

# [Manitoba Metis Federation Inc. v. Canada \(Attorney General\)](#)

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and LeBel, Deschamps,\* Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

Heard: December 13, 2011;

Judgment: March 8, 2013.

File No.: 33880.

[\[2013\] 1 S.C.R. 623](#) | [\[2013\] 1 R.C.S. 623](#) | [\[2013\] S.C.J. No. 14](#) | [\[2013\] A.C.S. no 14](#) | [2013 SCC 14](#)

Manitoba Metis 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; v. Attorney General of Canada and Attorney General of Manitoba, Respondents, and Attorney General for Saskatchewan, Attorney General of Alberta, Métis National Council, Métis Nation of Alberta, Métis Nation of Ontario, Treaty One First Nations and Assembly of First Nations, Interveners.

(303 paras.)

## **Appeal From:**

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

## **Case Summary**

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## **Subsequent History:**

\* Editor's Note: Deschamps J. took no part in the judgment.

## **Catchwords:**

**Aboriginal law — Métis — Crown law — Honour of the Crown — Canadian government agreeing in 1870 to grant Métis children shares of 1.4 million acres of land and to recognize existing Métis landholdings — Promises set out in ss. 31 and 32 of the Manitoba Act, 1870, a constitutional document — Errors and delays interfering with division and granting of land among eligible [page624] recipients — Whether Canada**

**failing to comply with the honour of the Crown in the implementation of ss. 31 and 32 of the Manitoba Act, 1870.**

**Aboriginal law — Métis — Fiduciary duty — Canadian government agreeing in 1870 to grant Métis children shares of 1.4 million acres of land and to recognize existing Métis landholdings — Promises set out in ss. 31 and 32 of the Manitoba Act, 1870, a constitutional document — Errors and delays interfering with division and granting of land among eligible recipients — Whether Canada in breach of fiduciary duty to Métis.**

**Limitation of actions — Declaration — Appellants seeking declaration in the courts that Canada breached obligations to implement promises made to the Métis people in the Manitoba Act, 1870 — Whether statute of limitations can prevent courts from issuing declarations on the constitutionality of Crown conduct — Whether claim for declaration barred by laches.**

**Civil procedure — Parties — Standing — Public interest standing — Manitoba Act, 1870, providing for individual land entitlements — Whether federation advancing collective claim on behalf of Métis people should be granted public interest standing.**

#### **Summary:**

After Confederation, the first government of Canada embarked on a policy aimed at bringing the western territories within the boundaries of Canada, and opening them up to settlement. Canada became the titular owner of Rupert's Land and the Red River Settlement; however, the French-speaking Roman Catholic Métis, the dominant demographic group in the Red River Settlement, viewed with alarm the prospect of Canadian control leading to a wave of English-speaking Protestant settlers that would threaten their traditional way of life. In the face of armed resistance, Canada had little choice but to adopt a diplomatic approach. The Red River settlers agreed to become part of Canada, and Canada agreed to grant 1.4 million acres of land to the Métis children (subsequently set out in s. 31 of the *Manitoba Act*) and to recognize existing landholdings (subsequently set out in s. 32 of the *Manitoba Act*). The Canadian government began the process of implementing s. 31 in early [page625] 1871. The land was set aside, but a series of errors and delays interfered with dividing the land among the eligible recipients. Initially, problems arose from errors in determining who had a right to a share of the land promised. As a result, two successive allotments were abandoned; the third and final allotment was not completed until 1880. The lands were distributed randomly to the eligible Métis children living within each parish.

While the allotment process lagged, speculators began acquiring the Métis children's yet-to-be granted interests in the s. 31 lands, aided by a range of legal devices. During the 1870s and 1880s, Manitoba passed five statutes, now long spent and repealed, dealing with the technical requirements to transfer interests in s. 31 lands. Initially, Manitoba moved to curb speculation and improvident sales of the children's interests, but in 1877, it changed course, allowing sales of s. 31 entitlements.

Eventually, it became apparent that the number of eligible Métis children had been underestimated. Rather than starting a fourth allotment, the Canadian government provided that remaining eligible children would be issued with scrip redeemable for land. The scrip was based on 1879 land prices; however, when the scrip was delivered in 1885, land prices had increased so that the excluded children could not acquire the same amount of land granted to other children. In the decades that followed, the position of the Métis in the Red River Settlement deteriorated. White settlers soon constituted a majority in the territory and the Métis community began to unravel.

The Métis sought a declaration that (1) in implementing the *Manitoba Act*, the federal Crown breached fiduciary obligations owed to the Métis; (2) the federal Crown failed to implement the *Manitoba Act* in a manner consistent with the honour of the Crown; and (3) certain legislation passed by Manitoba affecting the implementation of the *Manitoba Act* was *ultra vires*. The trial judge dismissed the claim for a declaration on the ground that ss. 31 and 32 of the *Manitoba Act* gave rise to neither a fiduciary duty nor a duty based on the honour of the Crown. He also found that the challenged Manitoba [page626] statutes were constitutional, and, in any event, the claim was barred by limitations and the doctrine of laches. Finally, he found that the Manitoba Metis Federation Inc. ("MMF") should not be granted standing in the action, since the individual plaintiffs were capable of bringing the claims forward. A five-member panel of the Manitoba Court of Appeal dismissed the appeal.

*Held* (Rothstein and Moldaver JJ. dissenting): The appeal should be allowed in part. The federal Crown failed to implement the land grant provision set out in s. 31 of the *Manitoba Act, 1870* in accordance with the honour of the Crown.

*Per* McLachlin C.J. and LeBel, Fish, Abella, Cromwell and Karakatsanis JJ.: The MMF should be granted standing. The action advanced is a collective claim for declaratory relief for the purposes of reconciling the descendants of the Métis people of the Red River Valley and Canada. It merits allowing the body representing the collective Métis interest to come before the court.

The obligations enshrined in ss. 31 and 32 of the *Manitoba Act* did not impose a fiduciary duty on the government. In the Aboriginal context, a fiduciary duty may arise in two ways. First, it may arise as a result of the Crown assuming discretionary control over specific Aboriginal interests. Where the Crown administers lands or property in which Aboriginal peoples have an interest, such a duty may arise if there is (1) a specific or cognizable Aboriginal interest, and (2) a Crown undertaking of discretionary control over that interest. The interest must be a communal Aboriginal interest in land that is integral to the nature of the Métis distinctive community and their relationship to the land. It must be predicated on historic use and occupation, and cannot be established by treaty or by legislation. Second, and more generally, a fiduciary duty may arise if there is (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary; (2) a defined person or class of persons vulnerable to a fiduciary's control; and (3) a legal or substantial practical interest of the beneficiary that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[page627]

Although the Crown undertook discretionary control of the administration of the land grants under ss. 31 and 32 of the *Manitoba Act*, the Métis are Aboriginal, and they had an interest in the land, the first test for fiduciary duty is not made out because neither the words of s. 31 nor the evidence establish a pre-existing communal Aboriginal interest held by the Métis. Their interests in land arose from their personal history, not their shared distinct Métis identity. Nor was a fiduciary duty established on the basis of an undertaking by the Crown. While s. 31 shows an intention to benefit the Métis children, it does not demonstrate an undertaking to act in their best interests, in priority to other legitimate concerns. Indeed, the discretion conferred by s. 31 to determine "such mode and on such conditions as to settlement and otherwise" belies a duty of loyalty and an intention to act in the best interests of the beneficiary, forsaking all other interests. Section 32 simply confirmed the continuance of different categories of landholdings in existence shortly before or at the creation of the new province. It did not constitute an undertaking on the part of the Crown to act as a fiduciary in settling the titles of the Métis landholders.

However, the Métis are entitled to a declaration that the federal Crown failed to act with diligence in implementing the land grant provision set out in s. 31 of the *Manitoba Act*, in accordance with the honour of the Crown. The ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Canadian sovereignty. Where this is at stake, it requires the Crown to act honourably in its dealings with the Aboriginal peoples in question. This flows from the guarantee of Aboriginal rights in s. 35(1) of the Constitution. The honour of the Crown is engaged by an explicit obligation to an Aboriginal group enshrined in the Constitution. The Constitution is not a mere statute; it is the very document by which the Crown asserted its sovereignty in the face of prior Aboriginal occupation. An explicit obligation to an Aboriginal group in the Constitution engages the honour of the Crown.

The honour of the Crown speaks to *how* obligations that attract it must be fulfilled, so the duties that flow from it vary with the situation. In the context of the implementation of a constitutional obligation to an Aboriginal people, the honour of the Crown requires that [page628] the Crown: (1) take a broad purposive approach to the interpretation of the promise; and (2) act diligently to fulfill it. The question is whether, viewing the Crown's conduct as a whole in the context of the case, it acted with diligence to pursue the fulfillment of the purposes of the obligation. The duty to act diligently is a narrow and circumscribed duty. Not every mistake or negligent act in implementing a constitutional obligation to an Aboriginal people brings dishonour to the Crown, and there is no guarantee that the purposes of the promise will be achieved. However, a persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise may amount to a betrayal of the Crown's duty to act honourably in fulfilling its promise.

Section 31 of the *Manitoba Act* is a solemn constitutional obligation to the Métis people of Manitoba, an Aboriginal people, and it engaged the honour of the Crown. Its immediate purpose was to give the Métis children a head start over the expected influx of settlers from the east. Its broader purpose was to reconcile the Métis' Aboriginal interests in the Manitoba territory with the

assertion of Crown sovereignty over the area that was to become the province of Manitoba. By contrast, s. 32 was a benefit made generally available to all settlers and did not engage the honour of the Crown.

Although the honour of the Crown obliged the government to act with diligence to fulfill s. 31, it acted with persistent inattention and failed to act diligently to achieve the purposes of the s. 31 grant. This was not a matter of occasional negligence, but of repeated mistakes and inaction that persisted for more than a decade, substantially defeating a purpose of s. 31. This was inconsistent with the behaviour demanded by the honour of the Crown: a government sincerely intent on fulfilling the duty that its honour demanded could and should have done better.

None of the government's other failures -- failing to prevent Métis from selling their land to speculators, issuing scrip in place of land, and failing to cluster family allotments -- were in themselves inconsistent with the honour of the Crown. That said, the impact of these measures was exacerbated by the delay inconsistent with [page629] the honour of the Crown: it increased improvident sales to speculators; it meant that when the children received scrip, they obtained significantly less than the 240 acres provided to those who took part in the initial distribution, because the price of land had increased in the interim; and it made it more difficult for Métis to trade grants amongst themselves to achieve contiguous parcels.

It is unnecessary to consider the constitutionality of the implementing statutes because they are moot.

The Métis claim based on the honour of the Crown is not barred by the law of limitations. Although claims for personal remedies flowing from unconstitutional statutes may be time-barred, the Métis seek no personal relief and make no claim for damages or for land. Just as limitations acts cannot prevent the courts from issuing declarations on the constitutionality of legislation, limitations acts cannot prevent the courts from issuing a declaration on the constitutionality of the Crown's conduct. So long as the constitutional grievance at issue here remains outstanding, the goals of reconciliation and constitutional harmony remain unachieved. In addition, many of the policy rationales underlying limitations statutes do not apply in an Aboriginal context. A declaration is a narrow remedy and, in some cases, may be the only way to give effect to the honour of the Crown.

Nor is the claim barred by the equitable doctrine of laches. Given the context of this case, including the historical injustices suffered by the Métis, the imbalance in power that followed Crown sovereignty, and the negative consequences following delays in allocating the land grants, delay on the part of the appellants cannot, by itself, be interpreted as some clear act which amounts to acquiescence or waiver. It is rather unrealistic to suggest that the Métis sat on their rights before the courts were prepared to recognize those rights. Furthermore, Canada has not changed its position as a result of the delay. This suffices to find that the claim is not barred by laches. However, it is difficult to see how a court, in its role as guardian of the Constitution, could apply an equitable doctrine to defeat a claim for a declaration that a Constitutional provision has not been fulfilled as required by the honour of the Crown.

*Per Rothstein and Moldaver JJ. (dissenting):* There is agreement with the majority that there was no fiduciary duty here, that no valid claims arise from s. 32 of the *Manitoba Act*, that any claims that might have arisen from the now repealed Manitoba legislation on the land grants are moot, that the random allocation of land grants was an acceptable means for Canada to implement the s. 31 land grants, and that the MMF has standing to bring these claims. However, the majority proposes a new common law constitutional obligation derived from the honour of the Crown. The courts below did not consider this issue and the parties did not argue it before this Court. This is an unpredictable expansion of the scope of the duties engaged under the honour of the Crown. The claim based on the honour of the Crown is also barred by both limitations periods and laches.

While a duty of diligent fulfillment may well prove to be an appropriate expansion of Crown obligations, and while a faster process would most certainly have been better, the duty crafted by the majority creates an unclear rule that is unconstrained by laches or limitation periods and immune from legislative redress, making the extent and consequences of the Crown's new obligations impossible to predict. It is not clear when an obligation rises to the "solemn" level that triggers the duty, what types of legal documents will give rise to solemn obligations, whether an obligation with a treaty-like character imposes higher obligations than other constitutional provisions, and whether it is sufficient for the obligation to be owed to an Aboriginal group. The idea that how the government is obliged to perform a constitutional obligation depends on how closely it resembles a treaty should be rejected. It would be a significant expansion of Crown liability to permit a claimant to seek relief so long as the promise was made to an Aboriginal group, without proof of an Aboriginal interest sufficient to ground a fiduciary duty, and based on actions that would not constitute a breach of fiduciary duty.

Even if the honour of the Crown was engaged and required the diligent implementation of s. 31, and even if this duty was not fulfilled, any claims arising from such a cause of action have long been barred by statutes of limitations and the equitable doctrine of laches. [page631] Limitations and laches cannot fulfill their purposes if they are not universally applicable. Limitations periods apply to the government as they do to all other litigants both generally and in the area of Aboriginal claims. This benefits the legal system by creating certainty and predictability, and serves to protect society at large by ensuring that claims against the Crown are made in a timely fashion so that the Crown is able to defend itself adequately.

Limitations periods have existed in Manitoba continuously since 1870, and, since 1931, Manitoba limitations legislation has provided a six-year limitation period for all causes of action, whether the cause of action arose before or after the legislation came into force. Manitoba has a 30-year ultimate limitation period. The Crown is entitled to the benefit of those limitations periods. The policy rationales underlying limitations periods do not support the creation of an exemption from those periods in this case. Manitoba legislation does not contain an exception from limitations periods for declaratory judgments and no such exception should be judicially created. In this case, the risk that a declaratory judgment will lead to additional remedies is fully realized: the Métis plan to use the declaration in extra-judicial negotiations with the Crown, so the declaration exposes the Crown to an obligation long after the time when the limitations period expired.

Moreover, this Court has never recognized a general exception from limitations for constitutionally derived claims. Rather, it has consistently held that limitations periods apply to factual claims with constitutional elements. While limitations periods do not apply to prevent a court from declaring a statute unconstitutional, the Métis' claim about unconstitutional statutes is moot. The remaining declaration sought concerns factual issues and alleged breaches of obligations which have always been subject to limitation periods. In suggesting that the goal of reconciliation must be given priority in the Aboriginal context, it appears that the majority has departed from the principle that the same policy rationales that support limitations generally should apply to Aboriginal claims.

These claims are also subject to laches. Laches can be used to defend against equitable claims that have [page632] not been brought in a sufficiently timely manner, and as breaches of fiduciary duty can be subject to laches, it would be fundamentally inconsistent to permit certain claims based on the honour of the Crown to escape the imputation of laches. Both branches of laches are satisfied: the Métis have knowingly delayed their claim by over a hundred years and in so doing have acquiesced to the circumstances and invited the government to rely on that, rendering the prosecution of this action unreasonable. As to acquiescence, the trial judge found that the Métis had the required knowledge in the 1870s, and that finding has not been shown to be an error. The suggestion that it is "unrealistic" to expect someone to have enforced their claim before the courts were prepared to recognize those rights is fundamentally at odds with the common law approach to changes in the law. Delay in making the grants cannot be both the wrong alleged and the reason the Crown cannot access the defence of laches: laches are always invoked as a defence by a party alleged to have wronged the plaintiff. If assessing conscionability is reduced to determining if the plaintiff has proven the allegations, the defence of laches is rendered illusory. The imbalance in power between the Métis and the government did not undermine their knowledge, capacity or freedom to the extent required to prevent a finding of acquiescence. The inference that delays in the land grants caused the vulnerability of the Métis was neither made by the trial judge nor supported by the record. In any event, laches are imputed against vulnerable people just as limitations periods are applied against them.

As to reliance, had the claim been brought promptly, the unexplained delays referred to as evidence for the Crown acting dishonourably may well have been accounted for, or the government might have been able to take steps to satisfy the Métis community.

Finally, while not doing so explicitly, the majority departs from the factual findings of the trial judge, absent a finding of palpable and overriding error, in two main areas: (1) the extent of the delay in distributing the land, and (2) the effect of that delay on the Métis. Manifestly, the trial judge made findings of delay. Nonetheless these findings and the evidence do not reveal a pattern of inattention, a lack of diligence, or that the purposes of the land grant were frustrated. That alone would nullify any claim the Métis might have based on a breach of duty [page633] derived from the honour of the Crown, assuming that any such duty exists.

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By McLachlin C.J. and Karakatsanis J.

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**referred to:** *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [\[1992\] 1 S.C.R. 236](#); *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [\[1989\] 2 S.C.R. 574](#); *Haida Nation v. British Columbia (Minister of Forests)*, [2004 SCC 73](#), [\[2004\] 3 S.C.R. 511](#); *Wewaykum Indian Band v. Canada*, [2002 SCC 79](#), [\[2002\] 4 S.C.R. 245](#); *Guerin v. The Queen*, [\[1984\] 2 S.C.R. 335](#); *R. v. Blais*, [2003 SCC 44](#), [\[2003\] 2 S.C.R. 236](#); *Beckman v. Little Salmon/Carmacks First Nation*, [2010 SCC 53](#), [\[2010\] 3 S.C.R. 103](#); *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004 SCC 74](#), [\[2004\] 3 S.C.R. 550](#); *R. v. Van der Peet*, [\[1996\] 2 S.C.R. 507](#); *R. v. Badger*, [\[1996\] 1 S.C.R. 771](#); *Mitchell v. Peguis Indian Band*, [\[1990\] 2 S.C.R. 85](#); *R. v. Sparrow*, [\[1990\] 1 S.C.R. 1075](#); *Mitchell v. M.N.R.*, [2001 SCC 33](#), [\[2001\] 1 S.C.R. 911](#); *R. v. Sioui*, [\[1990\] 1 S.C.R. 1025](#); *R. v. Sundown*, [\[1999\] 1 S.C.R. 393](#); *Province of Ontario v. Dominion of Canada (1895)*, [25 S.C.R. 434](#); *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005 SCC 69](#), [\[2005\] 3 S.C.R. 388](#); *R. v. Marshall*, [\[1999\] 3 S.C.R. 456](#); *The Case of The Churchwardens of St. Saviour in Southwark (1613)*, 10 Co. Rep. 66b, 77 E.R. 1025; *Roger Earl of Rutland's Case (1608)*, 8 Co. Rep. 55a, 77 E.R. 555; *Quebec (Attorney General) v. Moses*, [2010 SCC 17](#), [\[2010\] 1 S.C.R. 557](#); *Dumont v. Canada (Attorney General)*, [\[1990\] 1 S.C.R. 279](#); *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007 SCC 1](#), [\[2007\] 1 S.C.R. 3](#); *Ravndahl v. Saskatchewan*, [2009 SCC 7](#), [\[2009\] 1 S.C.R. 181](#); *Thorson v. Attorney General of Canada*, [\[1975\] 1 S.C.R. 138](#); *Canadian Bar Assn. v. British Columbia*, [2006 BCSC 1342](#), 59 B.C.L.R. (4) 38; *Waddell v. Schreyer (1981)*, [126 D.L.R. \(3d\) 431](#), aff'd [\(1982\)](#), [142 D.L.R. \(3d\) 177](#), leave to appeal refused, [\[1982\] 2 S.C.R. vii](#) (*sub nom. Foothills Pipe Lines (Yukon) Ltd. v. Waddell*); *Canada (Attorney General) v. Lameman*, [2008 SCC 14](#), [\[2008\] 1 S.C.R. 372](#); *Reference re Secession of Quebec*, [\[1998\] 2 S.C.R. 217](#); *Novak v. Bond*, [\[1999\] 1 S.C.R. 808](#); *Cheslatta [page634] Carrier Nation v. British Columbia*, [2000 BCCA 539](#), 193 D.L.R. (4) 344; *M. (K.) v. M. (H.)*, [\[1992\] 3 S.C.R. 6](#); *Lindsay Petroleum Co. v. Hurd (1874)*, L.R. 5 P.C. 221; *Pro Swing Inc. v. Elta Golf Inc.*, [2006 SCC 52](#), [\[2006\] 2 S.C.R. 612](#); *Ontario Hydro v. Ontario (Labour Relations Board)*, [\[1993\] 3 S.C.R. 327](#); *Attorney General of Manitoba v. Forest*, [\[1979\] 2 S.C.R. 1032](#).

