

The Manitoba Métis Decision and the Uses of History

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L E C T U R E I N L E G A L H I S T O R Y :
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John A. Macdonald and Louis Riel are perhaps the only two figures in our history well-known to most Canadians. Although they never met, in 1870, they were the prime movers in bringing the West into Confederation. In the case of *Manitoba Métis Federation Inc. v. Canada* (A.G.), decided by the Supreme Court of Canada on March 8, 2013, the Court dealt with ramifications of the encounter on the plains 140 years ago between Canada, extending westward, and Riel's people, the Métis.¹ The Métis were a new nation, of mixed Aboriginal and European blood, which had arisen in the West, children of Indian women and French or Scottish traders. The Red River settlement, at The Forks of the Red and Assiniboine Rivers (now Winnipeg), was the largest community on the prairies with a population of about 12,000. Red River was a Métis settlement. There were approximately 10,000 Métis, 1,600 “whites” and 600 Indians.² At Confederation, in 1867, Canada was a medium-sized country of four provinces lying along the St Lawrence River and the Great

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¹ *Manitoba Métis Federation Inc. v. Canada* (A.G.), 2013 SCC 14, [2013] 1 SCR 623 [MMF SCC].

² These numbers are taken from the census carried out by Lieutenant Governor Adams Archibald in 1870; they have been rounded off.

Lakes. To the west and to the north lay Rupert's Land and the North-Western Territory, respectively.³ In the fall of 1869, Canada moved to acquire this vast area without consulting or considering the interests of the people of the Red River settlement, and the Métis resisted. They turned back Canadian road builders and surveyors. In late 1869, Métis riflemen refused to allow Macdonald's newly-appointed Lieutenant Governor, sent from Ottawa to establish Canadian sovereignty, to enter the territory. Led by Louis Riel, the Métis formed their own Provisional Government and governed Red River until the following summer.

At first Macdonald was dismissive, even contemptuous, of the Métis. He wrote to J.W. Bown, a friend of his (October 1869):

...it will require considerable management to keep those wild people quiet. In another year the present residents [i.e., the Métis] will be altogether swamped by the influx of strangers who will go in with the idea of becoming industrious and peaceable settlers.⁴

It is ironic that on October 25, 1869, only nine days later, Riel spoke to the Council of Assiniboia in the same vein. He said that the Métis;

"...were uneducated and only half civilized and felt if a large immigration were to take place they would probably be crowded out of a Country which they claimed as their own...."⁵

Red River was the gateway to the West, but there was no way for Macdonald to send troops to Manitoba until the following spring. In the meantime, access could only be had through the United States, by rail to St. Paul and then north by stagecoach to the border. Rupert's Land was in any event under the sovereignty of the United Kingdom. Canada had no jurisdiction there. Would Great Britain intervene to remove Riel? It had troops stationed at Toronto and Halifax. But it was certainly not prepared to seek to negotiate permission from the United States for British troops to travel through the United States, by rail to St. Paul and then northward

³ Rupert's Land had been granted by royal charter to the Hudson's Bay Company in 1670. Beyond it was the North-Western Territory, extending to the Mackenzie Valley and the Western Arctic. Under S. 146 of the *Constitution Act, 1867*, provision was made for Canada to apply to the Crown, on the advice of the Imperial Privy Council, for both territories to be annexed to Canada.

⁴ Letter from Sir John A. MacDonald to J.W. Bown (14 October 1869).

⁵ Riel to Council of Assiniboia Appellants (25 October 1869), found in MMF SCC, *supra* note 1 (Factum of the Appellant at para 74).

to the border. Nor was Britain willing to make British troops available to Macdonald. This was a pivotal moment for Canada. If Riel and the Métis agreed to enter Canada, it would open the way to Canadian acquisition of the prairies and the North. If the attempt to bring Red River within Confederation failed, no one could be certain that the Americans might not move in with their own manifest destiny plans of annexation.

On February 4, 1870, Macdonald sent a cabinet minute to London, advising that he was expecting a delegation from Red River “to negotiate with the government here as to the terms on which the inhabitants will acquiesce in the transfer of the territory to the Dominion.”⁶ He went on to say, “When the delegates arrive at Ottawa, they will be kindly received and every reasonable attempt made to come to a satisfactory arrangement.”⁷ However, Macdonald’s letter was shot through with appeals for British troops for “a force sufficient to vindicate Her Majesty’s sovereignty and the authority of the law.”⁸ Macdonald was afraid that, if negotiations failed, “the delegates, smarting under the sense of failure, would, unless confronted by a military force and a strengthened government, make violent appeals to the people and mount a second insurrection on a more formidable basis.”⁹ He went on, “Under the circumstances, the committee [the Cabinet] are satisfied that it is of the first importance that a military force be sent to Fort William, at the head of Lake Superior, immediately on the opening of navigation.”¹⁰ That would be in the late spring 1870. Macdonald concluded:

It is obvious that the expedition must be undertaken, organized, commanded and carried through under the authority of Her Majesty’s government. Canada has no authority beyond her own limits and no power whatever to send a volunteer force or to order her militia on this, to her, a foreign service.¹¹

At Red River in the meantime, Riel’s Provisional Government succeeded in obtaining the support of French and English-speaking Métis. As Chief Justice Freedman wrote, in *Forest v. A.G. Manitoba*, a 1979 case

⁶ MMF SCC, *supra* note 1 (Factum of the Appellant at para 10).

