly to one and partly to the other, within two years after the cause of action arose.

Defamation See Lim Act, 1623, c 16, s 3.

(*c*) actions of defamation, whether libel or slander, within two years of the publication of the libel or the speaking of the slanderous words, or where special damage is the gist of the action, within two years after the occurrence of such damage;

Trespass to person Lim Act 1623 c 16 s 3

(*d*) actions for trespass to the person, assault, battery, wounding or other injury to the person, whether arising from an unlawful act or from negligence, or for false imprisonment, or for malicious prosecution or for seduction within two years after the cause of action arose;

Trespass to property Lim Act 1623, c 16 s 3

(*e*) actions for trespass or injury to real property or chattels, whether direct or indirect, and whether arising from an unlawful act or from negligence, or for the taking away, conversion or detention of chattels, within six years after the cause of action arose,

Contracts See Lim Acts 1623, c 16, 1833 c 42, 1856 c 97

(*f*) actions for the recovery of money, whether as a debt, damages or otherwise, on a recognizance, bond, covenant or other specialty, except a debt charged upon land, or on a simple contract, whether expressed or implied, or for any money demand (except a debt charged on land), or for an account or for not accounting, within six years after the cause of action arose;

Fraudulent misrepresentation

(*g*) actions grounded on fraudulent misrepresentation within six years from the discovery of the fraud;

Undue influence

(*h*) actions grounded on undue influence and brought by the person influenced or his personal representative within six years from the time when such influence ceased:

(*i*) actions grounded on accident, mistake or other equitable ground of relief not hereinbefore specifically dealt with, within six years from the discovery of the cause of action; Mistake

(*j*) actions on a judgment or order for the payment of money, within ten years after the cause of action thereon arose, but no such action shall be brought upon a judgment or order recovered upon any previous judgment or order; Judgments. See R S M 1913 c 116, s 24 (2)

(*k*) actions for foreclosure under any mortgage of or charge upon personal property within ten years after the cause of action arose; Foreclosure personalty mortgage

(*l*) any other action not in this or any other Act specifically provided for within six years after the cause of action arose Other actions

(2) Nothing in this section shall extend to any action where the time for bringing the action is by statute specially limited. Exception

4. When the existence of a cause of action has been concealed by fraud of the person setting up this Part or Part II as a defence, the cause of action shall be deemed to have arisen when the fraud was first known or discovered. Concealed fraud

5. No claim in respect of an item in an account which arose more than six years before the commencement of the action shall be enforceable by action by reason only of some other claim in respect of another item in the same account having arisen within six years next before the commencement of the action. Item in account R S O 1927 c 106 s 49

DISABILITIES.

6. If a person entitled to bring any action mentioned in paragraphs (*c*) to (*j*) inclusive of subsection (1) of section 3 is under disability at the time the cause of action arises, he may bring the action within the time hereinbefore limited with respect to such action or at any time within two years after he first ceased to be under disability. Person under disability See Lim Act 1623 c 16 s 7

ACKNOWLEDGMENTS AND PART PAYMENT.

7. (1) Whenever any person who is, or would have been but for the efflux on of time, liable to an action for the recovery of money (not being a charge on land) as a debt, or his duly authorized agent, Subsequent acts

(*a*) promises his creditor or the agent of the creditor in writing signed by the debtor or his agent to pay such debt; or Promises to pay

(*b*) gives a written acknowledgment signed by the debtor or his agent of a debt to his creditor or the agent of the creditor; or Acknowledgments

Part payments.

(c) makes a part payment on account of the principal debt or interest thereon, to his creditor or agent of the creditor,

See Imp. Acts 1828, c. 14, s. 1; 1833, c. 42, s. 5; 1856, c. 97, s. 13

then an action to recover any such debt may thereafter be brought within six years from the date of the promise, acknowledgment or part payment, as the case may be, notwithstanding that the action would otherwise be barred under the provisions of this Act.

Effect of written acknowledgment.

(2) A written acknowledgment of a debt shall have full effect whether or not a promise to pay can be implied therefrom and whether or not it is accompanied by a refusal to pay

Joint contractors and covenantors.