By Rothstein J. (dissenting)

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[737](#); *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221; *In re Spectrum Plus Ltd. (in liquidation)*, [2005] UKHL 41, [2005] 2 A.C. 680; *Canada (Attorney General) v. Hislop*, [2007 SCC 10](#), [\[2007\] 1 S.C.R. 429](#); *Barber v. Proudfoot*, [1890-91] 1 W.L.T.R. 144; *Hardy v. Desjarlais* (1892), 8 Man. R. 550; *Robinson v. Sutherland* (1893), 9 Man. R. 199; *City of Winnipeg v. Barrett*, [\[1892\] A.C. 445](#); *Brophy v. Attorney-General of Manitoba*, [\[1895\] A.C. 202](#); *Ontario Hydro v. Ontario (Labour Relations Board)*, [\[1993\] 3 S.C.R. 327](#).

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[page635]

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## History and Disposition:

APPEAL from a judgment of the Manitoba Court of Appeal (Scott C.J.M. and Monnin, Steel, Hamilton and Freedman J.J.A.), [2010 MBCA 71](#), [255 Man. R. \(2d\) 167](#), 486 W.A.C. 167, [\[2010\] 12 W.W.R. 599](#), [\[2010\] 3 C.N.L.R. 233](#), [216 C.R.R. \(2d\) 144](#), 94 R.P.R. (4) 161, [\[2010\] M.J. No. 219](#) (QL), [2010 CarswellMan 322](#), affirming a decision of MacInnes J., [2007 MBQB 293](#), [223](#)

[Man. R. \(2d\) 42](#), [\[2008\] 4 W.W.R. 402](#), [\[2008\] 2 C.N.L.R. 52](#), [\[2007\] M.J. No. 448](#) (QL), 2007 CarswellMan 500. Appeal allowed in part, Rothstein and Moldaver JJ. dissenting.

## Counsel

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Written submissions only by *Douglas B. Titosky*, for the intervener the Attorney General of Alberta.

*Clement Chartier, Q.C., and Marc LeClair*, for the intervener the Métis National Council.

*Jason Taylor Madden*, for the intervener the Métis Nation of Alberta.

*Jean Teillet and Arthur Pape*, for the intervener the Métis Nation of Ontario.

*Jeffrey R. W. Rath*, for the intervener the Treaty One First Nations.

[page637]

Written submissions only by *Joseph J. Arvay, Q.C., David C. Nahwegahbow and Bruce Elwood*, for the intervener the Assembly of First Nations.

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The judgment of McLachlin C.J. and LeBel, Fish, Abella, Cromwell and Karakatsanis JJ. was delivered by

## **McLACHLIN C.J. and KARAKATSANIS J.**

### I. Overview

1 Canada is a young nation with ancient roots. The country was born in 1867, by the

consensual union of three colonies - United Canada (now Ontario and Quebec), Nova Scotia and New Brunswick. Left unsettled was whether the new nation would be expanded to include the vast territories to the west, stretching from modern Manitoba to British Columbia. The Canadian government, led by Prime Minister John A. Macdonald, embarked on a policy aimed at bringing the western territories within the boundaries of Canada, and opening them up to settlement.

**2** This meant dealing with the indigenous peoples who were living in the western territories. On the prairies, these consisted mainly of two groups - the First Nations, and the descendants of unions between white traders and explorers and Aboriginal women, now known as Métis.

**3** The government policy regarding the First Nations was to enter into treaties with the various bands, whereby they agreed to settlement of their lands in exchange for reservations of land and other promises.

**4** The government policy with respect to the Métis population - which, in 1870, comprised 85 percent of the population of what is now Manitoba - was less clear. Settlers began pouring into the region, displacing the Métis' social and political [page638] control. This led to resistance and conflict. To resolve the conflict and assure peaceful annexation of the territory, the Canadian government entered into negotiations with representatives of the Métis-led provisional government of the territory. The result was the *Manitoba Act, 1870*, S.C. 1870, c. 3 ("*Manitoba Act*"), which made Manitoba a province of Canada.

**5** This appeal is about obligations to the Métis people enshrined in the *Manitoba Act*, a constitutional document. These promises represent the terms under which the Métis people agreed to surrender their claims to govern themselves and their territory, and become part of the new nation of Canada. These promises were directed at enabling the Métis people and their descendants to obtain a lasting place in the new province. Sadly, the expectations of the Métis were not fulfilled, and they scattered in the face of the settlement that marked the ensuing decades.

**6** Now, over a century later, the descendants of the Métis people seek a declaration in the courts that Canada breached its obligation to implement the promises it made to the Métis people in the *Manitoba Act*.

**7** More particularly, the appellants seek a declaration that (1) in implementing the *Manitoba Act*, the federal Crown breached fiduciary obligations owed to the Métis; (2) the federal Crown failed to implement the *Manitoba Act* in a manner consistent with the honour of the Crown; and (3) certain legislation passed by Manitoba affecting the implementation of the *Manitoba Act* was *ultra vires*.

**8** It is not disputed that there was considerable delay in implementing the constitutional provisions. The main issues are (1) whether Canada failed to act in accordance with its legal obligations, and (2) whether the Métis' claim is too late and thus barred by the doctrine of laches or by any [page639] limitations law, be it the English limitations law in force at the time the claims arose, or the subsequent limitations acts enacted by Manitoba: *The Limitation of Actions*

*Act, 1931, S.M. 1931, c. 30; The Limitation of Actions Act, 1931, R.S.M. 1940, c. 121; The Limitation of Actions Act, R.S.M. 1970, c. L150; collectively referred to as "The Limitation of Actions Act".*

**9** We conclude that s. 31 of the *Manitoba Act* constitutes a constitutional obligation to the Métis people of Manitoba, an Aboriginal people, to provide the Métis children with allotments of land. The immediate purpose of the obligation was to give the Métis children a head start over the expected influx of settlers from the east. Its broader purpose was to reconcile the Métis' Aboriginal interests in the Manitoba territory with the assertion of Crown sovereignty over the area that was to become the province of Manitoba. The obligation enshrined in s. 31 of the *Manitoba Act* did not impose a fiduciary or trust duty on the government. However, as a solemn constitutional obligation to the Métis people of Manitoba aimed at reconciling their Aboriginal interests with sovereignty, it engaged the honour of the Crown. This required the government to act with diligence in pursuit of the fulfillment of the promise. On the findings of the trial judge, the Crown failed to do so and the obligation to the Métis children remained largely unfulfilled. The Métis claim based on the honour of the Crown is not barred by the law of limitations or the equitable doctrine of laches. We therefore conclude that the Métis are entitled to a declaration that Canada failed to implement s. 31 as required by the honour of the Crown.

[page640]

**10** We agree with the courts below that the s. 32 claim is not established, and find it unnecessary to consider the constitutionality of the implementing statutes.

## II. The Constitutional Promises and the Legislation

**11** Section 31 of the *Manitoba Act*, known as the children's grant, set aside 1.4 million acres of land to be given to Métis children:

**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.

**12** Section 32 of the *Manitoba Act* provided for recognition of existing landholdings, where individuals asserting ownership had not yet been granted title:

**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:-

(1) All grants of land in freehold made by the Hudson's Bay Company up to the eighth day of March, in the year 1869, shall, if required by the owner, be confirmed by grant from the Crown.

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

[page641]

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

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

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

**13** During the 1870s and 1880s, Manitoba passed five statutes, now long spent and repealed, dealing with the technical requirements to transfer interests in s. 31 lands. The appellants seek to have the statutes declared *ultra vires* pursuant to the *Constitution Act, 1867*. Alternatively, they argue that the statutes were inoperative by virtue of federal paramountcy.

### III. Judicial Decisions

**14** The trial judge, MacInnes J. (as he then was), engaged in a thorough review of the facts: [2007 MBQB 293](#), [223 Man. R. \(2d\) 42](#). He found that while dishonesty and bad faith were not established, government error and inaction led to lengthy delay in implementing ss. 31 and 32, and left 993 Métis children who were entitled to a grant with scrip instead of land. However, he dismissed the claim for a declaration on the ground that ss. 31 and 32 of the *Manitoba Act* gave rise to neither a fiduciary duty nor a duty based on the honour of the Crown. [page642] The trial judge took the view that a fiduciary duty required proof that the Aboriginal people held the land collectively prior to 1870. Since the evidence established only individual landholdings by the Métis, their claim was "fundamentally flawed". He said of the action that "[i]t seeks relief that is in essence of a collective nature, but is underpinned by a factual reality that is individual": para. 1197.

**15** The trial judge concluded that, in any event, the claim was barred by *The Limitation of Actions Act* and the doctrine of laches. He also found that Manitoba's various legislative

initiatives regarding the land grants were constitutional. Finally, he held that the Manitoba Metis Federation Inc. ("MMF") should not be granted standing in the action, since the individual plaintiffs were capable of bringing the claims forward.

**16** A five-member panel of the Manitoba Court of Appeal, *per* Scott C.J.M., dismissed the appeal: [2010 MBCA 71](#), [255 Man. R. \(2d\) 167](#). It rejected the trial judge's view that collective Aboriginal title to land was essential to a claim that the Crown owed a fiduciary duty to Aboriginal peoples. However, the court found it unnecessary to determine whether the Crown in fact owed a fiduciary duty to the Métis, since the trial judge's findings of fact concerning the conduct of the Crown did not support any breach of such a duty.

**17** The Court of Appeal also rejected the assertion that the honour of the Crown had been breached. The honour of the Crown, in its view, was [page643] subsidiary to the fiduciary claim and did not itself give rise to an independent duty in this situation.

**18** Finally, the court held that the Métis' claim for a declaration was, in any event, statute-barred, and that the issue of the constitutional validity of the Manitoba legislation was moot. It also declined to interfere with the trial judge's discretionary decision to deny standing to the MMF.

#### IV. Facts

**19** This appeal concerns events that occurred over a century ago. Despite the difficulties imposed by the lack of live witnesses and distant texts, the trial judge made careful and complete findings of fact on all the elements relevant to the legal issues. The Court of Appeal thoroughly reviewed these findings and, with limited exceptions, confirmed them.

**20** The completeness of these findings, which stand largely unchallenged, make it unnecessary to provide a detailed narrative of the Métis people, the Red River Settlement, and the conflict that gave rise to the *Manitoba Act* and Manitoba's entry into Canada - events that have inspired countless tomes and indeed, an opera. We content ourselves with a brief description of the origins of the Red River Settlement and the events that give rise to the appellants' claims.

**21** The story begins with the Aboriginal peoples who inhabited what is now the province of Manitoba - the Cree and other less populous nations. In the late 17th century, European adventurers and explorers passed through. The lands were claimed nominally by England which granted the Hudson's Bay Company, a company of fur traders operating out of London, control over a vast territory called Rupert's Land, which included modern Manitoba. Aboriginal peoples continued to occupy the territory. In addition to the original First Nations, a new Aboriginal group, the Métis, arose - people [page644] descended from early unions between European adventurers and traders, and Aboriginal women. In the early days, the descendants of English-speaking parents were referred to as half-breeds, while those with French roots were called Métis.

**22** A large - by the standards of the time - settlement developed the forks of the Red and

Assiniboine Rivers on land granted to Lord Selkirk by the Hudson's Bay Company in 1811. By 1869, the settlement consisted of 12,000 people, under the governance of the Hudson's Bay Company.

**23** In 1869, the Red River Settlement was a vibrant community, with a free enterprise system and established judicial and civic institutions, centred on the retail stores, hotels, trading undertakings and saloons of what is now downtown Winnipeg. The Métis were the dominant demographic group in the Settlement, comprising around 85 percent of the population, and held leadership positions in business, church and government.

**24** In the meantime, Upper Canada (now Ontario), Lower Canada (now Quebec), Nova Scotia and New Brunswick united under the *British North America Act* of 1867 (now *Constitution Act, 1867*) to become the new country of Canada. The country's first government, led by Sir John A. Macdonald, was intent on westward expansion, driven by the dream of a nation that would extend from the Atlantic to the Pacific and provide vast new lands for settlement. England agreed to cede Rupert's Land to Canada. In recognition of the Hudson's Bay Company's interest, Canada paid it GBP300,000 and allowed it to retain some of the land around its trading posts in the Northwest. In 1868, the Imperial Parliament cemented the deal with *Rupert's Land Act, 1868* (U.K.), 31 & 32 Vict., c. 105.

[page645]

**25** Canada, as successor to the Hudson's Bay Company, became the titular owner of Rupert's Land and the Red River Settlement. However, the reality on the ground was more complex. The French-speaking Roman Catholic Métis viewed with alarm the prospect of Canadian control leading to a wave of English-speaking Protestant settlers that would threaten their traditional way of life. When two survey parties arrived in 1869 to take stock of the land, the matter came to a head.

**26** The surveyors were met with armed resistance, led by a French-speaking Métis, Louis Riel. On November 2, 1869, Canada's proposed Lieutenant Governor of the new territory, William McDougall, was turned back by a mounted French Métis patrol. On the same day, a group of Métis, including Riel, seized Upper Fort Garry (now downtown Winnipeg), the Settlement's principle fortification. Riel called together 12 representatives of the English-speaking parishes and 12 representatives of the French-speaking Métis parishes, known as the "Convention of 24". At their second meeting, he announced the French Métis intended to form a provisional government, and asked for the support of the English. The English representatives asked for time to confer with the people of their parishes. The meeting was adjourned until December 1, 1869.

**27** When the meeting reconvened, they were confronted with a proclamation made earlier that day by McDougall that the region was under the control of Canada. The group rejected the claim. The French Métis drafted a list of demands that Canada must satisfy before the Red River settlers would accept Canadian control.

**28** The Canadian government adopted a conciliatory course. It invited a delegation of "at least

two residents" to Ottawa to present the demands of the settlers and confer with Parliament. The provisional government responded by delegating [page646] a priest, Father Ritchot, a judge, Judge Black, and a local businessman named Alfred Scott to go to Ottawa. The delegates - none of whom were Métis, although Riel nominated them - set out for Ottawa on March 24, 1870.

**29** Canada had little choice but to adopt a diplomatic approach to the Red River settlers. As MacInnes J. found at trial:

Canada had no authority to send troops to the Settlement to quell the French Métis insurrection. Nor did it have the necessary troops. Moreover, given the time of year, there was no access to the Settlement other than through the United States. But, at the time, there was a concern in Canada about possible annexation of the territory by the United States and hence a reluctance on the part of Canada to seek permission from the United States to send troops across its territory to quell the insurrection and restore authority. [para. 78]

**30** The delegates arrived in Ottawa on April 11, 1870. They met and negotiated with Prime Minister Macdonald and the Minister of Militia and Defence, George-Étienne Cartier. The negotiations were part of a larger set of negotiations on the terms on which Manitoba would enter Canada as a province. It emerged that Canada wanted to retain ownership of public lands in the new province. This led to the idea of providing land for Métis children. The parties settled on a grant to Métis children of 1.4 million acres of land (s. 31) and recognition of existing landholdings (s. 32). Parliament, after vigorous debate and the failure of a motion to delete the section providing the children's grant, passed the *Manitoba Act* on May 10, 1870.

**31** The delegates returned to the Red River Settlement with the proposal, and, on June 24, 1870, Father Ritchot addressed the Convention of 40, now called the Legislative Assembly of Assiniboia, to [page647] advocate for the adoption of the *Manitoba Act*. The Assembly was read a letter from Minister Cartier which promised that any existing land interest contemplated in s. 32 of the *Manitoba Act* could be converted to title without payment. Minister Cartier guaranteed that the s. 31 children's grants would "be of a nature to meet the wishes of the half-breed residents" and the division of grant land would be done "*in the most effectual and equitable manner*": A.R., vol. XI, at p. 196 (emphasis added). On this basis, the Assembly voted to accept the *Manitoba Act*, and enter the Dominion of Canada. Manitoba became part of Canada by Order in Council of the Imperial government effective July 15, 1870.

**32** The Canadian government began the process of implementing s. 31 in early 1871. The first step was to set aside 1.4 million acres, and the second was to divide the land among the eligible recipients. A series of errors and delays interfered with accomplishing the second step in the "effectual" manner Minister Cartier had promised.

**33** The first problem was the erroneous inclusion of all Métis, including heads of families, in the allotment, contrary to the terms of s. 31, which clearly provided the lands were to be divided among the children of the Métis heads of families. On March 1, 1871, Parliament passed an Order in Council declaring that all Métis had a right to a share in the 1.4 million acres promised

in s. 31 of the *Manitoba Act*. This order, which would have created more grants of smaller acreage, was made over the objections raised by McDougall, then the former Lieutenant Governor of Rupert's Land, in the House of Commons. Nevertheless, the federal government began planning townships based on 140-acre lots, dividing the 1.4 million acres among approximately 10,000 recipients. This was the first allotment.

[page648]

**34** In 1873, the federal government changed its position, and decided that only Métis children would be entitled to s. 31 grants. The government also decided that lands traditionally used for haying by the Red River settlers could not be used to satisfy the children's land grant, as was originally planned, requiring additional land to be set aside to constitute the 1.4 million acres. The 1873 decision was clearly the correct decision. The problem is that it took the government over three years to arrive at that position. This gave rise to the second allotment.

**35** In November 1873, the government of Sir John A. Macdonald was defeated and a new Liberal government formed in early 1874. The new government, without explanation, did not move forward on the allotments until early 1875. The Liberal government finally, after questions in Parliament about the delay and petitions from several parishes, appointed John Machar and Matthew Ryan to verify claimants entitled to the s. 31 grants. The process of verifying those entitled to grants commenced five years after the *Manitoba Act* was passed.

**36** The next set of problems concerned the Machar/Ryan Commission's estimate of the number of eligible Métis children. Though a census taken in 1870 estimated 7,000 Métis children, Machar and Ryan concluded the number was lower, at 5,088, which was eventually rounded up to 5,833 to allow for even 240-acre plots. This necessitated a third and final allotment, which began in 1876, but was not completed until 1880.

**37** While the allotment process lagged, speculators began acquiring the Métis children's yet-to-be granted interests in the s. 31 lands, aided by a range of legal devices. Initially, the Manitoba legislature moved to block sales of the children's interests to speculators, but, in 1877, it passed legislation [page649] authorizing sales of s. 31 interests once the child obtained the age of majority, whether or not the child had received his or her allotment, or even knew of its location. In 1878, Manitoba adopted further legislation which allowed children between 18 and 21 to sell their interests, so long as the transaction was approved by a judicial officer and the child's parents. Dr. Thomas Flanagan, an expert who testified at trial, found returns on judicial sales were the poorest of any type of s. 31 sale: C.A., at para. 152.

**38** Eventually, it became apparent that the Acting Agent of Dominion Lands, Donald Codd had underestimated the number of eligible Métis children - 993 more Métis children were entitled to land than Codd had counted on. In 1885, rather than start the allotment yet a fourth time, the Canadian government provided by Order in Council that the children for whom there was no land would be issued with \$240 worth of scrip redeemable for land. Fifteen years after the passage of the *Manitoba Act*, the process was finally complete.

**39** The position of the Métis in the Red River Settlement deteriorated in the decades following

Manitoba's entry into Confederation. White settlers soon constituted a majority in the territory and the Métis community began to unravel. Many Métis sold their promised interests in land and moved further west. Those left amounted to a small remnant of the original community.

## V. Issues

**40** The appellants seek numerous declarations, including: (1) in implementing the *Manitoba Act*, the federal Crown breached fiduciary obligations owed to the Métis; (2) the federal Crown failed to implement the *Manitoba Act* in a manner [page650] consistent with the honour of the Crown; and (3) certain legislation passed by Manitoba affecting the implementation of the *Manitoba Act* was *ultra vires*. These claims give rise to the following issues:

- A. Does the Manitoba Metis Federation have standing in the action?
- B. Is Canada in breach of a fiduciary duty to the Métis?
- C. Did Canada fail to comply with the honour of the Crown in the implementation of ss. 31 and 32 of the *Manitoba Act*?
- D. Were the Manitoba statutes related to implementation unconstitutional?
- E. Is the claim for a declaration barred by limitations?
- F. Is the claim for a declaration barred by laches?

## VI. Discussion

### A. *Does the Manitoba Metis Federation Have Standing in the Action?*

**41** Canada and Manitoba take no issue with the private interest standing of the individual appellants. However, they argue that the MMF has no private interest in the litigation and fails the established test for public interest standing on the third step of the test set out in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, as the individual plaintiffs clearly demonstrate another reasonable and effective manner for the case to be heard.

[page651]

**42** The courts below denied the MMF public interest standing to bring this action. At trial, MacInnes J. found that the MMF would fail the third step of the test set out in *Canadian Council of Churches*, on the ground that the individual plaintiffs demonstrate another reasonable and effective manner for the case to be heard. The Court of Appeal declined to interfere with MacInnes J.'s discretionary standing ruling.