⁷ *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2007 MBQB 293 at para 458.1 [MMF QB] (Plaintiff’s Written Arguments at 38).

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

dealing with the abrogation of French language rights in Manitoba in 1890:

The French-speaking citizens of Manitoba, including not only the famous Louis Riel but all the representatives of the French-speaking parishes (who, it must be mentioned, reached a remarkable unanimity with their English-speaking representatives) were induced to put an end to the Red River insurrection and to support the creation of a Province and its union with Canada only on the basis that their rights would be ensured for the future.¹²

On February 9, 1870, the people of Red River chose three delegates to go to Ottawa, led by Father Joseph-Noel Ritchot.

On February 23, 1870, Macdonald wrote to Sir John Rose, his friend, confidant and *de facto* representative in London. There had been a suggestion from London that a representative of the Imperial government should be sent to Canada to sort out the dispute. Bishop Alexandre Taché (returning from Rome where he had attended the Vatican Council I) stopped in Ottawa to see Macdonald before heading back to Red River. Macdonald, in his own pungent style, rejected the notion of an Imperial arbiter:

He [Taché] is strongly opposed to the idea of an imperial commission, believing, as indeed we all do, that to send out an overwashed Englishman, utterly ignorant of the country and full of crotchets, as all Englishmen are, would be a mistake. He would be certain to make proposals and consent to arrangements which Canada could not possibly accept. Everything looks well for a delegation coming to Ottawa including the redoubtable Riel. If we once get him here, as you must know pretty well by now he is a gone coon. There is no place in the ministry for him... but perhaps may make him a senator for the territory.¹³

So there might be a place for Riel. But, as for the Métis, Macdonald saw no future for them. He concluded his letter to Rose, in almost the same language as he had used in his letter to J.W. Bown written four months earlier: "These impulsive half-breeds have got spoilt by this *émeute* [riot] and must be kept down by a strong hand until they are swamped by the influx of settlers."¹⁴

In the meantime, Macdonald had to deal with the Métis. They were the dominant element in the Provisional Government and a military force besides. Then there was the attitude of the Imperial government. Lord

¹² *Forest v Manitoba* (AG), [1979] 4 WWR 229 [Forest].

¹³ Letter from Sir John A. MacDonald to Sir John Rose (23 February 1870) at 4.

¹⁴ *Ibid.*

Granville, the Colonial Secretary, made clear to Macdonald that he would have to negotiate with the Métis. The providing of troops would be subject to a negotiated resolution with the Métis:

On March 4: "Adequate concessions should be made by the Canadian Government to the Half-Breeds"; On March 5: "Reasonable terms must be given to "the Roman Catholic settlers" [the French Métis, who were Roman Catholic, were more numerous than the English Protestant Métis].¹⁵

The Provisional Government governed the settlement from October 1869 until the summer of 1870. During that time there were two attempts to usurp Riel. Thomas Scott, a young Orangeman from Ontario, was involved in both attempts. Both failed. After the failure of the second attempt, Scott was tried and found guilty of insubordination by a jury of six Métis and executed by a firing squad on March 4, 1870. The execution created a firestorm of protest in Canada, especially in Ontario. It was to shadow Riel for the rest of his life.

On April 11, 1870, the delegates from Red River arrived in Ottawa, where outrage at the execution of Scott was running high. In fact, Father Ritchot was arrested and briefly detained. Negotiations began on April 26, 1870 and in themselves make a fascinating story. They took place mainly between Ritchot and Macdonald's Quebec lieutenant, George-Étienne Cartier, mainly in French, at Cartier's house. Macdonald, though absent much of the time, turned up on May 2nd as negotiations concluded. He wrote out, in English, his understanding of what was agreed. But the most complete record of the negotiations that we have is Father Ritchot's journal. He kept a journal, in French, only discovered in the 1930s in the archives of the presbytery of Saint-Norbert. Professor G.F.G. Stanley published it in *La Revue d'histoire de L'Amérique française* in March 1964.¹⁶ Prof. W. L. Morton translated it into English and published it in his book, *The Birth of a Province*, in 1965.¹⁷ Sir Stafford Northcote, the Governor of the Hudson's Bay Company, hovered over the negotiations as a titled lobbyist even though it had already been agreed the Hudson's Bay Company was to receive £300,000 and a great deal of land in the vicinity

¹⁵ Letter from Lord Granville to Sir John A. Macdonald (4 March 1870).