8. Where there are two or more joint debtors or joint contractors, or joint obligors or joint covenantors, or the executors or administrators of any of them, no such joint debtor, joint contractor, joint obligor or joint covenantor or his executor or administrator shall lose the benefit of this Act so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed, or by reason of any payment of any principal or interest made, by any other or others of them.

See Imp Acts 1828, c. 14, s 1; 1856, c. 97, ss. 11 and 14.

Recovery against those acknowledging

9. In actions commenced against two or more such joint debtors, joint contractors, joint obligors or joint covenantors or executors or administrators as defendants, if it appears at the trial or otherwise that the plaintiff, though barred by this Act as to one or more of such defendants, is nevertheless entitled to recover against any other or others of the defendants by virtue of a new acknowledgment, promise or payment, judgment shall be given for the plaintiff as to the defendant or defendants against whom he is entitled to recover, and for the other defendant or defendants against the plaintiff.

R S O 1927, c 106, s 56.

Indorsements of payment insufficient.

10. No indorsement or memorandum of any payment written or made upon any promissory note, bill of exchange or other writing, by or on behalf of the person to whom the payment has been made, shall be deemed sufficient proof of the payment, so as to take the case out of the operation of this Act.

R.S.O. 1927, c 106 s 57

Part applies to counterclaims

11. This Part shall apply to the case of any claim of the nature hereinbefore mentioned, alleged by way of counterclaim or set-off on the part of any defendant.

PART II.

CHARGES ON LAND, LEGACIES, ETC.

Recovery of money charged on land.

12. (1) No proceedings shall be taken to recover any rent charge or any sum of money secured by any mortgage or lien, or otherwise charged upon or payable out of any land or rent charge, or to recover any legacy, whether it is or is not charged upon land, or the personal estate or any share of the personal estate of any person dying intestate and possessed by his personal representative, but within ten years next after a present right to recover the same accrued to some person capable of giving a discharge therefor or release thereof, unless prior to the expiry of such ten years some part of the rent charge, principal money, legacy or estate or share thereof or some interest thereon has been paid by a person bound or entitled to make a payment thereof, or his duly authorized agent, to a person entitled to receive the same or his agent, or some acknowledgment in writing of the right to such sum of money, rent charge, legacy or estate or share thereof, signed by any person so bound or entitled or his duly authorized agent, has been given to a person entitled to receive the same or his agent, and in such case no action shall be brought but within ten years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was made or given.

See R P L Act 1874, s 7 s 8

Reversion not in possession

(2) In the case of a reversionary interest in land, no right to recover the sum of money charged thereon shall be deemed to accrue until the interest has fallen into possession

Recovery of rent and interest barred on land

13. (1) No arrears of rent, or of interest in respect of any sum of money to which the immediately preceding section applies, or any damages in respect of such arrears, shall be recovered by any proceeding but within six years next after a present right to recover the same accrued to some person capable, prior to the expiry of such six years, of giving a discharge for or release of the same, unless, prior to the expiration of such six years, some part of the arrears has been paid by a person bound or entitled to make a payment thereof, or his duly authorized agent, to a person entitled to receive the same or his agent, or some acknowledgment in writing of the right to the arrears, signed by a person so entitled or bound or his duly authorized agent, has been given to a person entitled to receive the arrears or his agent and in such case no proceeding shall be taken but within six years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was made or given.

R P L Act 1874, s 27, s 42

Except redemptions R S O 1937, c 106, s 17

(2) Subsection (1) shall not apply to an action for redemption or similar proceedings brought by a mortgagor or by any person claiming under him.

Recovery prior mortgagee in possession.

R.P.L. Act 1833, c 27, s. 42.

14. Where any prior mortgagee or other encumbrancer has been in possession of any land within one year next before an action is brought by any person entitled to a subsequent mortgage or other encumbrance on the same land, the person entitled to the subsequent mortgage or encumbrance may recover in such action the arrears of interest which have become due during the whole time that the prior mortgagee or encumbrancer was in such possession or receipt, although that time may have exceeded such term of six years.

Recovery of sums secured by express trust.

R.P.L. Act 1874, c. 57, s 10

15. (1) No action shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent charge, though secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable or so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust.

Saving.

(2) The preceding subsection shall not operate so as to affect any claim of a *cestui que trust* against his trustee for property held on an express trust.

CHAPTER 121

An Act respecting the Limitation of Actions.