**43** The courts below did not have the benefit of this Court's decision in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012 SCC 45](#), [2012] 2 S.C.R. 524. In that case, the Court rejected a strict approach to the third requirement for standing. The presence of other claimants does not necessarily preclude public interest standing; the question is whether this litigation is a reasonable and effective means to bring a

challenge to court. The requirements for public interest standing should be addressed in a flexible and generous manner, and considered in light of the underlying purposes of setting limits on who has standing to bring an action before a court. Even if there are other plaintiffs with a direct interest in the issue, a court may consider whether the public interest plaintiff will bring any particularly useful or distinct perspective to the resolution of the issue at hand.

**44** As discussed below, the action advanced is not a series of claims for individual relief. It is rather a collective claim for declaratory relief for the purposes of reconciliation between the descendants of the Métis people of the Red River Valley and Canada. The *Manitoba Act* provided for individual entitlements, to be sure. But that does not negate the fact that the appellants advance a collective claim of the Métis people, based on a promise made to them in return for their agreement to recognize Canada's sovereignty over them. This collective claim merits allowing the body representing the collective Métis [page652] interest to come before the Court. We would grant the MMF standing.

**45** For convenience, from this point forward in these reasons, we will refer to both the individual plaintiffs and the MMF collectively as "the Métis".

### B. *Is Canada in Breach of a Fiduciary Duty to the Métis?*

#### (1) When a Fiduciary Duty May Arise

**46** The Métis say that Canada owed them a fiduciary duty to implement ss. 31 and 32 of the *Manitoba Act* as their trustee. This duty, they say, arose out of their Aboriginal interest in lands in Manitoba, or directly from the promises made in ss. 31 and 32.

**47** Fiduciary duty is an equitable doctrine originating in trust. Generally speaking, a fiduciary is required to act in the best interests of the person on whose behalf he is acting, to avoid all conflicts of interest, and to strictly account for all property held or administered on behalf of that person. See *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [\[1989\] 2 S.C.R. 574](#), at pp. 646-47.

**48** The relationship between the Métis and the Crown, viewed generally, is fiduciary in nature. However, not all dealings between parties in a fiduciary relationship are governed by fiduciary obligations.

**49** In the Aboriginal context, a fiduciary duty may arise as a result of the "Crown [assuming] discretionary control over specific Aboriginal interests": *Haida Nation v. British Columbia (Minister of Forests)*, [2004 SCC 73](#), [\[2004\] 3 S.C.R. 511](#), at para. 18. The focus is on the particular interest that [page653] is the subject matter of the dispute: *Wewaykum Indian Band v. Canada*, [2002 SCC 79](#), [\[2002\] 4 S.C.R. 245](#), at para. 83. The content of the Crown's fiduciary duty towards Aboriginal peoples varies with the nature and importance of the interest sought to be protected: *Wewaykum*, at para. 86.

**50** A fiduciary duty may also arise from an undertaking, if the following conditions are met:

- (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

(*Alberta v. Elder Advocates of Alberta Society*, [2011 SCC 24](#), [\[2011\] 2 S.C.R. 261](#), at para. 36)

- (2) Did the Métis Have a Specific Aboriginal Interest in the Land Giving Rise to a Fiduciary Duty?

**51** As discussed, the first way a fiduciary duty may arise is where the Crown administers lands or property in which Aboriginal peoples have an interest: *Guerin v. The Queen*, [\[1984\] 2 S.C.R. 335](#), at p. 384. The duty arises if there is (1) a specific or cognizable Aboriginal interest, and (2) a Crown undertaking of discretionary control over that interest: *Wewaykum*, at paras. 79-83; *Haida Nation*, at para. 18.

**52** There is little dispute that the Crown undertook discretionary control of the administration of the land grants under ss. 31 and 32 of the *Manitoba Act*, meeting the second requirement. The issue is whether the first condition is met - is there a "specific or cognizable Aboriginal interest"? The trial judge held that the Métis failed to establish a specific, cognizable interest in land. The Court of Appeal found it unnecessary to decide the point, in [page654] view of its conclusion that in any event, no breach was established.

**53** The fact that the Métis are Aboriginal and had an interest in the land is not sufficient to establish an Aboriginal interest in land. The interest (title or some other interest) must be distinctly Aboriginal; it must be a communal Aboriginal interest in the land that is integral to the nature of the Métis distinctive community and their relationship to the land: see *R. v. Powley*, [2003 SCC 43](#), [\[2003\] 2 S.C.R. 207](#), at para. 37. The key issue is thus whether the Métis as a *collective* had a specific or cognizable *Aboriginal* interest in the ss. 31 or 32 land.

**54** The Métis argue that s. 31 of the *Manitoba Act* confirms that they held a pre-existing specific Aboriginal interest in the land designated by s. 31. Section 31 states that the land grants were directed "*towards the extinguishment of the Indian Title to the lands in the Province*", and that the land grant was for "*the benefit of the families of the half-breed residents*". This language, the Métis argue, acknowledges that the Métis gave the Crown control over their homeland in the Red River Settlement in exchange for a number of provisions in the *Manitoba Act*, a constitutional document. The Métis say speeches in the House of Commons by the framers of the *Manitoba Act*, Prime Minister Macdonald and George-Étienne Cartier, confirm that the purpose of s. 31 was to extinguish the "Indian Title" of the Métis. The Métis urge that the *Manitoba Act* must be read broadly in light of its purpose of bringing Manitoba peaceably into Confederation and assuring a future for the Métis as landholders and settlers in the new province: see *R. v. Blais*, [2003 SCC 44](#), [\[2003\] 2 S.C.R. 236](#), at para. 17.

**55** Canada replies that s. 31 does not establish pre-existing Aboriginal interest in land. It was an

[page655] instrument directed at settling grievances, and the reference to "Indian Title" does not establish that such title actually existed. It was up to the Métis to prove that they held an Aboriginal interest in land prior to the *Manitoba Act*, and they have not done so, Canada argues. Canada acknowledges that individual Métis people held individual parcels of land, but it denies that they held the collective Aboriginal interest necessary to give rise to a fiduciary duty.

**56** The trial judge's findings are fatal to the Métis' argument. He found as a fact that the Métis used and held land individually, rather than communally, and permitted alienation. He found no evidence that the Métis asserted they held Indian title when British leaders purported to extinguish Indian title, first in the Settlement belt and then throughout the province. He found that the Red River Métis were descended from many different bands. While individual Métis held interests in land, those interests arose from their personal history, not their shared Métis identity. Indeed the trial judge concluded Métis ownership practices were incompatible with the claimed Aboriginal interest in land.

**57** The Métis argue that the trial judge and the Court of Appeal erred in going behind the language of s. 31 and demanding proof of a collective Aboriginal interest in land. They assert that Aboriginal title was historically uncertain, and that the Crown's practice was to accept that any organized Aboriginal group had title and to extinguish that title by treaty, or in this case, s. 31 of the *Manitoba Act*.

**58** Even if this was the Crown's practice (a doubtful assumption in the absence of supporting evidence), it does not establish that the Métis held either Aboriginal title or some other Aboriginal interest in specific lands as a group. An Aboriginal interest in land giving rise to a fiduciary duty cannot be established by treaty, or, by extension, [page656] legislation. Rather, it is predicated on historic use and occupation. As Dickson J. stated in *Guerin*:

The "political trust" cases concerned essentially the distribution of public funds or other property held by the government. In each case the party claiming to be beneficiary under a trust depended entirely on statute, ordinance or treaty as the basis for its claim to an interest in the funds in question. The situation of the Indians is entirely different. Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive or legislative provision. [Emphasis added; p. 379.]

**59** In summary, the words of s. 31 do not establish pre-existing communal Aboriginal title held by the Métis. Nor does the evidence: the trial judge's findings of fact that the Métis had no communal Aboriginal interest in land are fatal to this contention. It follows that the argument that Canada was under a fiduciary duty in administering the children's land because the Métis held an Aboriginal interest in the land must fail. The same reasoning applies to s. 32 of the *Manitoba Act*.

(3) Did the Crown Undertake to Act in the Best Interests of the Métis, Giving Rise to a Fiduciary Duty?

**60** This leaves the question of whether a fiduciary duty is established on the basis of an undertaking by the Crown. To recap, this requires:

- (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely [page657] affected by the alleged fiduciary's exercise of discretion or control.

(*Elder Advocates*, at para. 36)

**61** The first question is whether an undertaking has been established. In order to elevate the Crown's obligations to a fiduciary level, the power retained by the Crown must be coupled with an undertaking of loyalty to act in the beneficiaries' best interests in the nature of a private law duty: *Guerin*, at pp. 383-84. In addition, "[t]he party asserting the duty must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake": *Elder Advocates*, at para. 31.

**62** While s. 31 shows an intention to benefit the Métis children, it does not demonstrate an undertaking to act in their best interests, in priority to other legitimate concerns, such as ensuring land was available for the construction of the railway and opening Manitoba for broader settlement. Indeed, the discretion conferred by s. 31 to determine "such mode and on such conditions as to settlement and otherwise" belies a duty of loyalty and an intention to act in the best interests of the beneficiary, forsaking all other interests.

**63** Nor did s. 32 constitute an undertaking on the part of the Crown to act as a fiduciary in settling the titles of the Métis landholders. It confirmed the continuance of different categories of landholdings in existence shortly before or at the creation of the new province (C.A., at paras. 673 and 717), and applied to all landholders (C.A., at para. 717; see also paras. 674 and 677).

[page658]

(4) Conclusion on Fiduciary Duty

**64** We conclude that Canada did not owe a fiduciary duty to the Métis in implementing ss. 31 and 32 of the *Manitoba Act*.

C. *Did Canada Fail to Comply With the Honour of the Crown in the Implementation of Sections 31 and 32 of the Manitoba Act?*

(1) The Principle of the Honour of the Crown

**65** The appellants argue that Canada breached a duty owed to the Métis based on the honour

of the Crown. The phrase "honour of the Crown" refers to the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign.

**66** The honour of the Crown arises "from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people": *Haida Nation*, at para. 32. In Aboriginal law, the honour of the Crown goes back to the *Royal Proclamation* of 1763, which made reference to "the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection": see *Beckman v. Little Salmon/Carmacks First Nation*, [2010 SCC 53](#), [\[2010\] 3 S.C.R. 103](#), at para. 42. This "Protection", though, did not arise from a paternalistic desire to protect the Aboriginal peoples; rather, it was a recognition of their strength. Nor is the honour of the Crown a paternalistic concept. The comments of Brian Slattery with respect to fiduciary duty resonate here:

The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a "weaker" or "primitive" people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, [page659] that their rights would be better protected by reliance on the Crown than by self-help.

("Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 753)

The ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty. As stated in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004 SCC 74](#), [\[2004\] 3 S.C.R. 550](#), at para. 24:

The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question.

**67** The honour of the Crown thus recognizes the impact of the "superimposition of European laws and customs" on pre-existing Aboriginal societies: *R. v. Van der Peet*, [\[1996\] 2 S.C.R. 507](#), at para. 248, *per* McLachlin J., dissenting. Aboriginal peoples were here first, and they were never conquered (*Haida Nation*, at para. 25); yet, they became subject to a legal system that they did not share. Historical treaties were framed in that unfamiliar legal system, and negotiated and drafted in a foreign language: *R. v. Badger*, [\[1996\] 1 S.C.R. 771](#), at para. 52; *Mitchell v. Peguis Indian Band*, [\[1990\] 2 S.C.R. 85](#), at pp. 142-43, *per* La Forest J. The honour of the Crown characterizes the "special relationship" that arises out of this colonial practice: *Little Salmon*, at para. 62. As explained by Brian Slattery:

... when the Crown claimed sovereignty over Canadian territories and ultimately gained factual control [page660] over them, it did so in the face of pre-existing Aboriginal sovereignty and territorial rights. The tension between these conflicting claims gave rise

to a special relationship between the Crown and Aboriginal peoples, which requires the Crown to deal honourably with Aboriginal peoples.

("Aboriginal Rights and the Honour of the Crown" [\(2005\), 29 S.C.L.R. \(2d\) 433](#), at p. 436)

(2) When Is the Honour of the Crown Engaged?

**68** The honour of the Crown imposes a heavy obligation, and not all interactions between the Crown and Aboriginal people engage it. In the past, it has been found to be engaged in situations involving reconciliation of Aboriginal rights with Crown sovereignty. As stated in *Badger*:

... the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. [para. 41]

**69** This Court has also recognized that the honour of the Crown is engaged by s. 35(1) of the *Constitution Act, 1982*. In *R. v. Sparrow*, [\[1990\] 1 S.C.R. 1075](#), the Court found that s. 35(1) restrains the legislative power in s. 91(24), in accordance with the "high standard of honourable dealing": p. 1109. In *Haida Nation*, this Court explained that "[i]t is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees": para. 20. Because of its connection with s. 35, the honour of the Crown has been called a "constitutional principle": *Little Salmon*, at para. 42.

**70** The application of these precedents to this case indicates that the honour of the Crown is also engaged by an explicit obligation to an Aboriginal group that is enshrined in the Constitution. The [page661] Constitution is not a mere statute; it is the very document by which the "Crow[n] assert[ed its] sovereignty in the face of prior Aboriginal occupation": *Taku River*, at para. 24. See also *Mitchell v. M.N.R.*, [2001 SCC 33](#), [\[2001\] 1 S.C.R. 911](#), at para. 9. It is at the root of the honour of the Crown, and an explicit obligation to an Aboriginal group placed therein engages the honour of the Crown at its core. As stated in *Haida Nation*, "[i]n all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably": para. 17 (emphasis added).

**71** An analogy may be drawn between such a constitutional obligation and a treaty promise. An "intention to create obligations" and a "certain measure of solemnity" should attach to both: *R. v. Sioui*, [\[1990\] 1 S.C.R. 1025](#), at p. 1044; *R. v. Sundown*, [\[1999\] 1 S.C.R. 393](#), at paras. 24-25. Moreover, both types of promises are made for the overarching purpose of reconciling Aboriginal interests with the Crown's sovereignty. Constitutional obligations may even be arrived at after a course of consultation similar to treaty negotiation.

**72** The last element under this rubric is that the obligation must be explicitly owed to an Aboriginal group. The honour of the Crown will not be engaged by a constitutional obligation in which Aboriginal peoples simply have a strong interest. Nor will it be engaged by a constitutional obligation owed to a group partially composed of Aboriginal peoples. Aboriginal peoples are part

of Canada, and they do not have special status with respect to constitutional obligations owed to Canadians as a whole. But a constitutional obligation explicitly directed at an Aboriginal group invokes its "special relationship" with the Crown: *Little Salmon*, at para. 62.

[page662]

### (3) What Duties Are Imposed by the Honour of the Crown?

**73** The honour of the Crown "is not a mere incantation, but rather a core precept that finds its application in concrete practices" and "gives rise to different duties in different circumstances": *Haida Nation*, at paras. 16 and 18. It is not a cause of action itself; rather, it speaks to *how* obligations that attract it must be fulfilled. Thus far, the honour of the Crown has been applied in at least four situations:

- (1) The honour of the Crown gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest (*Wewaykum*, at paras. 79 and 81; *Haida Nation*, at para. 18);
- (2) The honour of the Crown informs the purposive interpretation of s. 35 of the *Constitution Act, 1982*, and gives rise to a duty to consult when the Crown contemplates an action that will affect a claimed but as of yet unproven Aboriginal interest (*Haida Nation*, at para. 25);
- (3) The honour of the Crown governs treaty-making and implementation (*Province of Ontario v. Dominion of Canada (1895)*, [25 S.C.R. 434](#), at p. 512, *per* Gwynne J., dissenting; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005 SCC 69](#), [\[2005\] 3 S.C.R. 388](#), at para. 51), leading to requirements such as honourable negotiation and the avoidance of the appearance of sharp dealing (*Badger*, at para. 41); and
- (4) The honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples (*R. v. Marshall*, [\[1999\] 3 S.C.R. 456](#), at para. 43, referring to *The Case of The Churchwardens of St. Saviour in Southwark* (1613), 10 Co. Rep. 66b, 77 E.R. 1025, [page663] and *Roger Earl of Rutland's Case* (1608), 8 Co. Rep. 55a, 77 E.R. 555; *Mikisew Cree First Nation*, at para. 51; *Badger*, at para. 47).

**74** Thus, the duty that flows from the honour of the Crown varies with the situation in which it is engaged. What constitutes honourable conduct will vary with the circumstances.

**75** By application of the precedents and principles governing this honourable conduct, we find that when the issue is the implementation of a constitutional obligation to an Aboriginal people, the honour of the Crown requires that the Crown: (1) takes a broad purposive approach to the interpretation of the promise; and (2) acts diligently to fulfill it.

**76** The first branch, purposive interpretation of the obligation, has long been recognized as flowing from the honour of the Crown. In the constitutional context, this Court has recognized

that the honour of the Crown demands that s. 35(1) be interpreted in a generous manner, consistent with its intended purpose. Thus, in *Haida Nation*, it was held that, unless the recognition and affirmation of Aboriginal rights in s. 35 of the *Constitution Act, 1982* extended to yet unproven rights to land, s. 35 could not fulfill its purpose of honourable reconciliation: para. 27. The Court wrote, at para. 33: "When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable." A purposive approach to interpretation informed by the honour of the Crown applies no less to treaty obligations. For example, in *Marshall*, Binnie J. rejected a proposed treaty interpretation on the grounds that it was not "consistent with the honour and integrity of the Crown... . The trade arrangement must be interpreted in a manner which gives meaning and substance to the promises made by the Crown": para. 52.

[page664]

**77** This jurisprudence illustrates that an honourable interpretation of an obligation cannot be a legalistic one that divorces the words from their purpose. Thus, the honour of the Crown demands that constitutional obligations to Aboriginal peoples be given a broad, purposive interpretation.

**78** Second, the honour of the Crown requires it to act diligently in pursuit of its solemn obligations and the honourable reconciliation of Crown and Aboriginal interests.

**79** This duty has arisen largely in the treaty context, where the Crown's honour is pledged to diligently carrying out its promises: *Mikisew Cree First Nation*, at para. 51; *Little Salmon*, at para. 12; see also *Haida Nation*, at para. 19. In its most basic iteration, the law assumes that the Crown always intends to fulfill its solemn promises, including constitutional obligations: *Badger*; *Haida Nation*, at para. 20. At a minimum, sharp dealing is not permitted: *Badger*. Or, as this Court put it in *Mikisew Cree First Nation*, "the honour of the Crown [is] pledged to the fulfilment of its obligations to the Indians": para. 51. But the duty goes further: if the honour of the Crown is pledged to the fulfilment of its obligations, it follows then that the honour of the Crown requires the Crown to endeavour to ensure its obligations are fulfilled. Thus, in review proceedings under the *James Bay and Northern Québec Agreement*, the participants are expected to "carry out their work with due diligence": *Quebec (Attorney General) v. Moses*, [2010 SCC 17](#), [\[2010\] 1 S.C.R. 557](#), at para. 23. As stated by Binnie J. in *Little Salmon*, at para. 12: "It is up to the parties, when treaty issues arise, to act diligently to advance their respective interests. Good government requires that decisions be taken in a timely way." This duty applies whether the obligation arises in a treaty, as in the precedents outlined above, or in the Constitution, as here.

[page665]

**80** To fulfill this duty, Crown servants must seek to perform the obligation in a way that pursues the purpose behind the promise. The Aboriginal group must not be left "with an empty shell of a treaty promise": *Marshall*, at para. 52.

**81** It is a narrow and circumscribed duty, which is engaged by the extraordinary facts before us. This duty, recognized in many authorities, is not a novel addition to the law.

**82** Not every mistake or negligent act in implementing a constitutional obligation to an Aboriginal people brings dishonour to the Crown. Implementation, in the way of human affairs, may be imperfect. However, a persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise may amount to a betrayal of the Crown's duty to act honourably in fulfilling its promise. Nor does the honour of the Crown constitute a guarantee that the purposes of the promise will be achieved, as circumstances and events may prevent fulfillment, despite the Crown's diligent efforts.

**83** The question is simply this: Viewing the Crown's conduct as a whole in the context of the case, did the Crown act with diligence to pursue the fulfillment of the purposes of the obligation?

(4) The Argument That Failure to Act Diligently in Implementing Section 31 Should Not Be Considered by This Court

**84** Our colleague Rothstein J. asserts that the parties did not argue that lack of diligent implementation of s. 31 was inconsistent with the honour of the Crown, and that we should not therefore consider this possibility.

[page666]

**85** We agree with our colleague that new developments in the law must be approached with caution where they have not been canvassed by the parties to the litigation. However, in our view this concern does not arise here.

**86** The honour of the Crown was at the heart of this litigation from the beginning. Before the courts below and in this Court, the Métis argued that the conduct of the government in implementing s. 31 of the *Manitoba Act* breached the duty that arose from the honour of the Crown. They were supported in this contention by a number of interveners. In oral argument, the intervener the Attorney General for Saskatchewan stated that the honour of the Crown calls for "a broad, liberal, and generous interpretation", and acts as "an interpretive guide post to the public law duties ... with respect to the implementation of Section 31": transcript, at p. 67. The intervener Métis Nation of Alberta argued that s. 31 is an unfulfilled promise here, which the honour of the Crown demands be fulfilled by reconciliation through negotiation. The intervener the Métis Nation of Ontario argued that s. 31 "could not be honoured by a process that ultimately defeated the purpose of the provision": transcript, at p. 28.

