

# CASE COMMENT

## A Comment on *Manitoba Métis Federation Inc v Canada*

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### I. INTRODUCTION

Only one year after Confederation, Canada purchased the land known as Rupert's Land. Rupert's Land was a vast tract of land that included what is now Manitoba. Prime Minister John A MacDonald was intent on expanding the recently formed country westward. As the money changed hands from Canada to the Hudson's Bay Company, a new reality was about to dawn on the inhabitants of Rupert's Land. Canada was seeking control over land where the Métis lived.

News that the land under Métis feet had been sold to Canada understandably caused alarm. It also caused conflict. Louis Riel led the resistance to Canada's attempt at surveying the area around what is now Winnipeg, eventually leading to negotiations. Representatives of the Metis met with representatives of Canada in Ottawa. These negotiations lead to a deal in the form of the *Manitoba Act*.<sup>1</sup> This Act allowed Manitoba to enter Confederation, and also provided that 1.4 million acres of land would be allocated to Métis children.<sup>2</sup>

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<sup>1</sup> *Manitoba Act, 1870*, SC 1870, c 3 (the "Manitoba Act").

<sup>2</sup> This was provided by section 31 of the *Manitoba Act*. This section reads as follows:

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

Some 143 years later in *Manitoba Métis Federation Inc v Canada (Attorney General)*,<sup>3</sup> the Supreme Court of Canada examined how the 1.4 million acres was allocated and (in a 7 to 2 decision) found the process wanting. The Supreme Court issued a simple declaration: “the federal Crown failed to implement the land grant provision set out in section 31 of the *Manitoba Act, 1870* in accordance with the honour of the Crown.”<sup>4</sup> In essence, the Supreme Court held that Canada’s 10 year delay (from 1870 to 1880) in issuing the 1.4 million acres violated (the newly recognized) duty of diligence, which forms part of the honour of the Crown.

The plaintiff Manitoba Métis Federation (“MMF”) was elated. The issue of the allocation of land to the Métis (and the failure to provide the Métis with a meaningful amount of land) has been a long standing issue for the Métis. The objective of the MMF was achieved. The MMF was upfront about its goal. It litigated this case over the course of 30 years to get a simple declaration “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.”<sup>5</sup> The MMF now has the declaration it was seeking. How its “extra-judicial efforts” will translate into tangible change is now up to the MMF and the Crown.

As the MMF attempts to move this case into a settlement, the question is what does the MMF case do for the general state of Aboriginal law? It is this question I wish to address in this case comment.

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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.

<sup>3</sup> 2013 SCC 14, 355 DLR (4th) 577 [MMF Case].

<sup>4</sup> *Ibid* at para 154.

<sup>5</sup> *Ibid* at para 137.

## II. THE DUTY OF DILIGENCE AND THE HONOUR OF THE CROWN

### A. The Meaning of the Duty of Diligence

The enduring significance of the MMF Case for Aboriginal law generally will be in its recognition of the duty of diligence as part of the honour of the Crown. Simply put, the duty of diligence requires that when the Crown promises to confer a benefit to Aboriginal people it must take reasonable steps to ensure that the promise is kept. This duty requires that the Crown “endeavour to ensure its obligations are fulfilled.”<sup>6</sup> The majority (per McLachlin CJ and Karakatsanis J) wrote, “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’.”<sup>7</sup> They further cautioned as follows:

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.<sup>8</sup>

However, bad faith is not required to show a lack of diligence.<sup>9</sup>

What does it mean to be diligent? The MMF Case taken as a whole suggests that the administrative law standard of reasonableness will provide helpful guidance. By negative implication, if bad faith is not required to be shown, then unreasonable conduct is the most logical marker of a lack of diligence. The court will forgive mistakes and some “negligence” in the Crown’s efforts to fulfil a promise made. Yet if the mistakes or negligence do bring “dishonour to the Crown” then there will be a breach of the duty of diligence. Though not stated in these terms, the standard of diligence is akin to the administrative law standard of reasonableness which requires

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<sup>6</sup> *Ibid* at para 79.

<sup>7</sup> *Ibid* at para 80.

<sup>8</sup> *Ibid* at para 82.

<sup>9</sup> *Ibid* at para 109.