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

SHORT TITLE

1. This act may be cited as "The Limitation of Actions Act, 1931." S.M. 1931, c. 30, s. 1. Short title.

INTERPRETATION

2. In this Act, unless the context otherwise requires, Definitions: R.S.O. 1927, c. 106, s. 1.

(*a*) "action" means any civil proceeding; "action,"

(*b*) "assurance" means any transfer, deed or instrument, other than a will, by which land may be conveyed or transferred; "assurance,"

(*c*) "disability" means disability arising from infancy or unsoundness of mind; "disability,"

(*d*) "heirs" includes the persons entitled beneficially to the real estate of a deceased intestate; "heirs,"

(*e*) "land" includes all corporeal hereditaments, and any share or any freehold or leasehold estate or any interest in any of them; "land,"

(*f*) "mortgage" includes charge, "mortgagor" includes chargor, and "mortgagee" includes chargee; "mortgage," etc.,

(*g*) "proceedings" includes action, entry, taking of possession, distress and sale proceedings under an order of a court or under a power of sale contained in a mortgage or conferred by statute; "proceedings,"

(*h*) "rent" means a rent service or rent reserved upon a demise; "rent,"

(*i*) "rent charge" includes all annuities and periodical sums of money charged upon or payable out of land. S.M. 1931, c. 30, s. 2; am. S.M. 1932, c. 24, s. 1; S.M. 1939, c. 39, s. 1. "rent charge."

PART I.

LIMITATION PERIODS

Limitations:

3. (1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned:

Penal actions,

See 31 Eliz., c. 5, s. 5.

(*a*) Actions for penalties imposed by any statute brought by any informer suing for himself alone or for the Crown as well as himself, or by any person authorized to sue for the same, not being the person aggrieved, within one year after the cause of action arose;

Actions for penalties,

See Imp. Lim. Act 1833, c. 42, s. 3(*e*).

(*b*) Actions for penalties, damages or sums of money in the nature of penalties given by any statute to the person aggrieved, within two years after the cause of action arose;

Defamation,

See Imp. Lim. Act 1623, c. 16, s. 3.

(*c*) Actions of defamation, whether libel or slander, within two years of the publication of the libel or the speaking of the slanderous words, or where special damage is the gist of the action, within two years after the occurrence of such damage;

Trespass to person,

See Imp. Lim. Act 1623, c. 16, s. 3.

(*d*) Actions for trespass to the person, assault, battery, wounding or other injury to the person, whether arising from an unlawful act or from negligence, or for false imprisonment, or for malicious prosecution or for seduction, within two years after the cause of action arose;

Trespass to property,

See Imp. Lim. Act 1623, c. 16, s. 3.

(*e*) Actions for trespass or injury to real property or chattels, whether direct or indirect, and whether arising from an unlawful act or from negligence, or for the taking away, conversion or detention of chattels, within six years after the cause of action arose;

Actions for money,

(*f*) Actions for the recovery of money (except in respect of a debt charged upon land), whether recoverable as a debt or damages or otherwise, and whether on a recognizance, bond, covenant or other specialty, or on a simple contract, express or implied, and actions for an account or for not accounting, within six years after the cause of action arose;

Fraudulent misrepresentation,

(*g*) Actions grounded on fraudulent misrepresentation, within six years from the discovery of the fraud;

Mistake,

(*h*) Actions grounded on accident, mistake or other equitable ground of relief not hereinbefore specifically dealt with, within six years from the discovery of the cause of action;

(*i*) Actions on a judgment or order for the payment of money, within ten years after the cause of action thereon arose, but no such action shall be brought upon a judgment or order recovered upon any previous judgment or order; Judgments, See R.S.M. 1913, c. 116, s. 24 (2).

(*j*) Actions for damages against a hospital as defined by "The Hospital Aid Act" or the owner or board of management thereof or any of his or its officers, servants and employees, whether arising out of tort or contract in respect of any act whether of misfeasance or non-feasance in the operation of the hospital or in providing any service therein, within one year after the cause of action arose; Actions against hospitals,

(*k*) Any other action not in this or any other Act specifically provided for, within six years after the cause of action arose. S.M. 1931, c. 30, s. 3 (1); am. S.M. 1932, c. 24, s. 2; S.M. 1939, c. 39, s. 2, and c. 40, s. 1. Other actions.