**87** These submissions went beyond the argument that the honour of the Crown gave rise to a fiduciary duty, raising the broader issue of whether the government's conduct generally comported with the honour of the Crown. Canada understood this: it argued in its factum that while the Crown intends to fulfill its promises, the honour of the Crown in this case does not give rise to substantive obligations to do so.

**88** In short, all parties understood that the issue of what duties the honour of the Crown might

raise, [page667] apart from a fiduciary duty, was on the table, and all parties presented submissions on it.

**89** It is true that the Métis and the interveners supporting them did not put the argument in precisely the terms of the reasons. While they argued that the government's conduct in implementing s. 31 did not comport with the honour of the Crown, they did not express this alleged failure in terms of failure to comply with a duty of diligent implementation. However, this was implicit in their argument, given that the failure to diligently implement s. 31 lay at the heart of their grievance.

**90** For these reasons, we conclude that it is not inappropriate to consider and resolve the question of what duties the honour of the Crown gave rise to in connection with s. 31 of the *Manitoba Act*, not just as they impact on the argument that the government owed a fiduciary duty to the Métis, but more broadly.

(5) Did the Solemn Promise in Section 31 of the *Manitoba Act* Engage the Honour of the Crown?

**91** As outlined above, the honour of the Crown is engaged by constitutional obligations to Aboriginal groups. Section 31 of the *Manitoba Act* is just such a constitutional obligation. Section 31 conferred land rights on yet-to-be-identified individuals - the Métis children. Yet the record leaves no doubt that it was a promise made to the Métis people collectively, in recognition of their distinct community. The honour of the Crown is thus engaged here.

**92** To understand the nature of s. 31 as a solemn obligation, it may be helpful to consider its [page668] treaty-like history and character. Section 31 sets out solemn promises - promises which are no less fundamental than treaty promises. Section 31, like a treaty, was adopted with "the intention to create obligations ... and a certain measure of solemnity": *Sioui*, at p. 1044; *Sundown*. It was intended to create legal obligations of the highest order: no greater solemnity than inclusion in the Constitution of Canada can be conceived. Section 31 was conceived in the context of negotiations to create the new province of Manitoba. And all this was done to the end of reconciling the Métis Aboriginal interest with the Crown's claim to sovereignty. As the trial judge held:

... the evidence establishes that this [s. 31] grant, to be given on an individual basis for the benefit of the families, albeit given to the children, was given for the purpose of recognizing the role of the Métis in the Settlement both past and to the then present, for the purpose of attempting to ensure the harmonious entry of the territory into Confederation, mindful of both Britain's condition as to treatment of the settlers and the uncertain state of affairs then existing in the Settlement, and for the purpose of giving the children of the Métis and their families on a onetime basis an advantage in the life of the new province over expected immigrants. [Emphasis added; para. 544.]

**93** Section 31, though, is not a treaty. The trial judge correctly described s. 31 as a constitutional provision crafted for the purpose of resolving Aboriginal concerns and permitting

the creation of the province of Manitoba. When the *Manitoba Act* was passed, the Métis dominated the Red River provisional government, and controlled a significant military force. Canada had good reason to take the steps necessary to secure peace between the Métis and the settlers. Justice MacInnes wrote:

Canada, to the knowledge of Macdonald and Cartier, was in a difficult position having to complete the steps necessary for the entry of Rupert's Land into Canada. An insurrection had occurred at Red River such that, in the view of both Canada and Britain, a void in the lawful governance of the territory existed. Canada, as a result [page669] of McDougall's conduct on December 1, 1869, had in a practical sense claimed the territory for Canada, but the legal transfer of the territory from Britain had not yet occurred. Accordingly, Canada had no lawful authority to govern the area. Furthermore, there was neither the practical ability nor the will for Canada or the Imperial Government to enforce authority and in that sense, the purpose of the discussions or negotiations between the Red River delegates and Macdonald and Cartier was to bring about in a peaceful way the entry of the territory into Canada, thereby giving Canada the opportunity to peacefully take over the territory and its governance and be able to move forward with its goal of nation building. [para. 649]

**94** Section 31 is a constitutional obligation to an Aboriginal group. In accordance with the principles outlined above, the honour of the Crown is engaged by s. 31 and gives rise to a duty of diligent, purposive fulfillment.

(6) Did Section 32 of the *Manitoba Act* Engage the Honour of the Crown?

**95** We agree with the Court of Appeal that the honour of the Crown was not engaged by s. 32 of the *Manitoba Act*. Unlike s. 31, it was not a promise made specifically to an Aboriginal group, but rather a benefit made generally available to all settlers, Métis and non-Métis alike. The honour of the Crown is not engaged whenever an Aboriginal person accesses a benefit.

(7) Did the Crown Act Honourably in Implementing Section 31 of the *Manitoba Act*?

**96** The trial judge indicated that, although they did not act in bad faith, the government servants may have been negligent in administering the s. 31 grant. He held that the implementation of the obligation was within the Crown's discretion and that it had a discretion to act negligently: "Mistakes, even negligence, on the part of those responsible for implementation of the grant are not sufficient to successfully attack Canada's exercise of discretion [page670] in its implementation of the grant" (para. 943 (emphasis added)). The Court of Appeal took a similar view: see para. 656.

**97** Based on the arguments before them and the applicable precedents, the trial judge and the Court of Appeal did not focus on what we take as the central issue in the case: whether the government's implementation of s. 31 comported with the duty of the Crown to diligently pursue implementation of the provision in a way that would achieve its objectives. The question is

whether the Crown's conduct, viewed as a whole and in context, met this standard. We conclude that it did not.

**98** The broad purpose of s. 31 of the *Manitoba Act* was to reconcile the Métis community with the sovereignty of the Crown and to permit the creation of the province of Manitoba. This reconciliation was to be accomplished by a more concrete measure - the prompt and equitable transfer of the allotted public lands to the Métis children.

**99** The prompt and equitable implementation of s. 31 was fundamental to the project of reconciliation and the entry of Manitoba into Canada. As the trial judge found, s. 31 was designed to give the Métis a head start in the race for land and a place in the new province. This required that the grants be made while a head start was still possible. Everyone concerned understood that a wave of settlement from Europe and Canada to the east would soon sweep over the province. Acknowledging the need for timely implementation, Minister Cartier sent a letter to the meeting of the Manitoba Legislature charged with determining whether to accept the *Manitoba Act*, assuring the Métis that the s. 31 grants would "be of a nature to meet the wishes of the half-breed residents" and that the division of land would be done "in the most effectual and equitable manner".

[page671]

**100** The Métis allege Canada failed to fulfill its duties to the Métis people in relation to the children's grant in four ways: (1) inexcusably delaying distribution of the s. 31 lands; (2) distributing lands via random selection rather than ensuring family members received contiguous parcels; (3) failing to ensure s. 31 grant recipients were not taken advantage of by land speculators; and (4) giving some eligible Métis children \$240 worth of scrip redeemable at the Land Titles Office instead of a direct grant of land. We will consider each in turn.

(a) *Delay*

**101** Contrary to the expectations of the parties, it took over 10 years to make the allotments of land to Métis children promised by s. 31. Indeed, the final settlement, in the form not of land but of scrip, did not occur until 1885. This delay substantially defeated a purpose of s. 31.

**102** A central purpose of the s. 31 grant, as found by MacInnes J., was to give "families of the Métis through their children a head start in the new country in anticipation of the probable and expected influx of immigrants": para. 655. Time was then plainly of the essence, if the goal of giving the Métis children a real advantage, relative to an impending influx of settlers from the east, was to be achieved.

**103** The government understood this. Prime Minister Macdonald, on May 2, 1870, just before addressing Parliament, wrote that the land was

to be distributed as soon as practicable amongst the different heads of half breed families according to the number of children of both sexes then existing in each [page672] family

under such legislative enactments, which may be found advisable to secure the transmission and holding of the said lands amongst the half breed families. - To extinguish Indian claims - ... [Emphasis added.]

And Minister Cartier, as we know, confirmed that the "guarantee" would be effected "in the most effectual and equitable manner".

**104** Yet that was not what happened. As discussed earlier in these reasons, implementation was delayed by many government actions and inactions, including: (1) starting off with the wrong class of beneficiaries, contrary to the wording of s. 31 and objections in the House of Commons; (2) taking three years to rectify this error; (3) commissioning a report in 1875 that erroneously lowered the number of eligible recipients and required yet a third allotment; (4) completing implementation only in 1885 by giving scrip to eligible Métis denied land because of mistakes in the previous three iterations of the allotment process; (5) long delays in issuing patents; and (6) unexplained periods of inaction. In the meantime, settlers were pouring in and the Manitoba Legislature was passing various acts dealing in different and contradictory ways with how Métis could sell their yet-to-be-realized interests in land.

**105** The delay was noted by all concerned. The Legislative Council and Assembly of Manitoba complained of the delay on February 8, 1872, noting that new settlers had been allowed to take up land in the area. In early 1875, a number of Métis parishes sent petitions to Ottawa complaining of the delay, saying it was having a "damaging effect upon the prosperity of the Province": C.A., at para. 123. The provincial government also in that year made a request to the Governor General that the process be expedited. In 1883, the Deputy Minister of the Interior, A. M. Burgess, said this: "I am every day grieved and heartily sick when I [page673] think of the disgraceful delay ... .": A.R., vol. XXI, at pp. 123-24; see also C.A., at para. 160.

**106** This brings us to whether the delay was inconsistent with the duty imposed by the honour of the Crown to act diligently to fulfill the purpose of the s. 31 obligation. The Court of Appeal did not consider this question. But like the trial judge, it concluded that inattention and carelessness were likely factors:

With respect to those known events that contributed to the delay (prominent among them the cancellation of the first two allotments, the slow pace of the allotment process in the third and final round, the erroneous inclusion of adults as beneficiaries for the s. 31 grants, and the long delays in the issuance of patents), mistakes were made and it is difficult to avoid the inference that inattention or carelessness may have been a contributing factor. [para. 656]

**107** As discussed above, a negligent act does not in itself establish failure to implement an obligation in the manner demanded by the honour of the Crown. On the other hand, a persistent pattern of inattention may do so if it frustrates the purpose of the constitutional obligation, particularly if it is not satisfactorily explained.

**108** The record and findings of the courts below suggest a persistent pattern of inattention. The government was warned of the initial error of including all Métis, yet took three years to cancel

the first faulty allotment and start a second. An inexplicable delay lies between the first and second allotments, from 1873 to 1875. The government had changed, to be sure. But as the Court of Appeal found, there is no explanation in the record as to "why it took the new government over a year to address the continuing delays in moving ahead with the allotments": para. 126. The Crown's obligations cannot be suspended simply because there is a change in government. The second allotment, when [page674] it finally took place, was aborted in 1876 because of a report that underestimated eligible recipients. But there is no satisfactory explanation why a third and final allotment was not completed until 1880. The explanation offered is simply that those in charge did not have adequate time to devote to the task because of other government priorities, and they did not wish to delegate the task because information about the grants might fall into the hands of speculators.

**109** We take no issue with the finding of the trial judge that, with one exception, there was no bad faith or misconduct on the part of the Crown employees: paras. 1208-9. However, diligence requires more than simply the absence of bad faith. The trial judge noted that the children's grants "were not implemented or administered without error or dissatisfaction": para. 1207. Viewing the matter through the lens of fiduciary duty, the trial judge found this did not rise to a level of concern. We take a different view. The findings of the trial judge indicate consistent inattention and a consequent lack of diligence.

**110** We conclude that, viewing the conduct of the Crown in its entirety and in the context of the situation, including the need for prompt implementation, the Crown acted with persistent inattention and failed to act diligently to achieve the purposes of the s. 31 grant. Canada's argument that, in some cases, the delay secured better prices for Métis who sold is undermined by evidence that many Métis sold potential interests for too little, and, in any event, it does not absolve the Crown of failure to act as its honour required. The delay in completing the s. 31 distribution was inconsistent with the behaviour demanded by the honour of the Crown.

[page675]

(b) *Sales to Speculators*

**111** The Métis argue that Canada breached its duty to the children eligible for s. 31 grants by failing to protect them from land speculators. They say that Canada should not have permitted sales before the allotments were granted to the children or before the recipients attained the age of majority.

**112** Canada responds that the Crown was not obliged to impose any restraint on alienation, and indeed would have been criticized had it done so. It says that the Métis already had a history of private landholding, including buying and selling property. They say that the desire of many Métis to sell was not the result of any breach of duty by the Crown, but rather simply reflected that the amount of land granted far exceeded Métis needs, and many Métis did not desire to settle down in Manitoba.

**113** The trial judge held that restricting the alienability of Métis land would have been seen as

patronizing and been met with disfavour amongst the Métis. The Court of Appeal agreed, and added that, "practically speaking, next to nothing could have been done to prevent sales of and speculation in s. 31 lands in the absence of an absolute prohibition against sales of any kind": para. 631. It added that some Métis received more land than they needed, and many were leaving the settlement to follow the buffalo hunt, making the ability to sell their interests valuable.

**114** We see no basis to interfere with the finding that many eligible Métis were determined to sell their lots or the conclusion that a prohibition on sales would have been unacceptable. This said, we note that the 10-year delay in implementation of the land grants increased sales to speculators. Persons concerned at the time urged that information about [page676] the location of each child's individual allotment be made public as early as possible to give potential claimants a sense of ownership and avert speculative sell-offs. This did not happen: evidence of Dr. Thomas Flanagan, A.R., vol. XXVI, at p. 53. Dr. Flanagan concluded "[t]he Métis were already selling their claims to participate in the grant, and being able to sell the right to a particular piece of land rather than a mere right to participate in a lottery would indeed have enhanced the prices they received": p. 54. Until the Métis acquired their s. 31 grants, they provided no benefit to the children, and a cash offer from a speculator would appear attractive. Moreover, as time passed, the possibility grew that the land was becoming less valuable, as the Métis could not effectively protect any timber or other resources that might exist on the plots they might someday receive from exploitation by others.

**115** In 1873, the Manitoba government, aware of the improvident sales that were occurring, moved to curb speculation by passing *The Half-Breed Land Grant Protection Act*, S.M. 1873, c. 44, which permitted vendors to repudiate sales. The preamble to that legislation recognized that "very many persons entitled to participate in the said grant in evident ignorance of the value of their individual shares have agreed severally to sell their right to the same to speculators, receiving therefor only a trifling consideration". However, with *An Act to amend the Act passed in the 37th year of Her Majesty's reign, entitled "The Half-Breed Land Grant Protection Act"*, S.M. 1877, c. 5 ("*The Half-Breed Land Grant Amendment Act, 1877*"), Manitoba changed course, so that a Métis child who made a bad bargain was stuck with it. *An Act to enable certain children of Half-breed heads of families to convey their land*, S.M. 1878, c. 20 ("*The Half-Breed Land Grant Act, 1878*"), followed. It allowed Métis children between 18 and 21 years of age to sell their s. 31 entitlement with parental [page677] consent, so long as they appeared in front of one judge or two justices of the peace.

**116** Dr. Flanagan found that 11 percent of the sample examined sold their lands prior to learning the location of their grant, and received "markedly lower prices" as a result: "Metis Family Study", A.R., vol. XXVII, at p. 53. The Court of Appeal concluded that the price received by Métis who sold after allotment was about twice that received by those who sold before allotment: para. 168.

**117** The honour of the Crown did not demand that the grant lands be made inalienable. However, the facts on the ground, known to all, made it all the more important to complete the allotment without delay and, in the interim, to advise Métis of what holdings they would receive. By 1874, in their recommendations as to how the allotment process should be carried out, both Codd and Lieutenant Governor Alexander Morris implicitly recognized that delay was

encouraging sales at lower prices; nevertheless, allotment would not be complete for six more years. Until allotments were known and completed, delay inconsistent with the honour of the Crown was perpetuating a situation where children were receiving artificially diminished value for their land grants.

(c) *Scrip*

**118** Due to Codd's underestimation of the number of eligible children, 993 Métis were left out of the 1.4 million-acre allotment in the end. Instead, they received scrip redeemable for land at a land title office. Scrip could also be sold for cash on the open market, where it was worth about half its face value: C.A., at para. 168.

[page678]

**119** The Métis argue that Canada breached its duty to the children who received scrip because s. 31 demanded that land, not scrip, be distributed; and because scrip was not distributed until 1885, when at going land prices, Métis who received scrip could not acquire the 240 acres granted to other children.

**120** We do not accept the Métis' first argument that delivery of scrip instead of land constituted a breach of s. 31 of the *Manitoba Act*. As long as the 1.4 million acres was set aside and distributed with reasonable equity, the scheme of the *Manitoba Act* was not offended. It was unavoidable that the land would be distributed based on an estimate of the number of eligible Métis that would be inaccurate to some degree. The issuance of scrip was a reasonable mechanism to provide the benefit to which the excluded children were entitled.

**121** The Métis' second argument is that the value of scrip issued was deficient. The government decided to grant to each left-out child \$240 worth of scrip, based on a rate of \$1 per acre. While the Order in Council price for land was \$1 an acre in 1879, by 1885, when the scrip was delivered, most categories of land were priced at \$2 or \$2.50 an acre at the land title office: A.R., vol. XXIV, at p. 8. The children who received scrip thus obtained a grant equivalent to between 96 and 120 acres, significantly less than the 240 acres provided to those who took part in the initial distribution. The delay resulted in the excluded children receiving less land than the others. This was a departure from the s. 31 promise that the land would be divided in a roughly equal fashion amongst the eligible children.

**122** The most serious complaint regarding scrip is that Canada took too long to issue it. The process was marred by the delay and mismanagement that typified the overall implementation of the s. 31 grants. Canada recognized in 1884 that a significant number of eligible children would not receive the [page679] land to which they were entitled, yet it did nothing to provide a remedy to the excluded beneficiaries for almost a year. The trial judge observed:

By memorandum to the Minister of the Interior dated May 1884, Deputy Minister A.M. Burgess wrote that there were about 500 claimants whose applications had been

approved but whose claims were unsatisfied because the land had been "exhausted". He was unable to explain the error, but recommended that scrip be issued to the children.

For whatever reason action was postponed until April 1885 when Burgess submitted another report in which he explained how this shortage occurred. Burgess recommended as equitable that the issue of scrip to each half-breed child who has since proved his or her claim should be for \$240.00, the same to be accepted as in full satisfaction of such claim. The \$240.00 was based upon 240 acres (being the size of the individual grant) at the rate of \$1.00 per acre. [paras. 255-56]

**123** We conclude that the delayed issuance of scrip redeemable for significantly less land than was provided to the other recipients further demonstrates the persistent pattern of inattention inconsistent with the honour of the Crown that typified the s. 31 grants.

(d) *Random Allotment*

**124** The Métis assert that the s. 31 lands should have been allotted so that the children's lots were contiguous to, or in the vicinity of, their parents' lots. At a minimum, they say siblings' lands should have been clustered together. They say that this was necessary to facilitate actual settlement, rather than merely sale, of the s. 31 lands, so as to establish a Métis homeland.

[page680]

**125** Canada responds that it would not have been possible to settle all the Métis children on lots contiguous to their parents. Many families had a large number of children, and each child was entitled to a 240-acre lot. They argue that in the circumstances, a random allotment was reasonable.

**126** The trial judge found there was no agreement to distribute the land in family blocks. He observed that while the French Métis generally wanted grants contiguous to where they were residing and were not overly concerned with the value of the land, the English Métis were interested in selecting the most valuable allotments available even if they were not adjacent to their family lots. He also observed that the lottery was not random throughout the province: each parish received an allotment of land in its area and then distributed land within that allotment randomly to the individual Métis children living in the parish. He concluded that it was difficult to conceive how the land could have been administered other than by random lottery without creating unfairness and divisiveness within each parish. Further, because of the size of the grants, it would be hard to give a family a series of 240-acre contiguous parcels without interfering with neighbouring families' ability to receive the same. Moreover, a random lottery gave each child within the parish an equal chance at receiving the best parcel available. Finally, there was little, if any, complaint about the random selection from those present at the time. The Court of Appeal agreed, noting that Lieutenant Governor Archibald attempted to accommodate Métis wishes for the placement of a parish's allotments.

**127** Given the finding at trial that the grant was intended to benefit the individual children, not establish a Métis land base, we accept that random selection within each parish was an

acceptable way to distribute the land consistent with the purpose of the s. 31 obligation. This said, the delay in [page681] distributing land, and the consequential sales prior to patent, may well have made it more difficult for Métis to trade grants amongst themselves to achieve contiguous parcels.