¹⁶ George F G Stanley, "Le Journal de l'Abbé N.-J. Ritchot", *Revue d'histoire de l'Amérique Française*, 17:4 (March 1964) 537-564.

¹⁷ WL Morton, *Manitoba: The Birth of a Province*, Vol 1 (Altona, Manitoba: DW Friesen & Sons Ltd, 1965).

of its trading posts. He told Father Ritchot that people in London were following closely developments in Red River by reading the *New Nation*.¹⁸

Macdonald and Cartier agreed with the delegates from Red River that the new province (to be called Manitoba) would have two official languages, English and French, and that Roman Catholic schools would be publicly supported (the Métis were predominantly Catholic and French-speaking). Moreover, 1.4 million acres would be set aside for the seven thousand children of the Métis. The children constituted not only a majority of the Métis population but were also a majority of the population of Red River. Macdonald and Cartier had agreed that land claimed by the settlers, most of whom were Métis, along the Red and Assiniboine Rivers would be protected.¹⁹ Ritchot had assumed that the new province would be given ownership of public lands similar to the original four provinces. However, his journal records that Macdonald and Cartier insisted that they had to have a free hand to build the railway across Manitoba; thus, public lands would have to be in federal ownership. Out of this came the idea of the children's grant: at first 100,000 acres; then 1 million acres; and finally agreed at 1.4 million acres. Under section 31 of the *Manitoba Act*, the 1.4 million acres were to be distributed among the seven thousand children of the Métis "for the benefit of the families of the half-breed residents."²⁰

This was the key promise. Both the trial judge in the Manitoba Court of Queen's Bench and the Manitoba Court of Appeal found that the children's grant was intended to give the Métis a "head start" before any expected influx of settlers occurred. This would allow them the opportunity to become settlers and land owners and ensure that the next generation of Métis would be property owners in the heart of the new province. As the Supreme Court of Canada held, this was "the central promise the Métis obtained from the Crown in order to prevent their future marginalization."²¹

¹⁸ The *New Nation* was a weekly publication that ran from January 7, 1870 to September 3, 1870. It was an organ of Louis Riel's provisional government and reported on the debates and discussions of the provisional government.

¹⁹ Some settlers had a form of title provided by the Hudson's Bay Company, others a claim based on occupation.

²⁰ *Manitoba Act* 1870, SC 1870, c 3, s 31.

²¹ MMF SCC, *supra* note 1 at para 151.

What did Canada get from the negotiations? The Métis would lay down their arms and Canada would secure governance over the recently acquired Rupert's Land, the North-Western Territory, the prairies, and the North. Furthermore, Canada would no longer be vulnerable to American ambitions. The agreement that Macdonald and Cartier reached with the Red River delegates was a turning point in our history. Canada acquired half a continent, becoming (once British Columbia joined in 1871) the great red area on the top half of the map of North America that we all studied in school.²²

Whatever we may think of Macdonald's earlier attitude expressed toward the Métis, the fact is he sturdily defended this agreement in the House of Commons. He led off the debate on the *Manitoba Act* and intervened thereafter on several occasions. He said the grant of 1.4 million acres under section 31 was intended to extinguish the Indian title of the Métis, a title derived from their Indian heritage. By this, of course, he meant what today we call Aboriginal title. His argument was based on the language in the preamble of section 31. However, the government of Canada has always disputed that section 31 was an acknowledgment of an Aboriginal title of the Métis. Indeed, Canada was successful on this issue at all levels in litigation. In the result, the Métis argument that section 31 embodied a fiduciary obligation, dependent on their claim that section 31 had extinguished their Aboriginal title and that the Crown had thereby assumed the duty to protect the landed interests of the Métis children, was not sustained. Nevertheless, the Métis still had the actual language of the enacting provisions of section 31, a promise enshrined in the *Manitoba Act*, a constitutional enactment, a promise to the Métis that 1.4 million acres would be distributed to the Métis children. This was the basis of the Métis' alternative argument, that the honour of the Crown was engaged by this promise.

After the *Manitoba Act* passed, Father Ritchot sought further assurances from Macdonald and Cartier that the land would be expeditiously distributed to the children in accordance with local preferences and wishes. Ritchot was told that an order in council to that effect would be passed. But no order in council was forthcoming. Then there was discussion about establishing a committee of notables at Red

²² The Arctic Islands were transferred by the United Kingdom to Canada in 1880.

River, to include the Roman Catholic and Anglican bishops, to be given the task of distributing the children's grant. But nothing came of this. At last, as Ritchot was about to return to Red River, he cornered Cartier and secured Cartier's signature to a letter, dated May 23, 1870, promising that the children's land would be distributed "in the most effectual and equitable manner."²³ Ritchot, on his return to Red River, told the Legislative Assembly on 24 June, 1870, that "...as the Canadian Government seem really serious, they have to be believed, and we can trust them (cheers)."²⁴ Thus, on the strength of the promises in the *Manitoba Act*, the Assembly voted unanimously to join Canada.