(2) Nothing in this section shall extend to any action where the time for bringing the action is by statute specially limited. S.M. 1931, c. 30, s. 3(2). Exception.

Note: Limitation of action for negligence or malpractice of dentist—See sec. 44 of "The Dental Association Act."

Limitation of action for negligence and malpractice of practitioners—See sec. 74 of "The Medical Act."

4. Where the existence of a cause of action has been concealed by fraud of the person setting up this Part or Part II as a defence, the cause of action shall be deemed to have arisen when the fraud was first known or discovered. S.M. 1931, c. 30, s. 4 am. Concealed fraud.

5. No claim in respect of an item in an account which arose more than six years before the commencement of the action shall be enforceable by action by reason only of some other claim in respect of another item in the same account having arisen within six years next before the commencement of the action. S.M. 1931, c. 30, s. 5. Item in account. R.S.O., c. 106, s. 49.

DISABILITIES

6. If a person entitled to bring any action mentioned in paragraphs (*c*) to (*i*) inclusive of subsection (1) of section 3 is under disability at the time the cause of action arises, he may bring the action within the time hereinbefore limited with respect to such action or at any time within two years after he first ceased to be under disability. S.M. 1931, c. 30, s. 6. Person under disability. See Imp. Lim. Act 1623, c. 16, s. 7.

CHAPTER L150

AN ACT RESPECTING THE LIMITATION OF ACTIONS.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Short title.

1 This Act may be cited as: "The Limitation of Actions Act".

R.S.M., c. 145, s. 1.

Definitions.

2 In this Act,

(a) "action" means any civil proceeding but does not include any proceeding whether for the recovery of money or for any other purpose that is commenced by way of information or complaint or the procedure for which is governed by The Summary Convictions Act;

(b) "assurance" means any transfer, deed, or instrument, other than a will, by which land may be conveyed or transferred;

(c) "disability" means disability arising from infancy or mental disorders within the meaning of The Mental Health Act;

(d) "heirs" includes the persons entitled beneficially to the real estate of a deceased intestate;

(e) "injuries to the person" includes any disease and any impairment of the physical or mental condition of a person;

(f) "land" includes all corporeal hereditaments, and any share or any freehold or leasehold estate or any interest in any of them;

(g) "mortgage" includes charge, "mortgagor" includes chargor, and "mortgagee" includes chargee;

(h) "proceedings" includes action, entry, taking of possession, distress, and sale proceedings under an order of a court or under a power of sale contained in a mortgage or conferred by statute;

(i) "rent" means a rent service or rent reserved upon a demise;

(j) "rent charge" includes all annuities and periodical sums of money charged upon or payable out of land.

R.S.M., c. 145, s. 2; am. S.M., 1966-67, c. 32, s. 1.

PART I

LIMITATION PERIODS

Limitations.

3(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned:

(a) Actions for penalties imposed by any statute brought by an informer suing for himself alone or for the Crown as well as himself, or by any person authorized to sue for the same, not being the person aggrieved, within one year after the cause of action arose.

(b) Actions for penalties, damages, or sums of money in the nature of penalties, given by any statute to the person aggrieved, within two years after the cause of action arose.

(c) Actions for defamation, within two years of the publication of the defamatory matter, or, where special damage is the gist of the action, within two years after the occurrence of such damage.

(d) Actions for malicious prosecution, seduction, false imprisonment, trespass to the person, assault, battery, wounding or other injuries to the person, whether caused by misfeasance or non-feasance, and whether the action be founded on a tort or on a breach of contract or on any breach of duty, within two years after the cause of action arose.

(e) Actions for trespass or injury to real property, whether direct or indirect, within six years after the cause of action arose.

(f) Actions for trespass or injury to chattels, whether direct or indirect, or for the taking away, conversion, or detention of chattels, within two years after the cause of action arose.

(g) Actions for the recovery of money (except in respect of a debt charged upon land), whether recoverable as a debt or damages or otherwise, and whether a recognizance, bond, covenant, or other specialty, or on a simple contract, express or implied, and actions for an account or not accounting, within six years after the cause of action arose.