#### (8) Conclusion on the Honour of the Crown

**128** The s. 31 obligation made to the Métis is part of our Constitution and engages the honour of the Crown. The honour of the Crown required the Crown to interpret s. 31 in a purposive manner and to diligently pursue fulfillment of the purposes of the obligation. This was not done. The Métis were promised implementation of the s. 31 land grants in "the most effectual and equitable manner". Instead, the implementation was ineffectual and inequitable. This was not a matter of occasional negligence, but of repeated mistakes and inaction that persisted for more than a decade. A government sincerely intent on fulfilling the duty that its honour demanded could and should have done better.

#### D. *Were the Manitoba Statutes Related to Implementation Unconstitutional?*

**129** The Métis seek a declaration that the impugned eight statutes passed by Manitoba were *ultra vires* and therefore unconstitutional or otherwise inoperative by virtue of the doctrine of paramountcy.

**130** Between 1877 and 1885, Manitoba passed five statutes that regulated the means by which sales of s. 31 lands could take place by private contract or court order. They dealt with the technical requirements to transfer interests in s. 31 lands. These included: permitting sales by a s. 31 allottee who was over 21 years of age (*The Half-Breed Land Grant Amendment Act, 1877*); allowing sales of grants by Métis between 18 and 21 years of age with parental consent and consent of the child supervised [page682] by a judge or two justices of the peace (*The Half-Breed Land Grant Act, 1878*); and settling issues as to the sufficiency of documentation necessary to pass good title in anticipation of the introduction of the Torrens system (*An Act relating to the Titles of Half-Breed Lands*, S.M. 1885, c. 30). The Manitoba statutes were consolidated in the *Half-Breed Lands Act*, R.S.M. 1891, c. 67, and eventually repealed by *The Statute Law Revision and Statute Law Amendment Act, 1969*, S.M. 1969 (2nd Sess.), c. 34, s. 31.

**131** In *Dumont v. Canada (Attorney General)*, [\[1990\] 1 S.C.R. 279](#), a preliminary motion to strike was brought by Canada in respect of this litigation. Wilson J. stated:

The Court is of the view also that the subject matter of the dispute, inasmuch as it involves the constitutionality of legislation ancillary to the *Manitoba Act, 1870* is justiciable in the courts and that declaratory relief may be granted in the discretion of the court in aid of extra-judicial claims in an appropriate case. [Emphasis added; p. 280.]

This statement is not a ruling or a pre-determination on whether the review of the repealed statutes in this action is moot. The *Dumont* decision recognizes that a declaration *may* be

granted - in the discretion of the court - in aid of extra-judicial relief in an appropriate case. The Court simply decided that it was not "plain and obvious" or "beyond doubt" that the case would fail: p. 280.

**132** These statutes have long been out of force. They can have no future impact. Their only significance is as part of the historic matrix of the Métis' claims. In short, they are moot. To consider their constitutionality would be a misuse of the Court's time. We therefore need not address this issue.

[page683]

#### E. *Is the Claim for a Declaration Barred by Limitations?*

**133** We have concluded that Canada did not act diligently to fulfill the specific obligation to the Métis contained in s. 31 of the *Manitoba Act*, as required by the honour of the Crown. For the reasons below, we conclude that the law of limitations does not preclude a declaration to this effect.

**134** This Court has held that although claims for personal remedies flowing from the striking down of an unconstitutional statute are barred by the running of a limitation period, courts retain the power to rule on the constitutionality of the underlying statute: *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007 SCC 1](#), [\[2007\] 1 S.C.R. 3](#); *Ravndahl v. Saskatchewan*, [2009 SCC 7](#), [\[2009\] 1 S.C.R. 181](#). The constitutionality of legislation has always been a justiciable question: *Thorson v. Attorney General of Canada*, [\[1975\] 1 S.C.R. 138](#), at p. 151. The "right of the citizenry to constitutional behaviour by Parliament" can be vindicated by a declaration that legislation is invalid, or that a public act is *ultra vires*: *Canadian Bar Assn. v. British Columbia*, [2006 BCSC 1342](#), [59 B.C.L.R. \(4th\) 38](#), at paras. 23 and 91, citing *Thorson*, at p. 163 (emphasis added). An "issue [that is] constitutional is always justiciable": *Waddell v. Schreyer* ([1981](#)), [126 D.L.R. \(3d\) 431](#) (B.C.S.C.), at p. 437, aff'd ([1982](#)), [142 D.L.R. \(3d\) 177](#) (B.C.C.A.), leave to appeal refused, [\[1982\] 2 S.C.R. vii](#) (*sub nom. Foothills Pipe Lines (Yukon) Ltd. v. Waddell*).

**135** Thus, this Court has found that limitations of actions statutes cannot prevent the courts, as guardians of the Constitution, from issuing declarations on the constitutionality of legislation. By extension, limitations acts cannot prevent the courts from issuing a declaration on the constitutionality of the Crown's conduct.

[page684]

**136** In this case, the Métis seek a declaration that a provision of the *Manitoba Act* - given constitutional authority by the *Constitution Act, 1871* - was not implemented in accordance with the honour of the Crown, itself a "constitutional principle": *Little Salmon*, at para. 42.

**137** Furthermore, the Métis seek no personal relief and make no claim for damages or for land. Nor do they seek restoration of the title their descendants might have inherited had the Crown acted honourably. Rather, they seek a declaration that a specific obligation set out in the

Constitution was not fulfilled in the manner demanded by the Crown's honour. They seek this declaratory relief in order to assist them in extra-judicial negotiations with the Crown in pursuit of the overarching constitutional goal of reconciliation that is reflected in s. 35 of the *Constitution Act, 1982*.

**138** The respondents argue that this claim is statute-barred by virtue of Manitoba's limitations legislation, which, in all its iterations, has contained provisions similar to the current one barring "actions grounded on accident, mistake or other equitable ground of relief" six years after the discovery of the cause of action: *The Limitation of Actions Act*, [C.C.S.M. c. L150, s. 2\(1\)\(k\)](#). Breach of fiduciary duty is an "equitable ground of relief". We agree, as the Court of Appeal held, that the limitation applies to Aboriginal claims for breach of fiduciary duty with respect to the administration of Aboriginal property: *Wewaykum*, at para. 121, and *Canada (Attorney General) v. Lameman*, [2008 SCC 14](#), [\[2008\] 1 S.C.R. 372](#), at para. 13.

**139** However, at this point we are not concerned with an action for breach of fiduciary duty, but with a claim for a declaration that the Crown did not [page685] act honourably in implementing the constitutional obligation in s. 31 of the *Manitoba Act*. Limitations acts cannot bar claims of this nature.

**140** What is at issue is a constitutional grievance going back almost a century and a half. So long as the issue remains outstanding, the goal of reconciliation and constitutional harmony, recognized in s. 35 of the *Constitution Act, 1982* and underlying s. 31 of the *Manitoba Act*, remains unachieved. The ongoing rift in the national fabric that s. 31 was adopted to cure remains unremedied. The unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import. The courts are the guardians of the Constitution and, as in *Ravndahl* and *Kingstreet*, cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter. The principles of legality, constitutionality and the rule of law demand no less: see *Reference re Secession of Quebec*, [\[1998\] 2 S.C.R. 217](#), at para. 72.

**141** Furthermore, many of the policy rationales underlying limitations statutes simply do not apply in an Aboriginal context such as this. Contemporary limitations statutes seek to balance protection of the defendant with fairness to the plaintiffs: *Novak v. Bond*, [\[1999\] 1 S.C.R. 808](#), at para. 66, *per* McLachlin J. In the Aboriginal context, reconciliation must weigh heavily in the balance. As noted by Harley Schachter:

The various rationales for limitations are still clearly relevant, but it is the writer's view that the goal of reconciliation is a far more important consideration and ought to be given more weight in the analysis. Arguments that provincial limitations apply of their own force, or can be incorporated as valid federal law, miss the point when aboriginal and treaty rights are at issue. They ignore the [page686] real analysis that ought to be undertaken, which is one of reconciliation and justification.

("Selected Current Issues in Aboriginal Rights Cases: Evidence, Limitations and Fiduciary Obligations", in *The 2001 Isaac Pitblado Lectures: Practising Law In An Aboriginal Reality* (2001), 203, at pp. 232-33)

Schachter was writing in the context of Aboriginal rights, but the argument applies with equal force here. Leonard I. Rotman goes even farther, pointing out that to allow the Crown to shield its unconstitutional actions with the effects of its own legislation appears fundamentally unjust: "*Wewaykum: A New Spin on the Crown's Fiduciary Obligations to Aboriginal Peoples?*" (2004), *U.B.C. L. Rev.* 219, at pp. 241-42. The point is that despite the legitimate policy rationales in favour of statutory limitations periods, in the Aboriginal context, there are unique rationales that must sometimes prevail.

**142** In this case, the claim is not stale - it is largely based on contemporaneous documentary evidence - and no third party legal interests are at stake. As noted by Canada, the evidence provided the trial judge with "an unparalleled opportunity to examine the context surrounding the enactment and implementation of ss. 31 and 32 of the *Manitoba Act*": R.F., at para. 7.

**143** Furthermore, the remedy available under this analysis is of a limited nature. A declaration is a narrow remedy. It is available without a cause of action, and courts make declarations whether or not any consequential relief is available. As argued by the intervener the Assembly of First Nations, it is not awarded against the defendant in the same sense as coercive relief: factum, at para. 29, citing *Cheslatta Carrier Nation v. British Columbia*, [2000 BCCA 539](#), [193 D.L.R. \(4th\) 344](#), at paras. 11-16. In some cases, declaratory relief may be the only way to give effect to the honour of the Crown: Assembly of First Nations' factum, at para. 31. Were the Métis in this action seeking personal remedies, the [page687] reasoning set out here would not be available. However, as acknowledged by Canada, the remedy sought here is clearly not a personal one: R.F., at para. 82. The principle of reconciliation demands that such declarations not be barred.

**144** We conclude that the claim in this case is a claim for a declaration of the constitutionality of the Crown's conduct toward the Métis people under s. 31 of the *Manitoba Act*. It follows that *The Limitation of Actions Act* does not apply and the claim is not statute-barred.

#### F. *Is the Claim for a Declaration Barred by Laches?*

**145** The equitable doctrine of laches requires a claimant in equity to prosecute his claim without undue delay. It does not fix a specific limit, but considers the circumstances of each case. In determining whether there has been delay amounting to laches, the main considerations are (1) acquiescence on the claimant's part; and (2) any change of position that has occurred on the defendant's part that arose from reasonable reliance on the claimant's acceptance of the *status quo*: *M. (K.) v. M. (H.)*, [\[1992\] 3 S.C.R. 6](#), at pp. 76-80.

**146** As La Forest J. put it in *M. (K.)*, at pp. 76-77, citing *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221, at pp. 239-40:

Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

La Forest J. concluded as follows:

What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine. [Emphasis added; pp. 77-78.]

**147** Acquiescence depends on knowledge, capacity and freedom: *Halsbury's Laws of England* (4th ed. 2003), vol. 16(2), at para. 912. In the context of this case - including the historical injustices suffered by the Métis, the imbalance in power that followed Crown sovereignty, and the negative consequences following delays in allocating the land grants - delay by itself cannot be interpreted as some clear act by the claimants which amounts to acquiescence or waiver. As explained below, the first branch of the *Lindsay* test is not met here.

**148** The trial judge found that the delay in bringing this action was unexplained, in part because other constitutional litigation was undertaken in the 1890s: paras. 456-57. Two Manitoba statutes were challenged, first in the courts, and then by petition to the Governor General in Council: paras. 431-37. The trial judge inferred that many of the signatories to the petition would have been Métis: para. 435. While we do not contest this factual finding, we do question the legal inference drawn from it by the trial judge. Although many signatories were Métis, the petitioners were, in fact, a broader group, including many signatories and community leaders who were not Métis. For example, as noted by the trial judge, neither Archbishop Taché nor Father Ritchot - leaders in "the French Catholic/Métis community" - were Métis: para. 435. The actions of this large community say little, in law, about the ability of the Métis to seek a declaration based on the honour of the Crown. They do not [page689] establish acquiescence by the Métis community in the existing legal state of affairs.

**149** Furthermore, in this rapidly evolving area of the law, it is rather unrealistic to suggest that the Métis sat on their rights before the courts were prepared to recognize those rights. As it is, the Métis commenced this claim before s. 35 was entrenched in the Constitution, and long before the honour of the Crown was elucidated in *Haida Nation*. It is difficult to see how this could constitute acquiescence in equity.

**150** Moreover, a court exercising equitable jurisdiction must always consider the conscionability of the behaviour of both parties: see *Pro Swing Inc. v. Elta Golf Inc.*, [2006 SCC 52](#), [\[2006\] 2 S.C.R. 612](#), at para. 22. Canada was aware that there would be an influx of settlers and that the Métis needed to get a head start before that transpired, yet it did not work diligently to fulfill its constitutional promise to the Métis, as the honour of Crown required. The Métis did not receive the intended head start, and following the influx of settlers, they found themselves increasingly marginalized, facing discrimination and poverty: see, e.g., trial, at para. 541; C.A., at paras. 95, 244 and 638; A.F., at para. 200. Although bad faith is neither claimed nor needed here, the

appellants point to a letter written by Sir John A. Macdonald, which suggests that this marginalization may even have been desired:

... it will require a considerable management to keep those wild people quiet. In another year the present residents will be altogether swamped by the influx of strangers who will go in with the idea of becoming industrious and peaceable settlers.

(October 14, 1869, A.R., vol. VII, at p. 65)

[page690]

**151** Be that as it may, this marginalization is of evidentiary significance only, as we cannot - and need not - unravel history and determine the precise causes of the marginalization of the Métis community in Manitoba after 1870. All that need be said (and all that is sought in the declaration) is that the central promise the Métis obtained from the Crown in order to prevent their future marginalization - the transfer of lands to the Métis children - was not carried out with diligence, as required by the honour of the Crown.

**152** The second consideration relevant to laches is whether there was any change in Canada's position as a result of the delay. The answer is no. This is a case like *M. (K.)*, where La Forest J. observed that it could not be seen how the "plaintiff ... caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb": p. 77, quoting R. P. Meagher, W. M. C. Gummow and J. R. F. Lehane, *Equity Doctrines and Remedies* (2nd ed. 1984), at p. 755.

**153** This suffices to answer Canada's argument that the Métis claim for a declaration that the Crown failed to act in accordance with the honour of the Crown is barred by laches. We add this, however. It is difficult to see how a court, in its role as guardian of the Constitution, could apply an equitable doctrine to defeat a claim for a declaration that a provision of the Constitution has not been fulfilled as required by the honour of the Crown. We note that, in *Ontario Hydro v. Ontario (Labour Relations Board)*, [\[1993\] 3 S.C.R. 327](#), at p. 357, Lamer C.J. noted that the doctrine of laches does not apply to a constitutional division of powers question. (See also *Attorney General of Manitoba v. Forest*, [\[1979\] 2 S.C.R. 1032](#).) The Constitution is the supreme law of our country, and it demands that courts be empowered to protect its substance and uphold its promises.

[page691]

## VII. Disposition

**154** The appeal is allowed in part. We conclude that the appellants are entitled to the following declaration:

That the federal Crown failed to implement the land grant provision set out in s. 31 of the *Manitoba Act, 1870* in accordance with the honour of the Crown.

**155** The appellants are awarded their costs throughout.

The reasons of Rothstein and Moldaver JJ. were delivered by

**ROTHSTEIN J. (dissenting)**

I. Introduction

**156** In this case, the majority has created a new common law constitutional obligation on the part of the Crown - one that, they say, is unaffected by the common law defence of laches and immune from the legislature's undisputed authority to create limitations periods. They go this far notwithstanding that the courts below did not consider the issue, and that the parties did not argue the issue before this Court. As a result of proceeding in this manner, the majority has fashioned a vague rule that is unconstrained by laches or limitation periods and immune from legislative redress, making the extent and consequences of the Crown's new obligations impossible to predict.

**157** While I agree with several of the majority's conclusions, I respectfully disagree with their conclusions on the scope of the duty engaged by the honour of the Crown and the applicability of limitations and laches to this claim.

**158** The appellants, herein referred to collectively as the "Métis" made four main claims before this Court. Their primary claim was that [page692] the Crown owed the Métis a fiduciary duty arising from s. 31 of the *Manitoba Act, 1870*, S.C. 1870, c. 3 ("*Manitoba Act*"), and that this duty had been breached. As evidence of the breach of fiduciary duty, the Métis pointed to several factors: the random allocation of the land grants, the delay in allocation of the land, and the allocation of scrip instead of land to some Métis children. These claims make up the bulk of the argument in the Métis' factum.

**159** The Métis also raised three other claims in less detail. First, they claimed that provincial statutes were *ultra vires* or inoperative due to the doctrine of paramountcy. Second, they claimed that the Crown did not fulfill its fiduciary duty under, or simply did not properly implement, s. 32 of the *Manitoba Act*. Finally, they claimed a failure to fulfill constitutional obligations, obligations that they state engaged the honour of the Crown. However, they did not elaborate on what duties the honour of the Crown should trigger on these facts.

**160** The bulk of these claims were dismissed by the Chief Justice and Justice Karakatsanis and I am in agreement with them on those claims. I agree with their conclusion that there was no fiduciary duty here and therefore the claim for breach of fiduciary duty must fail. I agree that there are no valid claims arising from s. 32 of the *Manitoba Act* and that any claims that might have arisen from the now repealed Manitoba legislation on the land grants are moot, as those acts have long since been out of force. I agree with the majority that the random allocation of

land grants was an acceptable means for Canada to implement the s. 31 land grants. Finally, I accept that the Manitoba Metis Federation has standing to bring these claims.

**161** However, in my view, after correctly deciding all of these issues and consequently dismissing the vast majority of the claims raised on this appeal, my colleagues nonetheless salvage one aspect of the Métis' claims by expanding the scope of the duties that are engaged under the honour of the Crown. These issues were not the [page693] focus of the parties' submissions before this Court or the lower courts. Moreover, the new duty derived from the honour of the Crown that my colleagues have created has the potential to expand Crown liability in unpredictable ways. Finally, I am also of the opinion that any claim based on honour of the Crown was, on the facts of this case, barred by both limitations periods and laches. As a result, I would find for the respondents and dismiss the appeal.

## II. Facts

**162** While I agree with my colleagues' broad outlines of the facts of this case, I take issue with a number of the specific inferences or conclusions that they draw from the record.

**163** As in all appellate reviews, the trial judge's factual findings should not be interfered with absent palpable and overriding error (*Housen v. Nikolaisen*, [2002 SCC 33](#), [\[2002\] 2 S.C.R. 235](#), at para. 10). While the majority does not do so explicitly, aspects of their review and use of the facts depart from the findings of fact made by the trial judge. However, at no point do they show that the trial judge made any palpable and overriding error in reaching his conclusions. Nor did the Métis claim that the findings I describe below were based on palpable and overriding error.

**164** There are two main areas in which the majority reasons have departed from the factual findings of the trial judge, absent a finding of palpable and overriding error: (1) the extent of the delay in distributing the land, and (2) the effect of that delay on the Métis. In my view, the majority's departure from the appropriate standard of appellate review in these areas calls their analysis into question.

### A. *Extent and Causes of the Delay*

**165** The majority concludes that the record and findings of the courts below suggest a "persistent pattern of inattention". This pattern leads them to find that the duty of diligent fulfillment of solemn promises derived from the honour of the Crown [page694] was breached. In their view, there was a significant delay in implementing the land grants and this delay substantially defeated the purpose of s. 31. I respectfully disagree.

#### (1) Historical Evidence

**166** Historical evidence was presented at trial and the bulk of it was accepted by the trial judge. Based on that evidence and on the reasons of the trial judge, I have summarized the process of how the land grants were distributed below. Though I accept the finding of the trial judge that there was a lengthy delay in the distribution of the land grants, this history reveals a steady and

persistent effort to distribute the land grants in the face of significant administrative challenges and an unstable political environment. While a faster process would most certainly have been better, I cannot accept the majority's conclusion that this evidence reveals a pattern of inattention - a finding that is nowhere to be found in the reasons of the trial judge.

(a) *The Census*

**167** The first Lieutenant Governor of Manitoba, A. G. Archibald, conducted a census which was completed on December 9, 1870. It would have been impossible to begin the allocation process without a reasonable estimate of how many Métis were owed land.

(b) *The Survey*

**168** While the census was in progress, the Lieutenant Governor was also instructed to advise the government on a system for surveying the province. An order in council on April 25, 1871, adopted the survey method that Lieutenant Governor Archibald had proposed. The land needed to be surveyed before it was allocated and the Dominion lands survey was a formidable administrative challenge. The Court of Appeal acknowledged that "the evidence makes it clear that selection of the 1.4 million acres, all of which Canada was obliged [page695] to grant, would have been unworkable in the absence of a survey". The survey of the settlement belt was completed in the years 1871-74.

(c) *Selection of the Townships*

**169** Once enough of the survey was complete, the Lieutenant Governor was able to take the next step in the process by selecting which townships would be distributed to the Métis. Lieutenant Governor Archibald received instructions to begin this process on July 17, 1872. The process of selecting the townships required the Lieutenant Governor to consult with the Métis of each parish to determine which areas should be selected. This consultation process took several months. Such consultation cannot be characterized as persistent inattention to the situation of the Métis.