In the meantime, the Imperial government had agreed that Macdonald could use British soldiers under the command of Colonel Garnet Wolseley, together with Canadian militiamen to intervene at Red River. The soldiers arrived at Red River that summer, and many of them remained as settlers. More settlers followed. Professor Gerhard Ens, a historian who was an expert witness at the MMF trial for Canada, testified that a "reign of terror" against the Métis followed. Riel had to flee.

As Macdonald predicted, a great influx of settlers had followed. Within ten years Manitoba had a population of 60,000, largely Protestants from Ontario. They took a dim view of Roman Catholicism and of the use of French. Within twenty years, in 1890, the Province had abolished public funding for Roman Catholic schools and had put an end to official bilingualism, contrary to the promises set out in the *Manitoba Act*. The Roman Catholics challenged the provincial legislation on the basis that they had a constitutional entitlement to public funding for Roman Catholic schools. They went to the Supreme Court of Canada and won. But in those days, we still had appeals to the Judicial Committee of the Privy Council, which overturned the ruling of the Court.²⁵ The Roman Catholics had lost.

²³ MMF SCC, *supra* note 1 (Factum of the Appellant at para 751): Ritchot's concerns were not limited to the children's grant. He was throughout concerned as well about the claims of the settlers to validate their holdings and, of course, about the issue of amnesty (Cartier took the position that amnesty was a matter for the Imperial government, since the Resistance took place at a time when the United Kingdom was still sovereign in Rupert's Land.)

²⁴ Speech from Ritchot to Assembly of Manitoba (24 June 1870): Ritchot gave his report to the Assembly in French. Riel, who presided, provided interpretation in English.

²⁵ *Barrett v City of Winnipeg*, (1891) 19 SCR 374 (SCC); *City of Winnipeg v Barrett*, [1892]

As for the Franco-Manitobans, they challenged the Province's abrogation of official bilingualism. They won on two occasions in the county courts, in 1892 and 1909, but the Province would not enforce the judgments of its own courts. It was not until the 1980s that the issue of French language rights under the *Manitoba Act* was finally determined by the Supreme Court of Canada, which held that Manitoba was constitutionally required to recognize French as an official language in the legislature, in its statutes and in the courts.²⁶ But what about the promise of land for the children of the Métis? For the Roman Catholics and the Franco-Manitobans, the abrogation of their rights had been plain enough. It was written on the title pages of the 1890 Manitoba statutes. What had happened to the 1.4 million acres the children were to receive? Here was the crux. The *Manitoba Act* stated that the children were to receive 1.4 million acres. Had they? The Métis believed they had not. What happened? This tangled web had to be unravelled.

Macdonald had promised that the land would be distributed promptly to the children. The trial judge said that the purpose of the children's grant was to give the Métis a "head start" in view of the expected influx of settlers, to enable them to become land owners in the new province. The Court of Appeal agreed. But there was no head start; instead, there was delay after delay. In fact the Métis did not even get to the start line for ten years. Macdonald had told the House, on 04 May, 1870, "No land would be reserved for the benefit of white speculators, the land being only given for the actual purpose of settlement."²⁷

Nevertheless much of the land wound up in the hands of speculators. The fact is that the settlers shared the view of the Métis that Macdonald had expressed earlier in his letters to Bown and Rose. As Professor Ens wrote in 1983:

The Métis land grant regarded by the courts, judiciary and the incoming Ontario population as improvident and contrary to modern development, had to be appropriated legally or illegally.²⁸

AC 445 (PC) [Barrett].

²⁶ Re: *Manitoba Language Rights* [1985] 1 SCR 721 [*Man Lang Rights*].

²⁷ *Supra* note 17 at 204.

²⁸ Gerhard Ens, "Métis Lands in Manitoba," *Manitoba History*, 5 (Spring 1983) 2: On the stand, testifying for Canada, Professor Ens stood by what he had written, except that he sought to take back the words "legally or illegally" at the end of the sentence.

The task of the courts, in the case brought to trial by the Métis in the twenty-first century, was to find out what had happened. It is impossible in this lecture to do justice to the reasons for judgment of the trial judge Justice MacInnes, almost 400 pages in length, or the reasons of the Court of Appeal given by Chief Justice Scott, which run to 250 pages. The Métis lost their case before the Manitoba courts.

Before the Supreme Court of Canada, we were critical of these judgments but there can be no doubt that the Manitoba judges conscientiously approached their task. Chief Justice Scott acknowledged, at the outset of the hearing in the Court of Appeal, speaking for all five judges, that it would be the most important case of their careers. In the Supreme Court of Canada, we relied on many of the findings of the Manitoba courts. Our dispute with the Manitoba courts lay primarily in the conclusions to be drawn from those findings. Moreover, for the Manitoba courts their principal difficulty lay in dealing with a case that was 140 years old, well beyond the six-year limit laid down by the Manitoba statute of limitations for bringing such a case. After all, the action had not been filed until 1981. Then there was the sheer passage of time, the difficulty—as the Manitoba courts saw it—of understanding fully what had happened so long ago. There was as well the defence of laches to be dealt with, a defence based on the idea that a plaintiff may have waited so long that it may be said that he has acquiesced in the outcome or that it would not be fair to allow the case to proceed.