(h) Actions grounded on fraudulent misrepresentation, within six years from the discovery of the fraud.

(i) Actions grounded on accident, mistake, or other equitable ground of relief not hereinbefore specifically dealt with, within six years from the discovery of the cause of action.

(j) Actions on a judgment or order for the payment of money, within ten years after the cause of action thereon arose, but no such action shall be brought upon a judgment or order recovered upon any previous judgment or order.

(k) Actions brought under and by virtue of The Fatal Accidents Act, within twelve months after the death of the deceased person by reason of whose death the action is brought.

(l) Any other action for which provision is not specifically made in this Act, within six years after the cause of action arose.

Counterclaim and third party proceedings.

3(2) Where an action is brought for injuries to the person or for injuries to property within the time limited by this Act or any other Act of the Legislature and third party proceedings are instituted, or a counterclaim is made in respect of damages caused in the same accident, the lapse of time limited by this Act or any other Act of the Legislature is not a bar to the third party proceedings or to a counterclaim by the defendant or third party.

R.S.M., c. 145, s. 3; am. S.M., 1958, (1st Sess.), c. 34, s. 1; R. & S., S.M., 1966-67, c. 32, s. 2.

Note: Limitation of action for negligence or malpractice of dentist—See sec. 48 of The Dental Association Act.

Limitation of action for negligence and malpractice of medical practitioners—See secs. 43 and 54 of The Medical Act.

Limitation of action for negligence and malpractice of osteopaths and chiropractors—See sec. 20 of The Osteopathic Act and sec. 21 of The Chiropractic Act.

Limitation period for motor vehicle accidents.

4(1) Subject to subsection (2), no action shall be brought against a person for the recovery of damages occasioned by a motor vehicle as defined in The Highway Traffic Act or by the operator thereof after the expiration of one year from the time when the damages were sustained.

C.C.S.M. c. L150

The Limitation of Actions Act

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Definitions

1 In this Act,

"action" means any civil proceeding but does not include any proceeding whether for the recovery of money or for any other purpose that is commenced by way of information or complaint or the procedure for which is governed by *The Summary Convictions Act*; (« action »)

"assurance" means any transfer, deed, or instrument, other than a will, by which land may be conveyed or transferred; (« transfert »)

"Canadian judgment" means a Canadian judgment as defined in *The Enforcement of Canadian Judgments Act*; (« jugement canadien »)

"heirs" includes the persons entitled beneficially to the real estate of a deceased intestate; (« héritiers »)

"injuries to the person" includes any disease and any impairment of the physical or mental condition of a person; (« blessures »)

"land" includes all corporeal hereditaments, and any share or any freehold or leasehold estate or any interest in any of them; (« bien-fonds »)

"mortgage" includes charge, **"mortgagor"** includes chargor, and **"mortgagee"** includes chargee; (« hypothèque »)

"proceedings" includes action, entry, taking of possession, distress, and sale proceedings under an order of a court or under a power of sale contained in a mortgage or conferred by statute; (« procédures »)

"rent" means a rent service or rent reserved upon a demise; (« loyer »)

"rent charge" includes all annuities and periodical sums of money charged upon or payable out of land. (« rente foncière »)

S.M. 2005, c. 50, s. 17.

PART I

LIMITATION PERIODS

Limitations

2(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned:

(a) actions for penalties imposed by any statute brought by an informer suing for himself alone or for the Crown as well as himself, or by any person authorized to sue for the same, not being the person aggrieved, within one year after the cause of action arose;

(b) actions for penalties, damages, or sums of money in the nature of penalties, given by any statute to the person aggrieved, within two years after the cause of action arose;

(c) actions for defamation, within two years of the publication of the defamatory matter, or, where special damage is the gist of the action, within two years after the occurrence of such damage;

(d) actions for violation of privacy of a person,

52(2) No continual or other claim upon or near any land preserves any right of making an entry or distress or bringing an action.

Receipt of rent receipt of profits

52(3) The receipt of the rent payable by any tenant at will, tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him, but subject to the lease, be deemed to be the receipt of the profits of the land for the purposes of this Act.

Expiry of right of action terminates title

53 At the determination of the period limited by this Act, to any person for taking proceedings to recover any land, rent charge, or money charged on land, the right and title of that person to the land, or rent charge, or the recovery of the money out of the land, is extinguished.