**170** While this process was taking place, there was a change in Lieutenant Governor. On December 31, 1871, Lieutenant Governor Archibald had resigned, realizing that he had lost Prime Minister Macdonald's confidence. He was not replaced, however, until the fall of 1872 when Lieutenant Governor Alexander Morris was sworn in. Archibald continued to serve until Morris took over. These types of changes in government inevitably lead to time being lost. Any such delay cannot, without more, be attributed to inattention.

**171** By February 22, 1873, the preparatory work was sufficiently advanced that Lieutenant Governor Morris was able to begin drawing lots for the individual grants of 140 acres. He was able to draw lots at the rate of about 60 per hour.

(d) *Events Giving Rise to the Second Allotment*

**172** Early in 1873, concern was expressed about whether it was proper for the heads of Métis families to share in the land grant. As a result, in April 1873, the federal government determined that a stricter interpretation of s. 31 should be adopted. Participation in the land grant was limited to the "children of half-breed heads of families" (trial, at [page696] para. 202). As a result of this change, the number of recipients was significantly reduced, which meant that larger allotments would be required to distribute the entire 1.4 million acres. On August 5, 1873, Lieutenant Governor Morris was instructed to cancel the previous allotments. On August 16, 1873, Morris began the second allotment.

**173** This change meant that all of the drawing of the allotments up until that point had to be discarded. However, this was not the result of inattention. Rather, the federal government was taking care to make sure that the land grant was distributed correctly, to the right beneficiaries. The government had originally received advice from Lieutenant Governor Archibald that, in order to achieve the purposes of the land grant, it would be necessary to include the heads of the Métis families. While the Lieutenant Governor's interpretation was not consistent with the text of s. 31, it was an interpretation that was based on an effort to understand the purpose of the text and give meaning to the phrase "towards the extinguishment of the Indian Title to the lands". While the necessity of starting over no doubt resulted in some delay, it was not caused by inattention.

(e) *The Fall of Sir John A. Macdonald's Government*

**174** On November 5, 1873, Sir John A. Macdonald's government resigned. On January 22, 1874, an election was held. The opening of Parliament under Prime Minister Alexander Mackenzie was on March 26, 1874. David Laird became Minister of the Interior responsible for Dominion Lands. In the fall of 1874, Minister Laird went to Manitoba to gather information on all phases of the land question. According to Dr. Flanagan, Laird's notebook shows that he considered the appointment of a commission "to enumerate those entitled to land rights under the *Manitoba Act*, including the children's grant under s. 31" (evidence of Dr. Thomas Flanagan, A.R., vol. XXVI, at p. 11).

[page697]

(f) *The Machar/Ryan Commission*

**175** An April 26, 1875 order in council established a commission to take applications for patents from those entitled to participate in the land grants under the *Manitoba Act*. By order in council on May 5, 1875, John Machar and Matthew Ryan were appointed commissioners and went to Manitoba in the summer of 1875. By the end of 1875, the commissioners had prepared returns for all parishes. These returns were approved and constituted what was seen as an authoritative list of those entitled to share in the land grant. However, because there was a concern that this list was not in fact complete, Ryan, having become a magistrate in the North-West Territories, and Donald Codd in the Dominion Lands Office, were authorized to receive further applications by Métis children or heads of families who had not been able to appear before the commission

in 1875 because they had emigrated from Manitoba.

(g) *The Patents*

**176** On August 31, 1877, the first batch of patents arrived in Winnipeg. After completion of the drawings for a parish, issue of patents usually took one to two years. In the interim, posters were prepared within a few weeks of the approval of the allotment to inform recipients as to the location of their allotments. Most of the patents were issued by 1881, however allotments continued to be approved for some years thereafter. Over 6,000 patents had to be issued under s. 31 of the *Manitoba Act*, on top of over 2,500 under s. 32.

(h) *The Late Applications*

**177** In order to get their share of the land grant, the Métis had to file claims with the government. Because of the migration that was already underway, a certain number of these claims were filed late. While the government had anticipated some late claims, the number had been underestimated. As a [page698] result, claims continued to be filed after the 1.4 million acres had already been allocated. On April 20, 1885, an order in council granted the Métis children scrip rather than land, for those children who had submitted late applications.

**178** The deadline for filing claims to the \$240 scrip for children was May 1, 1886. However, it was not strictly enforced and the late applications continued to trickle in. The government extended the deadline at least four times. In the end, 993 scrips for \$240 (worth \$238,320) were issued to the Métis children or their heirs.

(2) Evidence of Delay

**179** My colleagues point to a number of delays including errors in determining the class of beneficiaries, errors in estimating the number of beneficiaries, long delays in issuing patents and "unexplained periods of inaction". However, these administrative issues must be placed in their proper historical context. At the time, Manitoba was a thinly settled frontier province. There was limited transportation and communications infrastructure and the federal civil service was small. The evidence of Dr. Flanagan was that

[e]ven with an omniscient, omnicompetent government, it would have taken years to implement the *Manitoba Act*. The objective requirements of carrying out surveys, sorting out claims, and responding to political protests could not be satisfied instantaneously. But, of course, the government of Canada was neither omniscient nor omnicompetent. [p. 171]

Given this context, some "delays" in fulfilling the *Manitoba Act* appear to have been inevitable.

**180** The trial judge, at para. 1055, observed that Manitoba was "a fledgling province [that] had just come into existence". Manitoba was far removed from Ottawa, which was the source of the

authority for administration of the grant. The trial judge noted, at paras. 155-56, that those involved in [page699] the land grants, including the Lieutenant Governor and the Manitoba legislature, had many challenges to contend with in the establishment of the new province:

Amongst other things, [the Lieutenant Governor] was to form a government on an interim basis which included selecting and appointing members of his Executive Council, selecting heads of departments of the government, and appointing the members of the Legislative Council. He was to organize electoral divisions, both provincially and federally. He was to undertake a census. He was to provide reports to the Federal Government as to the state of the laws and the system of taxation then existing in the province, and as to the state of the Indian tribes, their numbers, wants and claims, along with any suggestions he might have with reference to their protection and to improvement of their condition. He was to report generally on all aspects of the welfare of the province.

Aside from the foregoing, he also received extensive instructions as to the undertakings which he should fulfill as Lieutenant Governor of the North-West Territories.

**181** The majority attributes a three-year delay to the erroneous inclusion of the parents of the Métis children. However, much of the time before the cancellation of the first allotment was devoted to a survey that was used for all subsequent allotments. It is inappropriate to characterize this time as a delay. In my view, the delay stemming from the mistake about the beneficiaries amounts to less than a year, since the actual allocation under the first allotment did not begin until February 1873 and the allotment was cancelled on August 5, 1873.

**182** My colleagues also point to an "inexplicable delay" from 1873 and 1875. This period included the time after the fall of Sir John A. Macdonald's government in November 1873. In my view, the change in government followed by the decision to proceed by way of a commission accounts for this time period. This Court must recognize the implications of such a change. Even today, changes in government have policy and practical impacts that delay implementation of government programs. Moreover, it does not [page700] constitute inattention to decide to proceed by way of commission in order to determine who was eligible to share in the land grant.

**183** My colleagues criticize the failure of government officials to devote adequate time to the distribution of the allotments. However, there was no evidence tendered regarding the size of the civil service in Manitoba or in Ottawa during the 1870s and 1880s. We do not know how many federal or provincial civil servants there were or the extent of the work and functions they were required to perform. We do know that Lieutenant Governor Morris "wanted to move faster but was hampered by the limited time [Dominion Lands Agent] Donald Codd could devote to the enterprise" (Flanagan, at p. 58). Codd was only able to assist in drawing lots two days a week, until Ottawa sent someone to relieve him at the Lands Office. We have no evidence of what other obstacles there may have been impeding this process.

**184** There was another changeover in the Lieutenant Governor from Morris to Joseph-Édouard Cauchon in 1877. While there was no doubt time lost as a result of the change itself, drawing of lots was also delayed as Cauchon was concerned about reports of dissatisfaction he had

received. Unfortunately, over a hundred years later, the details of those reports are unclear. It is quite possible that they account for the second delay from 1878 to 1880.

**185** The trial judge did not make a finding of negligence. There was also no finding of bad faith. Indeed, the trial judge concluded that there was little evidence of complaint at the time the process was being conducted. The trial judge also made no finding that the relevant government officials lacked diligence or acted with a "pattern of inattention".

**186** The majority states, at para. 107, that

a negligent act does not in itself establish failure to implement an obligation in the manner demanded by [page701] the honour of the Crown. On the other hand, a persistent pattern of inattention may do so if it frustrates the purpose of the constitutional obligation, particularly if it is not satisfactorily explained.

**187** I agree, as my colleagues state, that a finding of lack of diligence requires a party to show more than just a negligent act. Here, the trial judge did not even find negligence. Despite this, the majority concludes that there was a lack of diligence. In my respectful opinion, that conclusion is inconsistent with the factual findings of the trial judge.

**188** There are gaps in the record. My colleagues appear to rely on these gaps to support their view that the government failed to fulfill the obligations set out in s. 31. In my view, the government cannot, at this late date, be called upon to explain specific delays. This is an insurmountable challenge due to the passage of time and the paucity of the historical record.

**189** If this land grant obligation had been made today, we would have expected a more expeditious procedure. However, the obligation was not undertaken by the present day federal government. It was undertaken by the government over 130 years ago, at a time when the government and the country were newly formed and struggling to become established. We cannot hold that government to today's standards when considering circumstances that arose under very different conditions. Indeed the need to avoid the application of a modern standard of conduct to historical circumstances has been noted by this Court in the past: *Wewaykum Indian Band v. Canada*, [2002 SCC 79](#), [\[2002\] 4 S.C.R. 245](#), at para. 121. To the extent there was delay, on a fair review of the available evidence and findings of the trial judge, it cannot be said to be the result of inattention, much less a persistent pattern of inattention.

#### *B. Effect of the Delay on the Métis*

**190** The majority attributes a number of negative consequences to the length of time that it took for the land grants to be made. In my respectful [page702] view, in so doing they have departed from the factual findings made by the trial judge and drawn inferences that are not supported by the evidence. While the length of time that it took for the land to be distributed may have been frustrating for some of the Métis, it was not the cause of every negative experience that followed for them.

#### (1) Departure From the Red River Settlement

**191** The majority suggests that the marginalization of the Métis and their departure from the Red River Settlement may have been caused by the length of time it took to issue the land grants. This is not supported by the findings of the trial judge or the record. There were other factors at play.

**192** The trial judge considered the historical evidence on this point and concluded:

As the buffalo robe trade was developing strength, agriculture experienced several years of bad crops. From 1844 to 1848, only once, 1845, was the harvest sufficient to feed the Settlement. By the fall of 1848, the Settlement was bordering on starvation. The 1850s brought better crops, but the 1860s were again very poor. The combination of a strong buffalo robe market and very poor crops led to increased abandonment of agriculture by the Métis and some emigration from the Settlement to points west following the buffalo. By 1869, the buffalo were so far west and south of Red River that the buffalo hunt no longer originated in the Settlement. [Emphasis added; para. 50.]

**193** Thus, it is clear that emigration from the Red River Settlement began before the s. 31 land grants were contemplated due to the economic forces of declining agriculture and location of the buffalo hunt. The westward retreat of the buffalo herds was a critical factor. The buffalo robe trade was the Métis' primary livelihood and one of the backbones of their economy. This indicates that the Métis' migration was motivated by economic forces, and that the government's actions or inactions were not the sole or even the predominant cause of this phenomenon.

[page703]

**194** The majority also attributes to the delay the Métis' inability to trade land to obtain contiguous parcels. With respect, the trial judge concluded that there was no general intention to create a Métis land base and thus, the ability to trade land to obtain contiguous parcels was never one of the objectives of the land grant. The trial judge concluded that only some Métis wanted to obtain contiguous parcels; others preferred to obtain the best land possible. This factual finding is entitled to deference.

**195** Finally, my colleagues quote Deputy Minister of the Interior, A. M. Burgess in an effort to suggest that there was general agreement about the existence of the delay and its supposed harmful consequences. Contrary to the majority's suggestions, Burgess's statements cannot be read as a general commentary on the entire land grant process in order to indict the federal government for inattention. Mr. Burgess stated that he was "heartily sick" of the "disgraceful delay which is taking place in issuing patents" (A.R., vol. XXI, at pp. 123-24 (emphasis added)). The issuing of the patents, and any delay that occurred in that process, represented only one aspect of the administrative challenge posed by the land grants. Mr. Burgess also wrote that he had been working night and day on those patents, hardly evidence of a pattern of inattention.

(2) Price Obtained for the Land

**196** My colleagues conclude that what they say was a 10-year delay in implementation of the land grants increased sales to speculators. They imply that sales to speculators were harmful to Métis interests. While I accept the finding of the trial judge that some sales were made to speculators for improvident prices, not all sales were bad bargains for the Métis.

**197** The trial judge also found that there was evidence of sales which occurred at market prices, sales to people who were not speculators and sales [page704] which were not the result of pressure or conduct of speculators. The trial judge held:

Overall, while there are many examples of what appear to be individuals having been taken advantage of, it is difficult to assess at this late date whether that was so or whether the price obtained was a fair price given the vagaries of what it was that was being sold and the consequent market value of that. [para. 1057]

It appears that some Métis got higher prices and some Métis got lower prices for their land. For the Métis community as a whole, this may have been a "zero sum game". At this stage it would be entirely speculative to conclude that there was adverse impact on the Métis community as a whole as a result of land sales.

**198** My colleagues suggest that as time passed, the possibility grew that the land was becoming less valuable. In my view, this conclusion is not supported by the evidence. In fact, 1880 to 1882 were boom years, where the land would have become even more valuable. The Court of Appeal noted that the vast majority of sales took place between 1877 and 1883. It is incongruous for the Métis descendants as a group to come forward ostensibly on behalf of some of their ancestors who may have benefitted from the delay.

### (3) Scrip

**199** The majority acknowledges that it was unavoidable that the land would be distributed based on an estimate of the number of eligible Métis and that the estimate would be inaccurate to some degree. They also acknowledge that the issuance of scrip was a reasonable mechanism to provide the benefit to which the excluded children were entitled. However, they find that

the delayed issuance of scrip redeemable for significantly less land than was provided to the other recipients further demonstrates the persistent pattern of inattention ... . [para. 123]

**200** I cannot agree that the delayed issuance of scrip demonstrates a persistent pattern of inattention by the government. Rather, the issuance of scrip [page705] was equally if not more consistent with the late filing of applications - over which the government had little control - and the corresponding underestimate in the number of eligible recipients. That is hardly evidence of government inattention.

**201** If there had been no delay and the accurate number of Métis children had been known from the outset, each child would have received less land than they actually did because the recipients of scrip would have been included in the original division. In this sense, then, Canada overfulfilled its obligations under the *Manitoba Act* by providing scrip after the 1.4 million acres were exhausted. The issuance of scrip reflected Canada's commitment to meaningful fulfillment of the obligation, not inattention.

### C. Conclusion on the Facts

**202** Manifestly, the trial judge made findings of delay. Nonetheless these findings and the evidence do not reveal a pattern of inattention. They do not reveal a lack of diligence. Nor do they reveal that the purposes of the land grant were frustrated. That alone would nullify any claim the Métis might have based on a breach of duty derived from the honour of the Crown, assuming that any such duty exists a matter to which I now turn.

## III. Analysis

### A. Honour of the Crown

**203** In their reasons, my colleagues develop a new duty derived from the honour of the Crown: a duty to diligently fulfill solemn obligations. Earlier cases spoke mostly to the manner in which courts should interpret treaties and statutory provisions and not to the manner in which governments should execute them. While *Haida Nation v. British Columbia (Minister of Forests)*, [2004 SCC 73](#), [\[2004\] 3 S.C.R. 511](#), explicitly leaves the door open to finding additional new Crown duties in the [page706] future, this is not an appropriate case to develop such a duty.

**204** A duty of diligent fulfillment may well prove to be an appropriate expansion of Crown obligations. However, the duty crafted in the majority reasons is problematic. The threshold test for what constitutes a solemn obligation is unclear. More fundamentally, however, the scope and definition of this new duty created by the majority were not explored by the parties in their submissions in this Court nor were they canvassed in the courts below, making the expansion of the common law in this way inappropriate on appeal to this Court.

#### (1) Ambiguity as to What Constitutes a Solemn Obligation

**205** In order to trigger this new duty of diligent fulfillment, there must first be a "solemn obligation". But no clear framework is provided for when an obligation rises to this "solemn" level such that it triggers the duty of diligent implementation. Furthermore, the majority reasons are unclear as to what types of legal documents will give rise to solemn obligations: Is it only provisions in the Constitution or does it also include treaties? In para. 75, the majority appears to restrict their conclusion on diligence to constitutional obligations to Aboriginal peoples. But, in para. 79, they note that the duty applies whether the obligation arises in a treaty or in the Constitution. This further reflects the inappropriateness of fashioning new common law rights

and obligations without the benefit of consideration by the trial judge or Court of Appeal and in particular without the benefit of argument before this Court.

**206** This difficulty is manifested in other aspects of the majority reasons. My colleagues accept that s. 31 was a constitutional provision (para. 94). Adopting the narrowest reading of their holding as to what documents trigger solemn obligations - [page707] one limited to constitutional provisions - it would seem such obligations would be triggered here. The majority nonetheless proceeds to consider how s. 31 of the *Manitoba Act* is similar to a treaty (para. 92). It thus appears that s. 31 engages the honour of the Crown, not just because of its constitutional nature, but also because of its treaty-like character.

**207** The idea that certain sections of the Constitution should be interpreted differently or should impose higher obligations on the government than other sections because some of these sections can be analogized to treaties is novel to say the least. I reject the notion that when the government undertakes a constitutional obligation, how it must perform that obligation depends on how closely it resembles a treaty.

**208** Setting aside the issue of what types of legal documents might contain solemn obligations, there is also uncertainty in the majority's reasons as to which obligations contained in those documents will trigger this duty. My colleagues assert that for the honour of the Crown to be engaged, the obligation must be specifically owed to an Aboriginal group. While I agree that this is clearly a requirement for engaging the honour of the Crown, this alone cannot be sufficient. As the majority notes, in the Aboriginal context, a fiduciary duty can arise as the result of the Crown assuming discretionary control over a *specific Aboriginal interest*. Reducing honour of the Crown to a test about whether or not an obligation is owed simply to an Aboriginal group risks making claims under the honour of the Crown into "fiduciary duty-light". This new watered down cause of action would permit a claimant who is unable to prove a specific Aboriginal interest to ground a fiduciary duty, to still be able to seek relief so long as the promise was made to an Aboriginal group. Moreover, as the majority acknowledges at para. 108, this new duty can be breached as a result of actions that would not rise to the level required to constitute a breach of fiduciary duty. This new duty, with a broader scope [page708] of application and a lower threshold for breach, is a significant expansion of Crown liability.

## (2) Absence of Submissions or Lower Court Decisions on This Issue

**209** Even if one were not concerned with the issues identified above, this case was never argued based on this specific duty of diligent fulfillment of solemn obligations arising from the honour of the Crown. The parties made no submissions on a duty of diligent implementation of solemn obligations. The Métis never provided argument as to why the honour of the Crown should be engaged here, what duty it should impose on these facts or how that duty was not fulfilled. As a result, Canada and Manitoba have not had an opportunity to respond on any of these points. This Court does not have the benefit of the necessary opposing perspectives which lie at the heart of our adversarial system.

**210** While there is no doubt that the phrase "honour of the Crown" was used in argument before

this Court, no submissions of any substance were made as to what duty the honour of the Crown should have engaged on these facts beyond a fiduciary duty, nor were there any submissions on a duty of diligent implementation.

**211** During the pleadings phase, honour of the Crown was not mentioned in the Métis' statement of claim and was mentioned only once in passing in their response to particulars (A.R., vol. IV, at p. 110). Before this Court, the Métis referred to honour of the Crown four times in their factum, but never alleged that there was a duty of diligent fulfillment of solemn obligations. Instead, two of the references to the honour of the Crown are contained in their summary of the points in issue and in their [page709] requested order. They also briefly assert that the honour of the Crown required the government to take a liberal approach to interpreting s. 32 and that the honour of the Crown could be used to show one of the elements of a fiduciary obligation under s. 32. They never provided submissions as to what constitutes a solemn obligation nor did they allege specifically that the honour of the Crown required due diligence in the implementation of such solemn obligations. In oral argument before this Court, the only submissions made on honour of the Crown were supplied by the Métis Nation of Alberta and the Attorney General for Saskatchewan. Neither of these interveners, nor the Métis themselves, made submissions about diligence, a new legal test based on patterns of inattention, or solemn obligations.

**212** Delineating the boundaries of new legal concepts is prudently done with the benefit of a full record from the courts below and submissions from both parties. Absent these differing perspectives and analysis by the courts below, it is perilous for this Court to embark upon the creation of a new duty under the common law. I believe this concern is manifestly made apparent by the ambiguity in the majority reasons about what legal documents can give rise to solemn obligations.