“justification, transparency and intelligibility” but does allow for a margin of error in making decisions.<sup>10</sup>

The majority’s reasons on the facts of the case show a reasonableness standard being applied. The Court found a breach of the duty of diligence in Canada’s failure to diligently implement section 31 of the *Manitoba Act*. The purpose of the section was to give the Métis a “head start” in obtaining land in Manitoba, which purpose was not fulfilled because it took over 10 years to grant the section 31 land.<sup>11</sup> The Court examined the ten year period and found:

- (a) the initial allotment in 1871 was based erroneously on all Metis as opposed to Metis children and thus had to be redone;
- (b) in 1873, the government rectified the error and directed the allocation of land to Métis children only;
- (c) the second allotment started in 1875, but was aborted in 1876 because Canada underestimated the number of recipients;
- (d) the two-year delay between the 1873 rectification of the error in the first allotment and the start of the second allotment in 1875 was “inexplicable;”
- (e) the third and final allotment started in 1876 but took until 1880 to complete; and
- (f) no “satisfactory explanation” was found for why it took four years to do the third allotment.<sup>12</sup>

The majority characterized these facts as “consistent inattention and a consequent lack of diligence.”<sup>13</sup> Its emphasis on the lack of explanation for delay is like analyzing an administrative tribunal’s decision on a reasonableness standard for the lack of an intelligible line of reasoning in its decision.

The MMF made three arguments respecting the allotment of section 31 lands, all of which were dismissed but then re-characterized through the lens of delay.

First, the MMF argued that Canada failed to protect the Métis from land speculators, many of whom purchased the section 31 land before the land was allotted. The majority dismissed the argument that the section 31 land grants should not have been subject of sale, but the fact that sales were occurring at low prices only underscored the need for a fast allotment process, which did

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<sup>10</sup> On the topic of the “Reasonableness” standard, see *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190.

<sup>11</sup> *MMF Case*, *supra* note 3 at para 101.

<sup>12</sup> *Ibid* at paras 32-38, 104-108.

<sup>13</sup> *Ibid* at para 109.

not occur. Delay perpetuated a situation where Métis children were selling their land at below value.<sup>14</sup>

Second, the MMF argued that since 993 Métis were left out of the section 31 allotment and since they only got money scrip (of modest value) and not land, this was a breach of Canada's obligation. For the majority, allocating scrip to these Métis was a reasonable method of addressing their exclusion from section 31, but the majority found fault in the fact that it took so long to issue scrip and the delay resulted in diminished purchasing power of the scrip. Simply put, scrip was allotted at \$1 per acre, which was reasonable in 1879, but when the scrip was allocated in 1885, the land had a value of over \$2 per acre.<sup>15</sup>

Third, the MMF argued that section 31 land should have been allocated together, in essence to make a Métis homeland. The court did not find any fault in allocating the land by random allotment as opposed to large blocks. Yet, the court found that the delay in issuing the land made it more difficult to allow for the Métis to trade their land grants in order to live in contiguous parcels.<sup>16</sup>

The result was a conclusion that the honour of the Crown was breached by Canada in failing to exercise diligence in administering the allocation of section 31 lands.

## **B. The Basis for the Duty of Diligence**

The best way to understand the conceptual basis for the duty of diligence is as an implied term to any Crown promise. In this case, the Crown promised to provide a specific and tangible benefit; namely 1.4 million acres of land to the Métis. This promise was documented in statute, which also happens to be a constitutional document. However, the promise in the *Manitoba Act* is silent as to the issue of timing. For the majority, the honour of the Crown doctrine is routinely applied as an interpretive aid for statutes, constitutional documents or treaties and sees these documents interpreted broadly.<sup>17</sup> Accordingly, when a specific and tangible promise of a benefit is made and that promise is made without any reference to timing then this

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<sup>14</sup> *Ibid* at para 117.

<sup>15</sup> *Ibid* at para 121.

<sup>16</sup> *Ibid* at para 127.

<sup>17</sup> *Ibid* at paras 73-75.

‘interpretive aid’ aspect to the honour of the Crown will imply a duty of diligence.

My approach to the conceptual basis for the duty of diligence must be implied from the words of the majority. In my view, its analysis on the issue is more complex than it needs to be and opened its line of reasoning to attack by the dissenting judgment of Rothstein J.