However, the Métis case was a constitutional case. The promise of 1.4 million acres was expressly made in section 31 of the *Manitoba Act*. It was “constitutionalized” by the Imperial Parliament by enactment of the *Constitution Act, 1871*, listed in the schedule to the *Constitution Act, 1982* as part of Canada’s constitution. This would provide our escape route from the bondage of limitations and laches.

We still had to prove what had happened. It had not been a swift and sudden deprivation of Métis rights. It was a process that went on for the better part of two decades at the end of which the Métis had little or no land. We had to prove that the federal government had failed the Métis.

Is the Métis case a case of Aboriginal title? No. The Supreme Court of Canada has made clear that it was not. The Court took pains to identify the distinctive position of the Métis historically. The Métis held their land as individuals. They did not ask for reserves to be set aside for them. Nevertheless, they are one of Canada’s Aboriginal peoples, recognized as

such under section 35 of the *Constitution Act, 1982*. They may or may not have had an Aboriginal title. The issue remains open. But all along, they have had a collective interest in the fulfillment of the Crown's promise under section 31 to provide their children with land, a promise made by Canada at a time when the Métis controlled the gateway to the West, to persuade them to lay down their arms. This gave rise to the argument based on the honour of the Crown.

But whether the argument was based on fiduciary obligation or on the honour of the Crown, the plaintiffs had to prove that the Crown had not in fact acted with due diligence to carry out its obligation to the seven thousand children assumed by the Crown under section 31. It was not necessary to prove bad faith. Nor was it necessary to prove a conspiracy to deprive the children of their land. Indeed, we did not wish to assume any onus of proving that John A. Macdonald, the father of our country, had been guilty of bad faith. Sir John, whatever he may have said privately, always publicly defended the grant of 1.4 million acres to the children. Moreover, events unfolded over a fifteen-year span. As a result of the Pacific Scandal, Macdonald had to give way in 1873 to a Liberal prime minister, Alexander Mackenzie, before returning to office in 1878. Was Mackenzie, too, part of a conspiracy? It seemed most unlikely. We simply wanted to prove a failure by the Crown to act with due diligence to carry out its promise.

The Supreme Court of Canada held that since the promise to provide land to the children was a promise to an Aboriginal group, a promise entrenched in the Constitution, it engaged the honour of the Crown and had to be fulfilled with due diligence.²⁹ Could we prove that the Crown had failed in its duty of due diligence? Our case was founded primarily on egregious delay. Implementing section 31 required determining the number of Métis children (all of those Métis under 21 as of July 15, 1870) and allotting a parcel of land to each child. There was to be a lottery in each parish. The lieutenant governor, charged under section 31 with administering the grant, would conduct a draw in each parish. He would

²⁹ The majority judgment of McLachlin C.J.C. and Karakatsanis J. breaks new ground; much of that ground is disputed in the spirited dissent by Rothman J. I leave it to others to explore the ramifications of the decision; I am here only offering a view from the trenches.

draw a child's name and the name would be matched with a parcel of land. In this way, each child would receive an allotment.

There were three successive allotments. The first allotment in 1873 had to be cancelled because it erroneously included heads of families as well as children. A second allotment was completed in 1875, but it was cancelled on the basis of a new and quite obviously flawed estimate of the total number of children. A third allotment, begun in 1876, was not completed until 1880. The process of actually granting deeds to the land was not completed for many years after that. Moreover, owing to the federal government's miscalculations, 993 children had been left out entirely; instead of receiving land, in 1885 they were given "scrip", worth less than one half of the value of the land they should have received.

The Supreme Court of Canada has held in the past that by asserting the sovereignty of the Crown over Aboriginal peoples, the Crown has assumed a duty of acting honourably toward them, with a view of reconciling pre-existing Aboriginal societies with the assertion of Crown sovereignty. This is not, the Court said, a paternalistic concept; rather (as it certainly was in the case of the Métis) this was a means of persuading Aboriginal peoples still possessing military capacity to lay down their arms and to rely instead on the honour of the Crown. Here the Court applied the principle to the promise the Crown had made that the children of the Métis would receive 1.4 million acres. If you read the judgments of the Manitoba courts, you will see that the judges found that there had been delay after delay. The trial judge found that Canada did not act "in a timely way."³⁰ The Court of Appeal found that it was "difficult to avoid the inference that inattention and carelessness may have been a contributing factor."³¹ The judgment of the Supreme Court of Canada sets out in detail a lamentable account of what it described as not merely "a matter of occasional negligence, but of repeated mistakes and inaction that persisted for more than a decade."³² Many of the Métis were driven from the province, moving farther west to Saskatchewan. Many of those who remained in Manitoba became members of a marginalized minority.