**213** Moreover, it is particularly unsatisfactory to impose a new duty upon a litigant without giving that party an opportunity to make submissions as to the validity or scope of the duty. This inroad on due process is no less concerning when the party to the proceedings is the government. As a result of the majority's reasons, the government's liability to Aboriginal peoples has the potential to be expanded in unforeseen ways. The Crown has not had the opportunity to address what impact this new duty might have on its ability to enter into treaties or make commitments to Aboriginal peoples. It is inappropriate to impose duties on any party, including the government, without giving that party an opportunity to make arguments about the impact that such liability might have. In the case of the government, where the new duty is constitutionally derived and therefore cannot be refined or modified [page710] through ongoing dialogue with Parliament, it is of very serious concern.

**214** This Court has always been wary of dramatic changes in the law: see *Watkins v. Olafson*, [1989] 2 S.C.R. 750, at p. 760. In that case, this Court concluded that courts are not well placed to know all of the problems with the current law and more importantly are not able to predict what problems will be associated with the proposed expansion. Courts are not always aware of all of the policy and economic consequences that might flow from the proposed expansion. While this is not a case about the appropriate role for the courts to play relative to the legislature, these same problems are apparent on the facts of this case. Without substantive

submissions from the parties, it is difficult for this Court to know how this new duty will operate and what consequences might flow from it. For all these reasons, it is inappropriate to create this new duty as a result of this appeal.

## B. *Limitations*

**215** Even if one accepts that the honour of the Crown was engaged, that it requires the diligent implementation of s. 31, and that this duty was not fulfilled, any claims arising from such a cause of action have long been barred by statutes of limitations. The majority has attempted to circumvent the application of these limitations periods by characterizing the claim as a fundamental constitutional grievance arising from an "ongoing rift in the national fabric" (para. 140). With respect, there is no legal or principled basis for this exception to validly enacted limitations statutes adopted by the legislature. In my view, these claims must be rejected on the basis that they are time-barred.

### (1) Decisions of the Courts Below

**216** The present action was commenced on April 15, 1981. The trial judge held that, except for the claims related to the constitutional validity of the Manitoba statutes, there was no question that the [page711] Métis' action was outside the statutorily mandated limitation period and he would have dismissed the action on that basis.

**217** The trial judge noted the applicable limitations legislation would have captured these claims. He held that the Métis at the time had knowledge of their rights under s. 31 of the *Manitoba Act* and were engaged in litigation to enforce other rights. From that he inferred that the Métis "chose not to challenge or litigate in respect of s. 31 and s. 32 knowing of the sections, of what those sections were to provide them, and of their rights to litigate" (para. 446). The trial judge concluded that the limitations legislation applied and barred the claims.

**218** In the Court of Appeal, Scott C.J.M. noted the trial judge's finding that the Métis knew of their rights and their entitlement to sue more than six years prior to April 15, 1981. The Court of Appeal concluded that the trial judge's factual findings regarding the Métis' knowledge of their rights were entitled to deference. Scott C.J.M. affirmed the trial judge's ruling that the Métis' claim for breach of fiduciary duty with respect to both s. 31 and s. 32 of the Act was statute-barred on the basis that the Métis had not demonstrated that the trial judge misapplied the law or committed palpable and overriding error in arriving at this conclusion.

### (2) Limitations Legislation in Manitoba

**219** While limitations periods have existed in Manitoba continuously since 1870 by virtue of the application of the laws of England, Manitoba first enacted its own limitations legislation in 1931. *The Limitation of Actions Act, 1931*, S.M. 1931, c. 30, provided for a six-year limitation period for "actions grounded on accident, mistake or other equitable ground of relief" (s. 3(1)(i)).

**220** There was also a six-year limitation period for any other action not specifically provided for

in [page712] that Act or any other act (s. 3(1)(l)). *The Limitation of Actions Act, 1931* provided that it applied to "all causes of action whether the same arose before or after the coming into force of this Act" (s. 42). Similar provisions have been contained in every subsequent limitations statute enacted in Manitoba.

**221** In my view, the effect of these provisions is that the Métis' claim, whether framed as a breach of fiduciary duty or as breach of some duty derived from honour of the Crown, has been statute-barred since at least 1937.

**222** My colleagues are of the view that since this claim is no longer based on breach of fiduciary duty, s. 3(1)(i) of *The Limitation of Actions Act, 1931* does not apply to bar these claims. Regardless of how the claims are classified, however, the basket clause of *The Limitation of Actions Act, 1931* contained in s. 3(1)(l) would apply to bar the claim since that section is intended to ensure that the six-year limitation period covers any and all causes of action not otherwise provided for by the Act.

**223** This claim for a breach of the duty of diligent fulfillment of solemn obligations is a "cause of action" and therefore s. 3(1)(l) bars it.

### (3) Limitations and Constitutional Claims

**224** My colleagues assert that limitations legislation cannot apply to declarations on the constitutionality of Crown conduct. They also state that limitations acts cannot bar claims that the Crown did not act honourably in implementing a constitutional obligation. With respect, these statements are novel. This Court has never recognized a general exception from limitations legislation for constitutionally derived claims. Rather, this Court has consistently held that limitations periods apply to factual claims with constitutional elements.

[page713]

**225** The majority notes that limitations periods do not apply to prevent a court from declaring a statute unconstitutional, citing *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, [2007 SCC 1](#), [\[2007\] 1 S.C.R. 3](#); *Ravndahl v. Saskatchewan*, [2009 SCC 7](#), [\[2009\] 1 S.C.R. 181](#); and *Thorson v. Attorney General of Canada*, [\[1975\] 1 S.C.R. 138](#). While I agree, the constitutional validity of statutes is not at issue in this case. Instead, this is a case about factual issues and alleged breaches of obligations which have always been subject to limitations periods, including on the facts of *Ravndahl* and *Kingstreet*.

**226** *Kingstreet* and *Ravndahl* make clear that there is an exception to the application of limitations periods where a party seeks a declaration that a statute is constitutionally invalid. Here, my colleagues have concluded that the Métis' claim about unconstitutional statutes is moot. The remaining declaration sought by the Métis has nothing to do with the constitutional validity of a statute.

**227** Instead, what the Métis seek in this case is like the personal remedies that the applicants

sought in *Kingstreet* and *Ravndahl*. The Métis are asking this Court to rule on a factual dispute about how lands were distributed over 130 years ago. While they are not asking for a monetary remedy, they are asking for their circumstances and the specific facts of the land grants to be assessed. As this Court said in *Ravndahl*:

Personal claims for constitutional relief are claims brought as an individual *qua* individual for a personal remedy. As will be discussed below, personal claims in this sense must be distinguished from claims which may enure to affected persons generally under an action for a declaration that a law is unconstitutional. [para. 16]

These claims are made by individual Métis and their organized representatives. The claims do not arise from a law which is unconstitutional. Rather, they arise from individual factual circumstances. As [page714] a result, the rule in *Kingstreet* and *Ravndahl* that individual factual claims are barred by limitations periods applies to bar suit in this case.

#### (4) Policy Rationale for Limitations Periods Applies to These Claims

**228** The majority finds that the issue in this case is of such fundamental importance to the reconciliation of the Métis peoples with Canadian sovereignty that invoking a limitations period would be inappropriate. They further conclude that unless this claim is resolved there will be an "ongoing rift in the national fabric".

**229** In my view, it is inappropriate to judicially eliminate statutory limitations periods for these claims. Limitations periods are set by the legislatures and are not discretionary. While limitations periods do not apply to claims that seek to strike down statutes as unconstitutional, as I noted above, this is not such a claim.

**230** Limitations statutes are driven by specific policy choices of the legislatures. The exceptions in such statutes are also grounded in policy choices made by legislatures. To create a new judicial exception for those fundamental constitutional claims that arise from rifts in the national fabric is to engage directly in social policy, which is not an appropriate role for the courts.

**231** Limitations acts have always been guided by policy. In *M. (K.) v. M. (H.)*, [\[1992\] 3 S.C.R. 6](#), this Court identified three groups of policies underlying limitations statutes: those concerning certainty, evidentiary issues, and diligence.

**232** The certainty rationale is connected with the concept of repose: "There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations" (*M. (K.) v. M. (H.)*, at p. 29).

[page715]

**233** The evidentiary issues were further expanded upon in *Wewaykum*, at para. 121:

Witnesses are no longer available, historical documents are lost and difficult to contextualize, and expectations of fair practices change. Evolving standards of conduct and new standards of liability eventually make it unfair to judge actions of the past by the standards of today.

**234** Finally, the diligence rationale encourages plaintiffs to not sleep on their rights. An aspect of this concept is the idea that "claims, which are valid, are not usually allowed to remain neglected" (*Riddlesbarger v. Hartford Insurance Co.*, 74 U.S. (7 Wall.) 386 (1868), at p. 390, cited in *United States v. Marion*, 404 U.S. 307 (1971), at p. 322, footnote 14).

**235** From these three rationales, limitations law has evolved to include a variety of exceptions which reflect further refinements in the policies that find expression in statutes of limitations. Older limitations acts contained few exceptions but modern statutes recognize certain situations where the strict application of limitations periods would lead to unfairness. For instance, while limitations acts have always included exceptions for minors, exceptions based on capacity have been expanded to recognize claimants with a variety of disabilities. Exceptions have also been created based on the principle of discoverability. However, even as those exceptions have been broadened or added, legislatures have created a counterbalance in the form of ultimate limitations periods which operate to provide final certainty and clarity. None of the legislatively created exceptions, nor their rationales, apply to this case.

(a) *Discoverability*

**236** The discoverability principle has its origins in judicial interpretations of when a cause of action "accrues". Discoverability was described [page716] in the English case of *Sparham-Souter v. Town and Country Developments (Essex) Ltd.*, [1976] 1 Q.B. 858 (C.A.), at p. 868, where Lord Denning, M.R. stated:

... when building work is badly done and covered up the cause of action does not accrue, and time does not begin to run, until such time as the plaintiff discovers that it has done damage, or ought, with reasonable diligence, to have discovered it.

**237** While this judicial discoverability rule was subsequently rejected by the House of Lords, Canadian legislatures moved to amend their limitations acts to take into account the fact that plaintiffs might not always be aware of the facts underlying a claim right away. This evolution was described by this Court in *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, at pp. 40-42, where it was noted that the British Columbia legislature had amended its limitations legislation to give effect to an earlier judicial decision which postponed "the running of time until the acquisition of knowledge or means of knowledge of the facts giving rise to the cause of action".

**238** The discoverability principle is grounded in the idea that, even if there is no active concealment on the part of the defendant giving rise to other ways of tolling limitations periods, the facts underlying a cause of action may still not be accessible to the plaintiff for some time. There is a potential injustice that can arise where a claim becomes statute-barred before a plaintiff was aware of its existence (*M. (K.) v. M. (H.)*, at p. 33).

**239** The discoverability principle has been applied in a variety of contexts. In *Kamloops*, the claim arose from negligent construction of the foundation of a house, where there was evidence that the defect was not visible until long after the house was completed. In *M. (K.) v. M. (H.)*, discoverability was used to toll the limitation period until such time as the victim of childhood incest was able to discover "the connection between the harm she has suffered and her childhood history" (p. 35). In *Peixeiro v. Haberman*, [\[1997\] 3 S.C.R. 549](#), [page717] at para. 43, this Court delayed the start of a limitation period under Ontario's no-fault insurance scheme until the plaintiff had knowledge of the extent of injuries that would allow him to make a claim within the scheme.

**240** The link in these cases is that the plaintiffs were unaware of the specific damage or were not aware of the link between the damage and the actions of the defendant. Limitations law permits exceptions grounded in lack of knowledge of the facts underlying the claim and the connection between those facts, the actions of the defendant and the harm suffered by the plaintiff.

**241** The Métis can make no such claim. They were not unaware of the length of time that it took for the land to be distributed at the time that the distribution was occurring. The trial judge found that representations to the federal government by the Legislative Council and Assembly of Manitoba were made about the length of time the process was taking as early as 1872. At the time, a significant proportion of the Manitoba legislature was Métis. Nor can they claim that they were unaware of the connection between the length of time that the distribution was taking and the actions of the government, since the trial judge found that the federal government responded to this 1872 complaint by reiterating that the selection and allocation of land was within the sole control of Canada. Thus, the exception that the majority has created is not consistent even at the level of public policy with the discoverability exceptions that have been created by legislatures.

**242** I would also note that while the history of the discoverability exception indicates that there is room for judicial interpretation in limitations law, that interpretation must be grounded in the actual words of the statute. In this case, the majority has not linked their new exception to any aspect of the text of the Act.

[page718]

(b) *Disability*

**243** Tolling limitations periods for minors or those with disabilities is another long-standing exception to the general limitation rules. Section 6 of *The Limitation of Actions Act, 1931* provided that for certain types of claims, a person under a disability had up to two years after the end of that disability to bring an action. These provisions have grown over time. *The Limitation of Actions Act*, [C.C.S.M. c. L150](#), currently in force in Manitoba provides for tolling where a person is a minor or where a person is "in fact incapable of the management of his affairs because of disease or impairment of his physical or mental condition" (s. 7).

**244** Incapacity due to disability has also been used as the legislative framework for tolling limitations periods for victims of sexual assault by a trusted person or person in authority. The Ontario *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, s. 10(2), creates a presumption that the person claiming to have been assaulted was "incapable of commencing the proceeding earlier than it was commenced if at the time of the assault one of the parties to the assault had an intimate relationship with the person or was someone on whom the person was dependent, whether financially or otherwise". This presumption can be rebutted.

**245** A victim who suffered sexual assault at the hands of a person in a position of trust, is said to be incapable of bringing a claim because of a variety of factors including

the nature of the act (personal violation), the perpetrator's position of power over the victim and the abuse of that position act effectively to silence the victim. Moreover, until recently, many victims of sexual assault were subject to social disapproval based on the perception that they were somehow to blame.

[page719]

(Ontario, Limitations Act Consultation Group, *Recommendations for a New Limitations Act: Report of the Limitations Act Consultation Group* (1991), at p. 20)

**246** If the discoverability rule has its origins in incapacity to litigate because of lack of knowledge of particular facts underlying the claim such as the damage or the relationship between the damage and the defendant, the exceptions for disability and minors are grounded in a broader view of incapacity:

Those under legal disability are presumed not to know their rights and remedies and it would be unfair to expect them to proceed diligently in such matters.

(*Murphy v. Welsh*, [\[1993\] 2 S.C.R. 1069](#), at p. 1080)

**247** The Métis were never in a position where they were under a legal disability. As the trial judge found, the Métis were full citizens of Manitoba who wanted to be treated the same as other Canadians. While some sought to entail the s. 31 lands to prevent the children from selling, this view was by no means unanimous. The Métis had always owned land individually and been free to sell it. It is paternalistic to suggest from our modern perspective that the Métis of the 1870s did not know their rights and remedies. This type of paternalism would have been an anathema to the Métis of the time who sought to be treated as equals.

**248** The power imbalance that justifies the presumption of incapacity for victims of certain types of sexual assaults is also inapplicable here. Section 31 was enacted *because* of the strength of the Métis community, not because the community was weak or vulnerable or subject to government abuse. While their power in Manitoba declined with the influx of settlers, it is revisionist to suggest that they were in such a weak position in relation to the federal government that the government was able to "silence" them (as described above in para. 245).

While many of the recipients of the land grants [page720] were minors, the findings of the trial judge make clear that the children's parents, adults who could have acted on their children's behalf, knew of their rights. The policy that underlies the exception for minors and those with disabilities does not track onto the experience of the Métis.

(c) *Ultimate Limitations Periods*

**249** As a counterweight to newer exceptions like discoverability and expanded disability provisions, legislatures have also adopted ultimate limitations periods. The purpose of these ultimate limitations periods is to provide true repose for defendants, even against undiscovered claims. Even if a claim is not discovered, meaning that the basic limitations period has not been engaged, an ultimate limitation period can bar a claim. While basic limitations periods are often in the range of two to six years, ultimate limitations periods are usually 10 to 30 years long.

**250** Manitoba has had an ultimate limitations period of 30 years since 1980 (*An Act to Amend The Limitation of Actions Act*, S.M. 1980, c. 28, s. 3). This ultimate limitation period continues in the current act as s. 14(4). Ultimate limitations periods are also in force in many other provinces. The purpose of these ultimate limitations periods was described by the Manitoba Law Reform Commission in their 2010 report on limitations:

In order to address the important repose aspect of limitations, there must be some ability to ensure that, after a certain period of time, no action may be brought regardless of the claim's discoverability of late occurring damage.

(*Limitations* (2010), at p. 26)

**251** As ultimate limitations periods were introduced, many provincial legislatures chose to effectively exempt certain types of Aboriginal claims from them by grandfathering Aboriginal claims into the former acts, which did not contain ultimate limitations periods. This was done in [page721] Alberta and Ontario, and will soon be done in British Columbia: *Limitations Act*, R.S.A. 2000, c. L-12, s. 13; Ontario *Limitations Act*, 2002, s. 2; *Limitation Act*, S.B.C. 2012, c. 13, s. 2 (not yet in force). In my view, this is evidence that legislatures are alive to the issues posed by Aboriginal claims and limitations periods and the choice of whether or not to exempt such claims from basic and ultimate limitations periods is one that belongs to the legislature.

**252** There is a fine balance to be struck between expanded ways to toll limitations periods through discovery and incapacity and a strict ultimate limitations period. It is not the place of the courts to tamper with the selection that each of the legislatures and Parliament have chosen by creating a broad general exception for claims that courts find to be fundamental or serious. The type of exception proposed by my colleagues is antithetical to the careful policy development that characterizes this area of the law. The courts are ill-suited for doing this type of work which must be grounded in a clear understanding of how each aspect of the limitations regime works together to produce a fair result.

**253** If Parliament or provincial legislatures wanted to exclude factual claims with a constitutional

component from limitations periods, then they could do so by statute. As they have not chosen to make an exception for the type of declaration that the Métis seek in this case, it is inappropriate for this Court to do so.

(d) *Role of Reconciliation*

**254** My colleagues suggest that the above rationales have little role to play in an Aboriginal context, where the goal of reconciliation must [page722] be given priority. In so doing, the majority's reasons call into question this Court's decisions in *Wewaykum*, at para. 121, and more recently in *Canada (Attorney General) v. Lameman*, [2008 SCC 14](#), [\[2008\] 1 S.C.R. 372](#). In *Lameman*, this Court specifically stated that policy rationales that support limitations periods "appl[y] as much to Aboriginal claims as to other claims" (para. 13 (emphasis added)). Without doing so explicitly, it appears that the majority has departed from the legal certainty created by *Wewaykum* and *Lameman*, in favour of an approach where "reconciliation" must be given priority.

**255** Moreover, the legal framework of this claim is very different from a claim based on an Aboriginal right. Aboriginal rights are protected from extinguishment under s. 35 of the *Constitution Act, 1982*. Aboriginal rights, therefore, constitute ongoing legal entitlements. By contrast, the claims in this case concern a constitutional obligation that was fulfilled over 100 years ago.

(5) Manitoba Legislation Does Not Exempt Declarations From Limitation Periods

**256** My colleagues assert that limitations periods should not apply to claims for failure to diligently fulfill solemn obligations arising from the Constitution where the only remedy sought is a declaration. Respectfully, this is a choice to be made by the legislature. In Manitoba, limitations legislation has never contained an exception for declarations. This Court is not empowered to create one.

**257** In some other provinces the legislation governing limitations periods provides for specific exceptions where the only remedy sought is a declaration without any consequential relief: *Alberta Limitations Act*, s. 1(i)(i); *Ontario Limitations Act, 2002*, s. 16(1)(a); *British Columbia Limitation Act*, s. 2(1)(d) (not yet in force).

[page723]

**258** These exceptions are contained within the finely tailored legislative schemes as described above. In those provinces where recent amendments have provided for declaratory judgments to be exempt from limitations periods, the limitations legislation also contains provisions that restrict the retroactive application of those exemptions. For example, in Ontario, if a claim was not started before the exemption was enacted and the limitation period under the former act had elapsed, the creation of the new exemption from limitation periods for declaratory judgments would not revive those previously barred claims, even if the only remedy sought was a

declaration: Ontario *Limitations Act, 2002*, s. 24. Thus, even where the legislature has seen fit to exempt declarations from limitation periods, it has not done so retroactively.

**259** This is unsurprising since changes to limitations periods are rarely made retroactively, because to do so would prejudice those who relied upon those limitations periods in organizing their affairs. Retroactive changes to limitations law mean that potential defendants who were under the impression that claims against them were time-barred would be again exposed to the threat of litigation. In contrast, when a limitations period is changed prospectively, potential defendants were never in a position to rely on a limitation period and would always be on notice as to the possibility of litigation. In effect, if limitations periods were changed retroactively, the certainty rationale would be significantly compromised by depriving defendants of the benefit of limitations protection that they had relied upon up until the change in the law.