The majority begins its analysis by summarizing the state of the law on the honour of the Crown. Conceptually, the honour of the Crown “refers to a principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign.”<sup>18</sup> This duty is a “heavy one”.<sup>19</sup> The goal of the principal is “the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty.”<sup>20</sup> The honour of the Crown is not a cause of action in itself, but “speaks to how obligations that attract [the concept] must be fulfilled.”<sup>21</sup> The honour of the Crown can arise in a number of situations, but not all interactions between the Crown and Aboriginal people engage this principle.<sup>22</sup>

The Supreme Court spoke of four situations in which the honour of the Crown has been applied. For present purposes,<sup>23</sup> the most pertinent were the last two which were as follows:

(3) The honour of the Crown governs treaty-making and implementation, leading to requirements such as honourable negotiation and the avoidance of the appearance of sharp dealing; 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.<sup>24</sup>

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<sup>18</sup> *Ibid* at para 65.

<sup>19</sup> *Ibid* at para 68.

<sup>20</sup> *Ibid* at para 66.

<sup>21</sup> *Ibid* at para 73.

<sup>22</sup> *Ibid* at para 68.

<sup>23</sup> See *ibid* at para 73 for the other two examples offered by the court, as follows:

(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.

<sup>24</sup> *MMF Case*, *supra* note 3 at para 73 [citations omitted].

The concepts of avoiding sharp dealing or examining means by which to achieve the purpose of the treaty or statute are all routinely used in providing a large and liberal interpretation to texts dealing with Aboriginal people.<sup>25</sup> In short, these two points really are one and deal with the fact that the honour of the Crown is an interpretive aid.

The majority focuses on the ‘interpretive aid’ aspect of the honour of the Crown. McLachlin CJC and Karakatsanis J write for the majority, “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 fulfil it.”<sup>26</sup> The fact that the majority closely ties the issue of diligence with the issue of “a broad purposive approach to the interpretation of the promise” suggests that the duty of diligence is an implied term to assist in the interpretation of a benefit clause that has no time parameter in it.

The duty of diligence stems from the presumption that when the Crown makes a promise, it intends to fulfil it. Citing, amongst other cases, two decisions written by Binnie J in *Marshall*,<sup>27</sup> and *Little Salmon*,<sup>28</sup> the Court justifies the existence of the duty of diligence by holding that the duty is required to prevent the Crown from giving “empty shells” of promises and further that simple good governance requires timely decisions.<sup>29</sup> In this way, the MMF Case allows a court to interpret a promise made in a way that avoids “empty shells” or even “sharp dealing” and is consistent with the general (and overarching) goal of good governance by implying a duty to act diligently.

### C. The Irrelevance of “Solemn Promises” to the Duty of Diligence

A significant battleground between the majority and the dissent is in linking the trigger for the duty of diligence to the existence of a solemn promise. The majority undoubtedly uses the term “solemn.” For example, the majority writes, “the honour of the Crown requires it to act diligently in pursuit of its solemn obligations and the honourable reconciliation of Crown

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<sup>25</sup> See generally Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: Lexis-nexis, 2008) at 515.

<sup>26</sup> *MMF Case*, *supra* note 3 at para 75.

<sup>27</sup> *Marshall v Canada*, [1999] 3 SCR 456, 177 DLR (4th) 513.

<sup>28</sup> *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103.

<sup>29</sup> *Ibid* at paras 76-80.

and Aboriginal interests” and further has a heading entitled “Did the Solemn Promise in Section 31 of the Manitoba Act Engage the Honour of the Crown?” under which the majority outlines why the honour of the Crown is engaged on the facts of the case.<sup>30</sup> The dissent contends “no clear framework is provided for when an obligation rises to this “solemn” level such that it triggers the duty of diligent implementation.”<sup>31</sup>

In my view, both the majority and the dissent place too much emphasis on the “solemnity” of the promise when they should be looking at whether there was a promise made of a tangible benefit. The majority held that the honour of the Crown was engaged under the *Manitoba Act* because the *Manitoba Act* is a constitutional instrument.<sup>32</sup> This was all that need be said, but the majority goes on to contend that section 31's constitutional obligation is also a solemn obligation.<sup>33</sup> This then allows the dissent to attack the unclear meaning of “solemnity”.