Action respecting conversion of chattel, where subsequent conversion occurs

54(1) Where any cause of action in respect of the conversion or wrongful detention of a chattel has accrued to any person, and before he recovers possession of the chattel, a further conversion or wrongful detention takes place, no action shall be brought in respect of the further conversion or detention after the expiration of six years from the accrual of the cause of action in respect of the original conversion or detention.

Termination of title to chattel on expiry of right of action

54(2) Where any such cause of action has accrued to any person, and the period prescribed for bringing that action and for bringing any action in respect of such a further conversion or wrongful detention as aforesaid has expired, and he has not during that period recovered possession of the chattel, the title of that person to the chattel is extinguished.

Administrator deemed claimant from death of deceased

55 For the purposes of Parts III, IV, and V, an administrator, claiming the estate or interest of the deceased person of whose property he has been appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.

Return to province

56 In respect of a cause of action, the time for taking proceedings as to which is limited by this Act (except those mentioned in clauses 2(1)(a) and (b), if a person is out of the province at the time a cause of action against him arises within the province, the person entitled to the action may bring it within two years after the return of the first mentioned person to the province or within the time otherwise limited by this Act for bringing the action.

Joint debtors within province not affected

57(1) Where a person has any cause of action against joint debtors or joint contractors, or joint obligors or joint covenantors, he is not entitled to any time within which to commence such an action against such of them as were within the province at the time the cause of action accrued by reason only that one or more of them was at that time out of the province.

Joint debtors outside province not released by action

57(2) A person having such a cause of action is not barred from commencing an action against any joint debtor or joint contractor, or joint obligor or joint covenantor, who was out of the province at the time the cause of action accrued, after his return to the province, by reason only that judgment has been already recovered against such others of them as were at such time within the province.

Application of Act

58 This Act applies to all causes of action whether they arose before or after the coming into force of this Act.

Refusing relief on acquiescence

59 Nothing in this Act interferes with any rule of equity in refusing relief on the ground of acquiescence, or otherwise, to any person whose right to bring an action is not barred by virtue of this Act.

Interpretation

60 This Act shall be so interpreted and construed as to effect its general purpose of making uniform the law of the provinces that enact it.

No. 8

MANITOBA ACT, 1870

33 Victoria, c. 3 (Canada)

(An Act to amend and continue the Act 32 and 33 Victoria, chapter 3; and to establish and provide for the Government of the Province of Manitoba)

[Note: The long title was repealed and "Manitoba Act, 1870" substituted by the *Constitution Act, 1982* (No. 44 *infra*).]

[Assented to 12th May, 1870]

Preamble

Whereas it is probable that Her Majesty The Queen may, pursuant to the Constitution Act, 1867, be pleased to admit Rupert's Land and the North-Western Territory into the Union or Dominion of Canada, before the next Session of the Parliament of Canada:

And Whereas it is expedient to prepare for the transfer of the said Territories to the Government of Canada at the time appointed by the Queen for such admission:

And Whereas it is expedient also to provide for the organization of part of the said Territories as a Province, and for the establishment of a Government therefor, and to make provision for the Civil Government of the remaining part of the said Territories, not included within the limits of the Province:

Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Province to be formed out of N.W. territory when united to Canada

1. On, from and after the day upon which the Queen, by and with the advice and consent of Her Majesty's Most Honorable Privy Council, under the authority of the 146th Section of the Constitution Act, 1867, shall, by Order in Council in that behalf, admit Rupert's Land

N° 8

LOI DE 1870 SUR LE MANITOBA

33 Victoria, ch. 3 (Canada)

(Acte pour amender et continuer l'acte trente-deux et trente-trois Victoria, chapitre trois, et pour établir et constituer le gouvernement de la province de Manitoba)

[Note : Le titre intégral a été abrogé et remplacé par «Loi de 1870 sur le Manitoba» aux termes de la *Loi constitutionnelle de 1982* (n° 44 *infra*).]