**260** The issue of whether to exempt declaratory judgments from limitations periods is one that has been canvassed recently in Manitoba. In 2010, the Manitoba Law Reform Commission recommended that an exception be created for declaratory judgments, but this recommendation has not been implemented. In making that recommendation, the Manitoba Law Reform Commission recognized that, while declaratory judgments do not compel [page724] the Crown to act in a particular way, there is still a risk that an exception for declaratory remedies might "undermin[e] the principles that support the establishment of limitations" (*Limitations*, at p. 33). This is because obtaining a declaration can be the first step in obtaining an additional remedy, one that would otherwise be barred by a limitation period.

**261** The Manitoba Law Reform Commission noted that this risk was particularly acute in the case of declarations made in respect of the Crown, since there is authority to support the proposition that the Crown does not generally ignore a court declaration (p. 32). While the Crown response to a declaration is not always satisfactory to everyone, the possibility that the declaration will lead to some additional extra-judicial remedy is real. This means that while a declaratory order without consequential relief might appear to have little impact on the certainty created by limitations periods, the result for litigants is not necessarily as benign. There is a risk that a declaratory judgment will lead to additional remedies, even when not ordered by the courts.

**262** In my view, that risk is fully realized in this case. As my colleagues note, the Métis do not seek a declaration as an end in itself. Rather, they plan to use the declaration to obtain redress in extra-judicial negotiations with the Crown. This result undermines the certainty rationale for limitation periods by exposing the Crown to an obligation long after the limitation period expired. By exempting the declaration sought by the Métis from limitation periods, the majority has inappropriately stepped into the shoes of the Manitoba legislature.

#### (6) Effect of Exempting These Claims From Limitations Periods

**263** The majority has removed these claims by the Métis from the ordinary limitations regime by arguing that these claims are fundamental [page725] and that a failure to address them perpetuates an "ongoing rift in the national fabric". With respect, the determination that a

particular historical injustice amounts to a rift in the national fabric is a political or sociological question. It is not a legally cognizable reason to exempt a claim from the application of limitations periods. Moreover, it leaves the courts in the position of having to assess whether any claim made is sufficiently fundamental to permit them to address it on its merits despite its staleness.

**264** Over the course of Canadian history, there have been instances where the Canadian government has acted in ways that we would now consider inappropriate, offensive or even appalling. The policy choice of how to handle these historical circumstances depends on a variety of factors and is therefore one that is best left to Parliament or the government, which have in recent years acted in a variety of ways, including apologies and compensation schemes, to make amends for certain historical wrongs.

**265** The reasons of the majority would now have the courts take on a role in respect of these political and social controversies. Where the parties ask for a declaration only and link it to some constitutional principle, the courts will now be empowered to decide those cases no matter how long ago the actions and facts that gave rise to the claim occurred. In my view, this has the potential to open the court system to a whole host of historical social policy claims. While the resolution of historical injustice is clearly an admirable goal, the creation of a judicial exemption from limitations periods for such claims is not an appropriate solution.

**266** This exception creates the possibility of indeterminate liability for the Crown, since claims under this new duty will apparently be possible forever. Courts have always been wary of the possibility of indeterminate liability. In *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931), at p. 444, Cardozo C.J. expressed concern about the creation of "liability in an indeterminate amount for an indeterminate time to an indeterminate class". This [page726] concern was recognized, albeit more with respect to indeterminate amounts and classes, by this Court in *Design Services Ltd. v. Canada*, [2008 SCC 22](#), [\[2008\] 1 S.C.R. 737](#), at paras. 59-66. In my view, as this exception from limitations periods creates liability for an indeterminate time, it is not an appropriate step for this Court to take.

**267** The exemption proposed by my colleagues is not aligned with any of the principles that underlie the limitations scheme. It is instead an exception that is virtually limitless in scope, relying, as it does, on a social policy appeal to restore our national fabric rather than accepted legal principles. It cannot be characterized as the type of incremental change that supports the development and evolution of the common law and it is therefore not an appropriate change for the courts to make.

#### (7) The Crown Is Entitled to the Benefit of Limitations Periods

**268** Limitations periods apply to the government as they do to all other litigants. At common law, limitations periods could be used by the Crown to defend against actions, but could not be used by defendants pursued by the Crown (P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at pp. 98-99). This is no longer the case as the *Crown Liability and Proceedings Act*, [R.S.C. 1985, c. C-50, s. 32](#), specifically provides that provincial

limitations periods apply to claims by and against the Crown:

**32.** Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

[page727]

The effect of this section is that the provincial limitations legislation in Manitoba applies to the federal Crown. Moreover, even absent this Act, the common law provided that it was possible for the Crown to rely on a limitations period to defend against claims (Hogg, Monahan and Wright, at p. 99).

**269** The application of limitations periods to claims against the Crown is clear from the cases generally and also specifically in the area of Aboriginal claims. For example, in both *Wewaykum* and *Lameman*, this Court applied a limitations period to bar an Aboriginal claim against the government.

**270** Application of limitations periods to the Crown benefits the legal system by creating certainty and predictability. It also serves to protect society at large by ensuring that claims against the Crown are made in a timely fashion so that the Crown is able to defend itself adequately.

**271** The relevance of limitations periods to claims against the Crown can clearly be seen on the facts of this case. My colleagues rely on "unexplained periods of inaction" and "inexplicable delay" to support their assertion that there is a pattern of indifference. In my view, it cannot reasonably be ruled out that, had this claim been brought in a timely fashion, the Crown might have been able to explain the length of time that it took to allocate the land to the satisfaction of a court. The Crown can no longer bring evidence from the people involved and the historical record is full of gaps. This case is the quintessential example of the need for limitations periods.

### C. Laches

**272** In addition to being barred by the limitation period, these claims are subject to laches. Laches is an equitable doctrine that requires a claimant in equity to prosecute his or her claim without undue delay. In Canada, there are two recognized branches to the doctrine of laches: delays that result from [page728] acquiescence or delays that result in circumstances that make prosecution of the action unreasonable (*M. (K.) v. M. (H.)*, at pp. 76-77, citing *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221, at pp. 239-40).

**273** The majority finds that the Métis cannot have acquiesced because of their marginalized position in society and the government's role in bringing about that marginalization. They further find that the government did not alter its position in reasonable reliance on the *status quo*, nor

would disturbing the current situation give rise to an injustice. Finally, they conclude that given the constitutional aspect of the Métis' claim, it would be inappropriate in any event to apply the doctrine of laches.

**274** Respectfully, I cannot agree. The Métis have knowingly delayed their claim by over a hundred years and in so doing have acquiesced to the circumstances and invited the government to rely on that, rendering the prosecution of this action unreasonable. As a result, their claim cannot succeed because it is barred by both branches of the doctrine of laches.

(1) Decisions of the Courts Below

**275** The trial judge held that the doctrine of laches acted as a defence to all of the Métis claims. He found that those entitled to benefits under ss. 31 and 32 of the *Manitoba Act* were, at the material time, aware of their rights under the Act and of their right to sue if they so wished. The trial judge held that there was "grossly unreasonable delay" in bringing this action in respect of those rights and the breaches that the Métis now claimed (para. 454). The majority have identified no palpable and overriding error with this conclusion.

**276** There is some irony in the majority in this Court crafting its approach around the government's delay and at the same time excusing the Métis' delay in bringing their action for over 100 years.

[page729]

**277** The trial judge observed that there was no evidence to explain the delay in making the claim. The only explanations offered came from counsel for the Métis and none of them provided "a justifiable explanation at law for those entitled under s. 31 and s. 32, whether individually or collectively, to have sat on their rights as they did until 1981" (para. 457). Nor, in the trial judge's view, did this delay in the exercise of their rights square with the evidence of Métis individuals and the larger community pursuing legal remedies throughout the 1890s for other claims arising from the *Manitoba Act*. The trial judge held that this amounted to acquiescence in law. Both Canada and Manitoba were prejudiced by the claim not being advanced in a timely fashion due to the incomplete nature of the evidence that was available at trial.

**278** The Court of Appeal concluded that laches "may be applied to claims seeking declaratory relief whether declaratory judgments are viewed as equitable in nature or *sui generis*" (para. 342). The Court of Appeal then considered whether laches can operate to bar constitutional claims. It concluded that, while laches cannot be applied to claims based on the division of powers, the claims advanced by the Métis were not of that type. The Court of Appeal decided that it was unnecessary to determine whether laches could be applied to the types of constitutional claims advanced by the Métis because it determined that those claims were moot.

(2) Acquiescence

**279** My colleagues suggest, at para. 149, that no one can acquiesce where the law has changed, since it is "unrealistic" to expect someone to have enforced their claim before the courts were prepared to recognize those rights. With respect, this conclusion is at odds with the common law approach to changes in the law. While there is no doubt that the law on Crown duties to Aboriginal people has evolved since the 1870s, defences of general application, including laches, have always applied to claimants despite such changes in the [page730] law (*In re Spectrum Plus Ltd. (in liquidation)*, 2005 UKHL 41, [2005] 2 A.C. 680, at para. 26). The applicability of general defences like limitations periods to evolving areas of the law was also recognized by this Court in *Canada (Attorney General) v. Hislop*, [2007 SCC 10](#), [\[2007\] 1 S.C.R. 429](#), at para. 101. My colleagues' approach to acquiescence is a significant change in the law of laches in Canada with potentially significant repercussions.

**280** Turning to the specific requirements for the application of acquiescence, I agree with my colleagues that it depends on knowledge, capacity and freedom (*Halsbury's Laws of England* (4th ed. 2003), vol. 16(2), at para. 912). In my view, all three were present on the facts of this case.

**281** Justice La Forest, in *M. (K.) v. M. (H.)*, described the required level of knowledge to apply laches:

... an important aspect of the concept is the plaintiff's knowledge of her rights. It is not enough that the plaintiff knows of the facts that support a claim in equity; she must also know that the facts give rise to that claim: *Re Howlett*, [1949] Ch. 767. However, this Court has held that knowledge of one's claim is to be measured by an objective standard; see *Taylor v. Wallbridge* (1879), [2 S.C.R. 616](#), at p. 670. In other words, the question is whether it is reasonable for a plaintiff to be ignorant of her legal rights given her knowledge of the underlying facts relevant to a possible legal claim. [Emphasis deleted; pp. 78-79.]

**282** Given the trial judge's findings, the Métis had this required knowledge in the 1870s. This conclusion amounts to a finding of fact and cannot be set aside absent palpable and overriding error. The majority has not identified any such error.

[page731]

**283** Instead of confronting this conclusion on knowledge, my colleagues conclude that the Métis could not acquiesce for three reasons: (1) historical injustices suffered by the Métis; (2) the imbalance in power that followed Crown sovereignty; and (3) the negative consequences following delays in allocating the land grants. I cannot agree with these conclusions.

(a) *Historical Injustices*

**284** The main historical injustice discussed by the majority is the very issue of this case: delay in making the land grants. They conclude that the Métis did not receive the benefit that was

intended by the land grants, and they imply that this was a cause of the Métis' subsequent marginalization. They suggest that, because laches is an equitable construct, the conscionability of both parties must be considered. While this is no doubt true, they then rely on the facts of the claim to conclude that equity does not permit the government to benefit from a laches defence. Effectively, they conclude that the very wrong that it is alleged the government committed resulted in a level of unconscionability that means they cannot access the defence of laches. With respect, this cannot be so. Laches is always invoked as a defence by a party alleged to have, in some way, wronged the plaintiff. If assessing conscionability is reduced to determining if the plaintiff has proven his or her allegations against the defendant, the defence of laches is rendered illusory.

(b) *Imbalance in Power Following Crown Sovereignty*

**285** The evidence is not such that any imbalance in power between the Métis and the government was enough to undermine the knowledge, capacity and freedom of the Métis to the extent required to prevent a finding of acquiescence.

[page732]

**286** At the start of the relevant time period, the Métis were a political and military force to be reckoned with. The majority notes, at para. 23 that "[t]he Métis were the dominant demographic group in the Settlement, comprising around 85 percent of the population, and held leadership positions in business, church and government." They also note that

[w]hen the *Manitoba Act* was passed, the Métis dominated the Red River provisional government, and controlled a significant military force. Canada had good reason to take the steps necessary to secure peace between the Métis and the settlers. [para. 93]

**287** Furthermore, while the power and influence of the Métis declined in the following years, there is no evidence that the Métis reached a point where the imbalance in power was so great that they lost the knowledge, capacity or freedom required to acquiesce. Indeed, throughout the 1890s, applications were brought to the courts regarding disputes over individual allotments governed by s. 31. The Attorney General of Manitoba cites three examples of such litigation: *Barber v. Proudfoot*, [1890-91] 1 W.L.T.R. 144 (Man. Q.B. *en banc*) (a Métis individual sought to have a sale set aside), *Hardy v. Desjarlais* (1892), 8 Man. R. 550 (Q.B.) (the deed of sale was executed prior to the court order approving it, the money was not paid into court until the land was sold at a higher price), and *Robinson v. Sutherland* (1893), 9 Man. R. 199 (Q.B.) (a Métis minor alleged that her father forced her to sell her land contrary to the wishes of her husband). This litigation demonstrates that individual Métis had knowledge of their rights under s. 31 during this time period and had knowledge that they could apply to court in order to enforce their rights.

**288** While the power of the Métis had declined by the 1890s, there is no evidence that this prevented them from organizing in such a way as to avail themselves of the courts when they felt their rights were being threatened. Throughout the 1890s [page733] Métis individuals were involved in a series of cases related to the "Manitoba Schools Question".

**289** Catholic members of the Métis community collectively appealed to the courts regarding legislation involving denominational schools and twice pursued these issues all the way to the Judicial Committee of the Privy Council (*City of Winnipeg v. Barrett*, [1892] A.C. 445; and *Brophy v. Attorney-General of Manitoba*, [1895] A.C. 202). As these cases were not successful, Archbishop Taché organized a petition, which contained 4,267 signatures, that was submitted to the Governor General. This led to a reference to this Court and a subsequent appeal to the Privy Council.

**290** From this evidence the trial judge inferred "that many of the 4,267 signatories [to the petition] would have been Métis" and that it was "clear that those members of the community including their leadership certainly were alive to [their] rights ... and of the remedies they had in the event of an occurrence which they considered to be a breach" (para. 435). My colleagues reject the second inference drawn by the trial judge, again without identifying any palpable and overriding error, stating that the actions of a larger community do not provide evidence of the Métis' ability to seek a declaration based on the honour of the Crown (para. 148). I cannot accept that conclusion. In my view, the evidence demonstrates that, when the rights of the Métis under the *Manitoba Act* were infringed by government action, the Métis were well aware of and able to access the courts for remedies.

**291** The trial judge did not conclude that Archbishop Taché and Father Ritchot were Métis; he merely noted that they were leaders of a group that included some Métis and that group had accessed the courts to enforce rights contained in the *Manitoba Act*. This conclusion did not demonstrate any palpable and overriding error. It was reasonable for the trial judge to infer that by signing the petition and being aware of the litigation on denominational schools individual Métis had the [page734] knowledge required under the test described by La Forest J. in *M. (K.) v. M. (H.)*. Both the cases of individual claims under the Manitoba legislation and the cases about the denominational schools show that members of the Métis community had the capacity and freedom to pursue litigation when they saw their rights being affected. In respect of any delay in making land grants, they chose not to do anything until 100 years later. As a result, the Métis acquiesced and laches should be imputed against them.

(c) *Negative Consequences Created by Delays in Allocating the Land Grants*

**292** The reasons of the majority suggest that the fact that there was delay in distributing the land is sufficient to lead to the conclusion that the Métis were rendered so vulnerable as to be unable to acquiesce. In my view, this conclusion is untenable as a matter of law. It suggests that no party that suffered injury could ever acquiesce and thus renders the first part of the laches test meaningless. While laches requires consideration of whether the plaintiff had the capacity to bring a claim, this has never been extended to except from laches all who are vulnerable. Laches is imputed against vulnerable people just as limitations periods are applied against them. These doctrines cannot fulfill their purposes if they are not universally applicable.

**293** Moreover, I do not accept the implication that the marginalization of the Métis was caused by delays in the distribution of the land grants. As noted above, the Métis community was under

pressure for a number of reasons during the 1870s and 1880s. To suggest, as my colleagues do, that delays in the land grants caused the vulnerability of the Métis is to make an inference that was not made by the trial judge and is not supported by the record.

**294** In my view, the trial judge was correct in finding that the Métis had acquiesced and that laches could be imputed against them on that basis.

[page735]

### (3) Circumstances That Make the Prosecution Unreasonable

**295** Though my conclusion on acquiescence would be sufficient to result in imputing laches against the Métis, I am also of the view that the Métis' delay resulted in circumstances that make the prosecution of their claim unreasonable.

**296** The majority finds that the delay did not result in circumstances that make prosecution of the claim unreasonable since they do not find that the government reasonably relied on the Métis' acceptance of the *status quo*. I cannot agree. The delay in commencing this suit was some 100 years. This delay has resulted in an incomplete evidentiary record. The unexplained delays that my colleagues refer to as evidence for the Crown acting dishonourably may well have been accounted for had the claim been brought promptly. The effect of this extraordinary delay on the evidentiary record, in a case dependent on establishing the actions of Crown officials over 100 years ago, constitutes circumstances that would make the prosecution unreasonable.

**297** Moreover, we cannot know whether, if the claims had been brought at the time, the government might have been able to reallocate resources to allow the grants to be made faster or to take other steps to satisfy the Métis community. It cannot be said that the government did not alter or refrain from altering its position in reliance on the failure of the Métis to bring a claim in a timely manner.

### (4) Laches Applies to Equitable Claims Against the Crown

**298** The doctrine of laches can be used by all parties, including the Crown, to defend against equitable claims that have not been brought in a sufficiently timely manner. In *Wewaykum*, this Court considered the application of laches to an Aboriginal claim against the Crown and concluded [page736] that laches could act to bar a claim for breach of fiduciary duty. The delay at issue in that case was at least 45 years. The Court in *Wewaykum*, at para. 110, stated that

[t]he doctrine of laches is applicable to bar the claims of an Indian band in appropriate circumstances: *L'Hirondelle v. The King* (1916), 16 Ex. C.R. 193; *Ontario (Attorney General) v. Bear Island Foundation* (1984), 49 O.R. (2d) 353 (H.C.), at p. 447 (aff'd on other grounds (1989), 68 O.R. (2d) 394 (C.A.), aff'd [1991] 2 S.C.R. 570); *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (C.A.). There are also dicta in two decisions of this Court considering, without rejecting, arguments that

laches may bar claims to aboriginal title: *Smith v. The Queen*, [\[1983\] 1 S.C.R. 554](#), at p. 570; *Guerin, supra*, at p. 390.

**299** As discussed above in relation to limitations periods, the application of the defence of laches to the Crown is beneficial for the legal system and society generally. The rationales that justify the application of laches for private litigants apply equally to the Crown.

#### (5) Laches Applies to Claims Under Honour of the Crown

**300** The majority concludes that claims for a declaration that a provision of the Constitution was not fulfilled as required by the honour of the Crown ought never to be subject to laches. This is a broad and sweeping declaration, especially considering the conclusion of this Court in *Wewaykum* that breaches of the fiduciary duty could be subject to laches. A fiduciary duty is one duty derived from the honour of the Crown. It is fundamentally inconsistent to permit certain claims (e.g. those based on "solemn obligations" contained in Constitutional documents) derived from the honour of the Crown to escape the imputation of laches while other claims (e.g. those based on the more well-established and narrowly defined fiduciary obligation) are not given such a wide berth. Moreover, this holding will encourage litigants to reframe claims in order to bring themselves within the scope of this new, more [page737] generous exception to the doctrine of laches, which - particularly in light of the ambiguities associated with the new duty - creates uncertainty in the law.

**301** My colleagues rely on the holding in *Ontario Hydro v. Ontario (Labour Relations Board)*, [\[1993\] 3 S.C.R. 327](#), to support their position. In my view, reference to that case is inapposite. Division of powers claims, such as the one considered in *Ontario Hydro*, are based on ongoing legal boundaries between federal and provincial jurisdiction. This claim based on the honour of the Crown is grounded in factual circumstances that occurred over 100 years ago. Just as *Kingstreet* and *Ravndahl* distinguish claims based on factual circumstances from those based on ongoing statutory issues in the context of limitations statutes, so too should this case be distinguished from *Ontario Hydro*.

#### (6) Conclusion on Laches

**302** In my view, both branches of laches are satisfied. The Crown is entitled to the benefit of this equitable defence generally and specifically in relation to claims arising from the honour of the Crown in implementing constitutional provisions. As La Forest J. stated in *M. (K.) v. M. (H.)*, at p. 78, "[u]ltimately, laches must be resolved as a matter of justice as between the parties". Both the Métis and the government are entitled to justice. As a matter of justice, laches applies and precludes granting the equitable remedy sought here.

#### IV. Conclusion

**303** I would dismiss the appeal with costs.

[page738]

*Appeal allowed in part with costs throughout, ROTHSTEIN and MOLDAVER JJ. dissenting.*

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