The better way of understanding the issue is by focusing on whether there is a clear and tangible benefit being conferred by the Crown. It was submitted that the benefits seen in the *Manitoba Act* are relatively rare and relatively easily identifiable. For the most part statutes, constitutional documents, or treaties rarely expressly provide for the conferral of a tangible benefit. Provisions like section 35 of the *Constitution Act, 1982* protect rights from infringement as opposed to granting rights.<sup>34</sup> Of course, the Crown does from time to time promise to provide tangible benefits. This is seen in the treaties in which the Crown promises to provide a certain amount of reserve land or an annuity to all treaty members. But these provisions are quite easy to identify; and thus it is easy to identify when the duty of diligence arises.

The use of the term “solemn” is not meant to be a legal test. Instead the term is meant to describe the fact that when the Crown does make a promise, it is by definition a “solemn one”. The form of the promise — be it in treaty, statute, constitution, or even ministerial letter — should not matter. What does matter is the fact of a promise made by the Crown. The dissent then is misplaced in emphasizing solemnity when it should be looking at the nature of the promise and whether the promise is one of a tangible benefit.

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<sup>30</sup> *Ibid* at paras 78, 91.

<sup>31</sup> *Ibid* at para 205.

<sup>32</sup> *Ibid* at para 91.

<sup>33</sup> *Ibid* at para 92-94.

<sup>34</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 35.



The dissent suggests that if the duty could arise if there is an obligation owed to an Aboriginal group then this is far too modest a trigger. Rothstein J writes at paragraph 208:

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.<sup>35</sup>

The problem with the dissent's analysis is that it fails to appreciate that the duty of diligence is an outgrowth of the interpretive aid aspect of the honour of the Crown and not an outgrowth of that fiduciary duty aspect of the honour of the Crown.<sup>36</sup> It is routinely the case that when a provision in statute or a constitutional document is directed to an Aboriginal group then the interpretive principles of avoiding sharp dealing or giving a large and liberal interpretation are applied simply because the provision is directed at the Aboriginal group.<sup>37</sup> In the MMF Case, the majority rejected the application of the duty of diligence to section 32 of the *Manitoba Act* precisely because their provision was not directed solely at the Métis, but to the general public.<sup>38</sup> Accordingly, there is nothing wrong in triggering the honour of the Crown only because there is reference to an Aboriginal group.

In the end, the debate over solemnity is unfortunate and obscures the simplicity of the duty of diligence.

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<sup>35</sup> MMF Case, *supra* note 3 at para 208 [emphasis added].

<sup>36</sup> The majority held that the owner of the Crown can give rise to a fiduciary duty in appropriate circumstances, thus tying the concept of the honour of the Crown with the concept of the fiduciary duty, *ibid* at para 73.

<sup>37</sup> See Sullivan, *supra* note 25 at 509. Sullivan cites the following from *Mitchell v Peguis Indian Band* at 510, "it is clear that in the interpretation of any statutory enactment dealing with Indians, and particularly the Indian act, it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret nearly provisions aimed at limiting or abrogating them."

<sup>38</sup> MMF Case, *supra* note 3 at para 95. The plaintiff was unsuccessful in showing a breach of section 32 of the *Manitoba Act*. In short, this provision dealt with the recognition of existing landholding in Manitoba and was not directed solely at the Métis.

## D. The Potential of the Duty of Diligence

It has been common for Aboriginal people to experience delay and not diligence when dealing with the Crown. The Métis experienced delay in receiving its land under the *Manitoba Act*. Many First Nations experienced delay in receiving reserve land promised under treaty. The duty then has significant potential in changing the relationship between Canada and Aboriginal people for the better.

One area ripe area for the duty is in reserve creation. The ability of a First Nation to obtain reserve land (and jurisdiction over that reserve land) is a prime way for the First Nation to spur economic development. For example, a First Nation may be able to obtain reserve land close to urban centres and offer commercial space to paying tenants, thereby creating an income source for the entire community. Yet, with all things business, time is money. Delay in creating reserves leads to a delay in a rental income stream and the loss of opportunities (e.g. rental tenants moving elsewhere because the reserve land is not yet ready for lease).