The SCC summarized the delays at paragraph 104:

³⁰ *Supra* note 7 at para 458.1.

³¹ *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2010 MBCA 71 at para 656 [MMF CA].

³² MMF SCC, *supra* note 1 at para 128.

(1) starting off with the wrong class of beneficiaries, contrary to the wording of s. 31; (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 three previous 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.³³

The Court also quoted a statement made in 1883 by A.M. Burgess, deputy minister of the Interior, writing about the treatment of the Métis, “I am every day grieved and heartily sick when I think of the disgraceful delay.”³⁴

What about expert witnesses? Of course, historians can provide context. They can outline the procession of events and discuss the players. Catherine Macdonald, an expert for the Crown, did so in discussing the events of 1869-1870 and the main figures such as Riel, Macdonald, and Ritchot. But these things we all knew from reading the histories of the period. On our part we decided not to call any experts. Lawyers can rely far too extensively in these cases on expert evidence. All of us are capable of reading our own history. We can read the original documents. If we turn this task over to experts, they may propel counsel and the court along a diversionary line of argument; they may even wind up effectively writing the judgment in the case. Of course, historians had examined Canadian policy toward expansion to the West, the grievances of the Métis, the events at Red River, the formation of the Provisional Government, the trial of Thomas Scott, and so on. But had historians considered the issue we faced in any detail: what happened to the 1.4 million acres? My colleague, Jim Aldridge, had spent a great deal of time over several years in the National Archives of Canada. He had unearthed many of the documents we relied on. They numbered in the thousands: some in

³³ MMF SCC, *supra* note 1 at para 104: The plaintiffs challenged the constitutionality of the provincial legislation, much of it designed to hasten the passage of the children’s grant into non-Métis ownership. The Court held it did not need to consider the validity or otherwise the provincial legislation.

³⁴ MMF SCC, *supra* note 1 at para 105: Burgess was referring to delays in validating the titles of the Métis and other settlers along the Red and Assiniboine Rivers. These delays were in their own way as egregious as the delays in the children’s grants. The Court held that neither fiduciary obligation nor the honour of the Crown applied to the settlers who, though mainly Métis, were not an Aboriginal group.

English, others in French. They were often hand-written. Of course, Macdonald himself had a scribe, but he, too, wrote frequently in longhand. There were some printed materials, but the correspondence was mainly in longhand until about 1880 when, after invention of the typewriter, we begin to see in the documents the abandonment of the use of longhand. We thought we knew the documents as well as any scholar.

However, there were two exceptions—scholars Professors Gerhard Ens and Thomas Flanagan, one a historian and the other a political scientist—had been retained by Canada. They had written in the past about these events. Then they had been retained by the Crown from the 1980s. They put together most of the Crown’s materials. They wrote extensive expert reports. Indeed, they wrote books, based on their research on behalf of the Crown. We had read their books and their reports. Indeed, we relied on their work where they supported our case. But we disputed many of their conclusions. My colleague, Jim Aldridge, cross-examined each of them for a week or more.

The main thrust of Canada’s defence, based on the evidence of their experts, was to establish that when the land passed from Métis ownership, ten or fifteen years after 1870, it fetched market prices. This was their theory. It was not fully developed and, in any event, it was beside the point. The case they had to meet was based on the failure of due diligence by the federal government. Events on the ground overwhelmed the Métis, delay piled upon delay, which had undermined the whole scheme of the children’s grant. Canada said, in effect, “Well, it may have taken a long time, but here are the maps: they show that deeds were finally issued in the names of each of the children (except for 993 who received scrip).” This was a bloodless bureaucrat’s answer. It provided no adequate explanation, in fact or in law, to justify the delay.

From the viewpoint of the legal historian, it is important to realize what the Supreme Court of Canada did not do. The Court wrote, at paragraph 150:

The Métis did not receive the intended head start, and following the influx of settlers, they found themselves increasingly marginalized, facing discrimination and poverty. Although bad faith is neither claimed nor needed here, the appellants point to a letter written by Sir John A. Macdonald, which suggest that this marginalization may even have been desired.³⁵

³⁵ MMF SCC, *supra* note 1 at para 150.

The Court then quoted the passage from Macdonald's letter to Bown written in October 1869 which I have already cited. Then the Court went on, at paragraph 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 honor of the Crown.³⁶

I think it may be useful to set out here the state of the evidence which tracked the three allotments. To start with, the federal government in the teeth of the language of section 31 decided that all 10,000 Métis, including the heads of families, should share in the grant. The law officers of the Crown advised that this was contrary to section 31, so in 1873 the first allotment had to be cancelled. A second allotment was undertaken, limited to the 7000 (actually 7,368 children), enumerated in the 1870 census.