[Sanctionnée le 12 Mai 1870]

Préambule

Considérant qu'il est probable qu'il plaira à Sa Majesté la Reine, conformément à la Loi constitutionnelle de 1867, d'admettre la Terre de Rupert et le Territoire du Nord-Ouest dans l'Union ou la Puissance du Canada, avant la prochaine session du parlement canadien;

Et considérant qu'il importe, en vue du transfert, de ces territoires au gouvernement du Canada, d'adopter certaines mesures pour l'époque qui sera fixée par la Reine pour leur admission dans l'Union;

Et considérant qu'il est également expédient d'organiser en province une partie de ces territoires, et d'y fonder un gouvernement, et d'établir des dispositions pour le gouvernement civil de la partie restante de ces territoires qui ne sera pas comprise dans les limites de la province:

A ces causes, Sa Majesté par et de l'avis et du consentement du Sénat et de la Chambre des Communes du Canada, décrète ce qui suit:

Province fondée dans les territoires du N.-O., après qu'ils auront été annexés au Canada

1. Le, depuis et après le jour auquel la Reine, par et de l'avis et du consentement du très-honorable conseil privé de Sa Majesté sous l'autorité du 146e article de la Loi constitutionnelle de 1867, admettra, par ordre en conseil rendu à cet effet, la Terre de Rupert et le

proceeds of such duties shall form part of the Consolidated Revenue Fund of Canada.

ces droits formeront partie du fonds consolidé du revenu du Canada.

Customs laws

28. Such provisions of the Customs Laws of Canada (other than such as prescribe the rate of duties payable) as may be from time to time declared by the Governor General in Council to apply to the Province of Manitoba, shall be applicable thereto, and in force therein accordingly.

28. Les dispositions des lois de douane du Canada (autres que celles qui fixent le tarif des droits payables) qui pourront, de temps à autre, être par le gouverneur-général en conseil déclarées applicables à la province de Manitoba, s'y appliqueront et y seront en vigueur en conséquence.

Lois douanières

Inland Revenue laws and duties

29. Such provisions of the Laws of Canada respecting the Inland Revenue, including those fixing the amount of duties, as may be from time to time declared by the Governor General in Council applicable to the said Province, shall apply thereto, and be in force therein accordingly.

29. Les dispositions des lois du Canada concernant le revenu de l'intérieur, y compris celles fixant le montant des droits, qui pourront, de temps à autre, être par le gouverneur-général en conseil déclarées applicables à la province, s'y appliqueront et y seront en vigueur en conséquence.

Revenu de l'intérieur, lois et droits y relatifs

Ungranted lands vested in the Crown for Dominion purposes

30. All ungranted or waste lands in the Province shall be, from and after the date of the said transfer, vested in the Crown, and administered by the Government of Canada for the purposes of the Dominion, subject to, and except and so far as the same may be affected by, the conditions and stipulations contained in the agreement for the surrender of Rupert's Land by the Hudson's Bay Company to Her Majesty.

30. Toutes les terres non concédées ou incultes dans la province seront, à dater du transfert, réunies à la couronne et administrées par le gouvernement du Canada pour l'avantage de la Puissance, mais subordonnées aux conditions et stipulations énoncées dans l'acte de cession de la Terre de Rupert consenti par la compagnie de la Baie d'Hudson à Sa Majesté.

Terres non concédées, réunies à la couronne pour le bénéfice de la Puissance; exception

Provisions as to Indian title

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

31. Et considérant qu'il importe, dans le but d'éteindre les titres des Indiens aux terres de la province, d'affecter une partie de ces terres non concédées, jusqu'à concurrence de 1,400,000 acres, au bénéfice des familles des Métis résidants, il est par la présente décrété que le lieutenant-gouverneur, en vertu de règlements établis de temps à autre par le gouverneur-général en conseil, choisira des lots ou étendues de terre dans les parties de la province qu'il jugera à propos, jusqu'à concurrence du nombre d'acres ci-dessus exprimé, et en fera le partage entre les enfants des chefs de famille métis domiciliés dans la province à l'époque à laquelle le transfert sera fait au Canada, et ces lots seront concédés aux dits enfants respectivement, d'après le mode et aux conditions d'établissement et autres conditions que le gouverneur-général en conseil pourra de temps à autre fixer.