Canada creates reserve land and follows its “Additions to Reserve” Policy. This policy has been the subject of criticism due (amongst other things) to the length of time it takes to complete.<sup>39</sup> Based upon the MMF Case, it is available to contend that once Canada makes a commitment to allocate a reserve (e.g. in a settlement agreement) then such a commitment must be done diligently. No one expects that a reserve will spring out of nothingness the day after a settlement agreement is signed, but the MMF Case would allow for careful analysis of the delay to determine if it reasonable or not. It further opens up the possibility for damages based upon delay, lost rental income or lost business opportunities for example, and can serve as a powerful incentive on Canada to move quickly or face an award of damages.

The uncharted water for the duty of diligence is where the promise is not as concrete as seen in section 31 of the *Manitoba Act*. For example, not every reserve addition stems from agreement or some other legal obligation. Some reserves stem from the need to accommodate the growing size of a reservation community. These allocations of reserve land, while necessary, stem from the discretion of the Crown. The addition to reserve process then winds along until a decision is made to recommend or not recommend the creation of the

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<sup>39</sup> See generally Canada, *Additions to Reserve: Expediting the Process* (Ottawa: Standing Senate Committee on Aboriginal Peoples, 2012) (Chair: Hon Gerry St Germain).

reserve. Arguably, the decision to confer a benefit does not arise until the end of the process. This may take years. This begs the question of whether the duty of diligence should act as a control on the exercise of discretion.

Administrative law already provides a basis to control discretion by public bodies. In appropriate circumstances, the remedy of *mandamus* may be available to compel a decision maker to make a discretionary decision;<sup>40</sup> thus it may well be that the duty of diligence is already covered by administrative law principles making any further expansion of the duty unnecessary.

### III. THE FIDUCIARY DUTY AND METIS TITLE

#### A. No Breach of Fiduciary Duty

Though the Manitoba Métis Federation was successful in showing a breach of the honour of the Crown, it was not successful in showing a breach of a fiduciary duty.

The Métis argued that Canada owed them a fiduciary duty in implementing section 31 of the *Manitoba Act*. The Court considered the issue in two ways. The first way was to consider whether the fiduciary duty unique to Aboriginal law could be used to ground the MMF's claim, and the second way was to look at the general law of fiduciary duties to determine if the Crown undertook to act as a fiduciary. Both attempts to attach fiduciary duty to the Crown were rejected.

In considering the Aboriginal fiduciary duty, the Court held, "[t]he duty arises if there is (1) a specific or cognizable Aboriginal interest, and (2) a Crown undertaking of discretionary control over that interest."<sup>41</sup> The Court easily found that section 31 provided Canada with wide discretion as to how to administer and grant the 1.4 million acres of land promised to the Métis. The issue was whether there was a "specific or cognizable Aboriginal interest" at play. The Supreme Court was unanimous that there was no such Aboriginal interest.

The basis of the appellants' case was that section 31 itself referenced "Indian title" and that the 1.4 million acres of land was being granted "towards the extinguishment of the Indian Title to the lands in the Province." In essence, the *Manitoba Act* was alleged to recognize the existence of

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<sup>40</sup> See generally *Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 at 766-769, 18 Admin LR (2d) 122.

<sup>41</sup> *MMF Case*, *supra* note 3 at para 51.

Aboriginal title, which, in turn, was the “specific or cognizable Aboriginal interest” that could ground the fiduciary duty.<sup>42</sup>

The Supreme Court held that the facts did not establish Métis title and that section 31 of the *Manitoba Act* did not recognize such title. The Court stressed that the interest “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.”<sup>43</sup> The facts demonstrated that the land at issue was not held collectively, but individually, and that the Métis permitted the sale of land. This was fatal to the claim for an Aboriginal interest in the section 31 lands.

Furthermore, the Court held “an Aboriginal interest in land giving rise to a fiduciary duty cannot be established by treaty, or, by extension legislation. Rather, it is predicated on historic use and occupation.”<sup>44</sup> The result was that there was no uniquely Aboriginal interest that could ground a fiduciary duty and this claim was dismissed.

The Supreme Court quickly dismissed a general fiduciary duty. The appropriate test for a general fiduciary duty was to establish “(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.”<sup>45</sup>

The general fiduciary duty failed on the first step. The Court held,

[w]hile 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.<sup>46</sup>

In essence, section 31 simply allowed for the allocation of land and not the allocation of land to the Métis in priority to any other issue considered important to Canada.

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<sup>42</sup> *Ibid* at para 54.