With Alexander Mackenzie in office after 1873, there was no discernible progress with respect to the second allotment until early 1875. As Chief Justice Scott wrote, “There is no explanation why it took the new government over a year to address the continuing delays in moving ahead with the allotments.”³⁷ Petitions were sent to Ottawa from a number of parishes. One of these, for example, dated February 24, 1875 from St Andrews, was sent to David Laird, Minister of the Interior:

2. That nearly five years have elapsed since the passing of the [Manitoba] Act and there is not yet one Half-breed in the Province in possession of one acre of said lands or deriving any benefit therefrom.

...

5. That a feeling of very great dissatisfaction and sadness exists among the Half-breeds of this Division and in the Province generally, giving to the great length of time that has elapsed since the Grant was made, and as yet they see no prospect of early possession, and also because they see daily, and are unable to prevent the plundering of timber from those lands.³⁸

³⁶ MMF SCC, *supra* note 1 at para 151.

³⁷ MMF CA, *supra* note 31 at para 126.

³⁸ Petition to David Laird from John Norquay (23 February 1875).

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

At last the Mackenzie government acted. An order-in-council from April 26, 1875 provided that persons for whom allotments had been drawn would be required to appear before commissioners appointed for the purpose in order to establish their identity and entitlement to receive a patent under section 31. The commission became known as the Machar-Ryan Commission. The order-in-council provided that once the commissioners had returned their assessment of the claims to the Dominion Lands Office, "the patent should issue forthwith to the party so entitled, and to the others respectively, as the return might show them to arrive at the necessary age," [emphasis added].³⁹

The lists of eligible Métis compiled by the commissioners were approved in January 1876 by Colonel Dennis and David Laird, Minister of the Interior, as authoritative lists. By early 1876, the second allotment was complete. Patents could issue to the children whose applications had been approved by Machar and Ryan, namely those who were at least eighteen years of age, and thereafter to children as they attained that age. The patents should have issued "forthwith," as the OIC issued April 26, 1875 had provided.

The framers' "intention that there should be no sales to speculators" was acknowledged by Order-in-Council March 23, 1876, which made clear that assignment before patents (i.e., sales of the allotments by the children) would not be recognized, as it would "not be in the interests of the persons for whose benefit the lands were appropriated."⁴⁰ Returns indicated that approximately 5,000 had established their entitlements. The

³⁹ *Report of a Committee of the Honourable the Privy Council, approved by His Excellency the Governor General in Council on the 26th April, 1875*, PC 406, 26 April 1875 at para 5.

⁴⁰ OIC 4 December 1893, OIC 3058 (1894) C Gaz, 1128 (Published on 6 January 1894). OIC 23 March 1876 must be considered in tandem with OIC 4 December, 1893, which rescinded OIC 23 March 1876. The preamble to OIC 4 December 1893 reads (referring to OIC March 23, 1876): "If it could have served the purpose for which it was adopted—that is discouraging speculation in Half-breed lands, which is very doubtful—the period of its usefulness has definitely passed."

number was more than 2,000 fewer than the number of children enumerated in the 1870 census.

Had the Crown at this stage actually carried out the provisions of Order-in-Council April 26, 1875, which required that patents issue forthwith to children found to be entitled, the impact of the delay on the realization of the Métis children's rights would have been mitigated to some extent. Of course, owing to random selection, the possibilities for settlement by the children on the allotted lands would have been greatly diminished. But more than 5,000 patents would have been issued or prepared for issuance upon the children reaching eighteen years. No special provincial laws singling out Métis children and their lands, enabling sales before grant, or facilitating sales by minors (though such measures would soon be passed) had been enacted at this stage. But as Chief Justice Scott wrote: "this was still not the end of the delays."⁴¹

There remained the discrepancy between the 7,000 children enumerated in the census of 1870 and the 5,000 in the lists compiled by Machar and Ryan. Yet, the 5,000 children identified as eligible should have received their land. In August 1876, sometime after the patents ought to have been issued "forthwith" under Order-in-Council April 26, 1875, Donald Codd, the Dominion Lands Agent in Winnipeg, expressed the view that instead of there being 7,000 children, there were unlikely to be more than 5,814. He proposed increasing this estimate to 5,833 children which when divided into 1.4 million acres, result in allotments of exactly 240 acres, or a quarter-section and a half, a much more convenient size for the Dominion Lands Office than 190 acres.

Codd's estimate was adopted by cabinet despite formally acknowledging in Order-in-Council September 7, 1876 that no satisfactory explanation appears of the difference between the numbers of children in the 1870 census as compared to Codd's estimate. The adjustment in the estimated number of children (an adjustment made purely for bureaucratic convenience—240 acres would work best for the Dominion Lands Office) meant that the completed second allotment had to be cancelled. The result, as Chief Justice Scott noted, was yet more delay.