Quant aux titres des Indiens

Grant for half-breeds

Concessions en faveur des Métis

Quieting titles

32. For the quieting of titles, and assuring to the settlers in the Province the peaceable possession of the lands now held by them, it is enacted as follows:—

32. Dans le but de confirmer les titres et assurer aux colons de la province la possession paisible des immeubles maintenant possédés par eux, il est décrété ce qui suit:

Confirmation des titres

Grants by H.B. Company

(1) All grants of land in freehold made by the Hudson's Bay Company up to the eighth

(1) Toute concession de terre en franc-alleu (*freehold*) faite par la compagnie de la Baie

Concessions faites par la compagnie de la Baie d'Hudson

day of March, in the year 1869, shall, if required by the owner, be confirmed by grant from the Crown.

d'Hudson jusqu'au huitième jour de mars de l'année 1869, sera, si le propriétaire le demande, confirmée par une concession de la couronne;

The same

(2) All grants of estates less than freehold in land made by the Hudson's Bay Company up to the eighth day of March aforesaid, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.

(2) Toute concession d'immeubles autrement qu'en franc-alleu, faite par la compagnie de la Baie d'Hudson jusqu'au huitième jour de mars susdit, sera, si le propriétaire le demande, convertie en franc-alleu par une concession de la couronne;

Même

Titles by occupancy with permission

(3) All titles by occupancy with the sanction and under the license and authority of the Hudson's Bay Company up to the eighth day of March aforesaid, of land in that part of the Province in which the Indian Title has been extinguished, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.

(3) Tout titre reposant sur le fait d'occupation, avec la sanction, permission et autorisation de la compagnie de la Baie d'Hudson jusqu'au huitième jour de mars susdit, de terres situées dans cette partie de la province dans laquelle les titres des Indiens ont été éteints, sera, si le propriétaire le demande, converti en franc-alleu par une concession de la couronne;

Titres reposant sur le fait de l'occupation autorisée

By peaceable possession

(4) All persons in peaceable possession of tracts of land at the time of the transfer to Canada, in those parts of the Province in which the Indian Title has not been extinguished, shall have the right of pre-emption of the same, on such terms and conditions as may be determined by the Governor in Council.

(4) Toute personne étant en possession paisible d'étendues de terre, à l'époque du transfert au Canada, dans les parties de la province dans lesquelles les titres des Indiens n'ont pas été éteints, pourra exercer le droit de préemption à l'égard de ces terres, aux termes et conditions qui pourront être arrêtés par le gouverneur en conseil;

Sur le fait de la paisible possession

Lieut.-Governor to make provisions under Order in Council

(5) The Lieutenant-Governor is hereby authorized, under regulations to be made from time to time by the Governor General in Council, to make all such provisions for ascertaining and adjusting, on fair and equitable terms, the rights of Common, and rights of cutting Hay held and enjoyed by the settlers in the Province, and for the commutation of the same by grants of land from the Crown.

(5) Le lieutenant-gouverneur est par la présente autorisé, en vertu de règlements qui seront faits de temps à autre par le gouverneur-général en conseil, à adopter toutes les mesures nécessaires pour constater et régler, à des conditions justes et équitables, les droits de commune et les droits de couper le foin dont jouissent les colons dans la province, et pour opérer la commutation de ces droits au moyen de concessions de terre de la couronne.

Le lieutenant-gouverneur adoptera certaines mesures à la suite d'arrêtés en conseil

Governor in Council to appoint form, etc., of grants

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

33. Le gouverneur-général en conseil établira et réglera, de temps à autre, le mode et la formule d'après lesquels se feront les concessions des terres de la couronne; et tout ordre en conseil rendu à cet égard, lorsqu'il sera publié dans la *Gazette du Canada*, aura la même force et le même effet que s'il faisait partie de la présente loi.

Le gouverneur en conseil réglera le mode, etc., d'après lequel se feront les concessions

Rights of H.B. Company not affected

34. Nothing in this Act shall in any way prejudice or affect the rights or properties of the Hudson's Bay Company, as contained in the conditions under which that Company surrendered Rupert's Land to Her Majesty.

34. Rien de contenu à la présente loi ne préjudiciera ni ne portera en quoi que ce soit atteinte aux droits ou aux propriétés de la compagnie de la Baie d'Hudson, tels qu'énumérés dans les conditions auxquelles cette compagnie a cédé la Terre de Rupert à Sa Majesté.

Droits de la compagnie de la Baie d'Hudson sauvegardés