<sup>43</sup> *Ibid* at para 53.

<sup>44</sup> *Ibid* at para 58.

<sup>45</sup> *Ibid* at para 60.

<sup>46</sup> *Ibid* at para 62.

## B. An Unreachable Goal? Métis Title and Communal Land Tenure

What is striking in the MMF Case is the unwillingness of the Supreme Court to accommodate the concept of Métis title because of the fact that the land was held individually and not communally. All of the Aboriginal title cases to date have involved First Nations who have historically held land communally. The emphasis on the communal interest in land was inconsistent with the facts of Métis land tenure prior to the creation of Manitoba. Undoubtedly, the Métis did have a system of private ownership. However, the Supreme Court was not willing to expand its understanding of Aboriginal title to accommodate the Métis but, instead, demands that history accommodate the Supreme Court's understanding of Aboriginal title (namely that it must be communal).

The inflexibility on the issue of Métis title is in contrast to the flexibility shown in *R v Powley*.<sup>47</sup> In this case, the Supreme Court modified the test for Aboriginal rights (namely the right to hunt for food) in order to move the relative timeframe from the point of contact to the point of effective European control in order to recognize the fact that the Métis did not exist as a community at the point of contact. In the MMF Case, the facts demonstrated that Métis land tenure was individual. This sets it apart from First Nation land tenure which is seen as communal. This reflects a difference in these two cultural groups. There is no requirement in section 35 of the *Constitution Act, 1982* that Métis land tenure be identical to First Nation land tenure.<sup>48</sup> Differences amongst Aboriginal people are to be expected. Both the Métis and First Nations have protections under section 35. Yet, the Supreme Court seemingly requires the Métis to hold land communally when the facts demonstrate that this apparently was not the case.

In many respects, this rigid approach is not surprising. The test for Aboriginal title is commonly seen as quite onerous. The fact that the test was not made any easier for the Métis then is consistent with the Supreme Court's cautious approach on title. The result could be that Métis title may never get off the ground. Of course, each case must be considered on its own facts but if it is the case that land tenure prior to the *Manitoba Act* was individual in

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<sup>47</sup> 2003 SCC 43, [2003] 2 SCR 207.

<sup>48</sup> Rather, subsection 35(1) provides for the protection of existing aboriginal and treaty rights, and subsection 35(2) defines "aboriginal peoples of Canada" to include Métis states only, without any indication differentiation is expected or required.

Manitoba, it may well be the case that such individual land tenure would be seen in other Prairie provinces. This in turn practically means that Aboriginal title may be off the table for many Métis people, at least in the Prairies.

### C. The Rejection of the Doctrine of Recognition of Title

The Manitoba Métis Federation argued that the Métis held title because it was recognized in the text of section 31 of the *Manitoba Act*.<sup>49</sup> Section 31 granted land “towards the extinguishment of the Indian title to the lands in the province”. On a plain reading of section 31, it would appear that Canada is giving land in exchange for a release; namely the extinguishment of Métis title. The motivation for Canada in providing a large sum of land would be that it believed there was “Indian title” in the first place.

The majority categorically rejects this argument by simply writing, “[a]n Aboriginal interest in land giving rise to a fiduciary duty cannot be established by treaty, or, by extension, legislation. Rather, it is predicated on historic use and occupation.”<sup>50</sup> As support for its conclusion, the majority draws upon *Guerin* and specifically this comment from Dickson J: “[t]heir 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.”<sup>51</sup>

It is submitted that there is an important difference between suggesting that an aboriginal right is created by a statute or constitutional document and that an aboriginal right is recognized by statute or constitutional document. In this regard the principles of interpretation that form part of the honour of the Crown can be a significant assistance. Sharp dealing is prohibited. Ambiguities are interpreted in favour of Aboriginal litigants. In this case, it is important to note that section 31 is expressly directed at Indian title held by the Métis. It would seem sharp for Canada to deny the existence of title that it is offering 1.4 million acres in land to extinguish. Of course, it is possible for Canada to deny the existence of a right and not admit liability when it seeks a release, but one would expect words to that effect. The *Manitoba Act* was drafted by Canada and passed by Canada and was not drafted or passed by the Métis. To the extent that there is any ambiguity it should be interpreted in favour of the Métis. Accordingly, there is a basis to suggest that Canada recognized the existence of Métis title in section 31.

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<sup>49</sup> MMF Case, *supra* note 3 at para 54.

<sup>50</sup> *Ibid* at para 58.

<sup>51</sup> *Ibid* [emphasis omitted].

The issue of recognition could be relevant for First Nations. The numbered treaties seen in the prairies contain provisions dealing with the extinguishment of rights held by First Nations people. For example, Treaty Five reads,

The Saulteaux and Swampy Cree Tribes of Indians and all other the Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever to the lands included within the following limits.<sup>52</sup>

Such a clause is predicated upon the legitimate belief that there were rights to extinguish and one of those rights would be Aboriginal title. It may well be necessary to show that a treaty First Nation indeed had Aboriginal title but the effect of the MMF Case is to require that First Nation to meet the tests set out in *Delgamuukw*<sup>53</sup> as opposed to simply relying upon its own treaty to prove the fact that seemingly was recognized by Canada through the treaty text.

#### IV. THE CONTINUING RELEVANCE OF LIMITATION DEFENCES IN ABORIGINAL LAW

The strategy of the Manitoba Métis Federation was brilliant and shrewd. Anyone dealing with the administration of a statute in the 1870s and 1880s would know that filing a statement of claim in 1980 was hopelessly out of time. Yet, this led to the appellants seeking a declaration of rights and seeking to negotiate with the Crown in the spirit of reconciliation. The Court was not asked to compel the Crown to pay for its past dishonour. It was only called upon to state that a wrong had occurred and let the parties discuss a resolution.

The Supreme Court was happy to do this. The Court held that unconstitutional conduct (i.e. the administration of the *Manitoba Act*) is like considering the constitutionality of a statute – neither can be insulated from

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<sup>52</sup> Treaty Five between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren's River and Norway House, 20 September 1875 [emphasis added], available online: <<http://www.aadnc-aandc.gc.ca/eng/1100100028699/1100100028700>>.

<sup>53</sup> *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw* cited to SCR].

judicial consideration by mere limitation statutes. The Court held at para 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.<sup>54</sup>

The Court was careful to make this a narrow ruling. Personal remedies such as a claim for damages would face a limitation bar.<sup>55</sup> Furthermore, the majority was careful to note that there were “no third party legal interests at stake;”<sup>56</sup> accordingly, if a private party is sued for damages for infringements of Aboriginal rights, limitation bars would still apply. Furthermore, if an Aboriginal group attempted to seek a declaration against the third party it is submitted that the limitation bars would still apply. Fundamentally, the claim of the Métis is based upon the honour of the Crown and its application to the *Manitoba Act*. Since the honour of the Crown does not apply to third parties,<sup>57</sup> any litigation against a third party predicated upon the honour of the Crown would not fall within the ambit of the MMF Case. As such, third parties would be able to rely upon any limitation defences that they may have too many Aboriginal claims advanced against them. This approach will be of significant benefit to resource developers like mining companies or utilities who have long-standing developments that may impact adversely Aboriginal and Treaty rights.

## V. CONCLUSION

All of this takes us back to the comments of Lamer CJ in *Delgamuukw*:

Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, *supra*, at para 31, to be a basic purpose of s 35(1) – “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”. Let us face it, we are all here to stay.<sup>58</sup>

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<sup>54</sup> MMF Case, *supra* note 3.

<sup>55</sup> *Ibid* at para 143.

<sup>56</sup> *Ibid* at para 142.

<sup>57</sup> See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 53, [2004] 3 SCR 511.

<sup>58</sup> *Delgamuukw*, *supra* note 53 at 123-124.



A court looked at how the Métis were treated in 1870 and found the Crown's conduct wanting. This simple confirmation has now allowed the MMF to press for a political solution to resolve the outstanding issues arising from the entry of Manitoba into Confederation.

The litigation by the MMF was 30 years long, and all the case did was transition the battle from the courtroom to the board room. It is a heavy cost to pay simply to set up the framework for negotiations but one deemed necessary by the MMF. Whether other aboriginal groups will take the same position for cases that may otherwise be barred by limitation periods is unclear.

The winning gamble of the MMF has significantly added to the state of Aboriginal law to the benefit of all Aboriginal people. The duty of diligence has the potential to continue to impress upon the Crown that promises made must be promises kept, and diligently at that.