This delay was caused by the failure of the Crown to follow its own provisions of Order-in-Council April 26, 1875, requiring patents to issue

⁴¹ MMF CA, *supra* note 31 at para 128.

forthwith and by the Crown's embrace of an estimate of the number of children convenient to the Dominion Lands Office. However, Chief Justice Scott held at paragraph 159 that notwithstanding Cabinet's own verdict that "no satisfactory explanation appears of the difference between the numbers of children in the 1870 census as compared to Codd's estimate," the decision to cancel the second allotment could be defended on the ground that "accuracy of the 1870 census is by no means certain."⁴² Scott C.J.M. offered in support, at paragraph 80, the opinion of Professor Flanagan in his expert report. Yet, on cross-examination Professor Flanagan admitted that he had based this view on a 1954 article by Herbert Douglas Kemp and that Kemp had not actually expressed the view attributed to him as to the adequacy of 1870 census. Moreover, Professor Flanagan admitted that he "didn't go back to the census forms to attempt to form [his] own opinion about whether it was inadequate."⁴³ In fact, Chief Justice Scott noted that Deputy Minister of the Interior A.M. Burgess concluded in 1885 that Codd's error arose from the fact that Codd had failed to take into account "the transitory (*sic*) nature of Métis families, many of whom would have been absent from the province during

⁴² MMF CA, *supra* note 31 at para 159.

⁴³ Canada, in its factum filed in the Supreme Court of Canada, did not dispute this account of Flanagan's cross-examination. Professor Flanagan himself has written about it in his book—Thomas Flanagan, "A Political Scientist in Public Affairs", in Nelson Wiseman, ed, *The Public Intellectual in Canada* (Toronto: University of Toronto Press 2013) at 120:

"One of the most challenging experiences of my life was to be cross-examined in the Manitoba Métis case for two weeks by Jim Aldridge, a Vancouver lawyer with a deservedly high reputation in Aboriginal issues. Having immersed himself in all the details of my long and complicated reports, and the thousands of pages of nineteenth-century documents on which they were based, Aldridge took me through everything line by line, asking polite but probing questions. His manner was so friendly that I had to constantly remind myself that he was not drawing out the strengths of my report but zeroing in on its weaknesses. And indeed he did find spots where I had overlooked or misunderstood relevant documents. As a witness, you have to accept that as a fallible human being you will have made some mistakes that are bound to be discovered by all the smart people working for the other side. You have to admit it when you are obviously wrong and not try to defend the indefensible or make excuses for yourself."

the Machar-Ryan hearings.”⁴⁴ So now a third allotment had to be undertaken. It was not completed until 1880, four years later.

Sir John A. Macdonald, in his speech of 16 July, 1885, described the situation as he found it on his return to office in 1878:

When the present Government returned to office, in 1878, they found that the half-breeds of St. Boniface, St. Norbert, St. Francois Xavier, Baie St. Paul and St. Agathe, containing more than one-half of the population, amongst whom the reserve lands were to be distributed, had not only not received their patents, but the allotments had not even been made [emphasis added].⁴⁵

Moreover, even after allotment, there were further unexplained delays before any grant. As Professor Flanagan said:

Depending on administrative difficulties, weeks, months or years might elapse between the Lieutenant Governor's certification [of the allotments] and the Department's approval of the grant [emphasis added].⁴⁶

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

Owing to the designs of speculators the majority of claims of Half-breed Children, as the same mature, will pass from the owners for a mere nominal consideration.

...the probable practical operation of the Grant as proposed, will (for the reason already given) fall very far short of realizing the benefit to the claimants which was contemplated, and there remains the serious objection to the scheme... that is to say, the locking up for years of the greater portion of the lands [emphasis added].⁴⁷

Mills therefore proposed that Parliament should enact a measure for the commutation of the claim of each child by providing a fixed cash payment instead of land.⁴⁸ On 14 March, 1877, Sir Richard Scott, Secretary of State, told the Senate, “The Government were the guardians

⁴⁴ MMF CA, *supra* note 31 at para 148.

⁴⁵ House of Commons Debates, 06 July, 1885, p.3114.

⁴⁶ MMF SCC, *supra* note 1 (Factum of the Appellant at para 172).

⁴⁷ MMF SCC, *supra* note 1 (Factum of the Appellant at para 173).

⁴⁸ Taché rightly pointed out that “[T]he Manitoba Act having received the sanction of an Imperial Act, its provisions cannot be adjusted by the Canadian Parliament....”

of these people, and it was their duty to see that they were protected to their rights in their properties.”⁴⁹

He went on:

It was a subject attended with a great deal of embarrassment. There was no object in issuing patents to minors who could not make use of their property. It would be very unfortunate if the Province of Manitoba should remove the disability of minors to sell their lands as it would open a way to a great deal of jobbery. The Government were the guardians of these people, and it was their duty to see they were protected in their rights to their properties.⁵⁰

This was the last occasion on which the federal government acknowledged its obligation to carry out its promise under section 31.

Order-in-Council April 25, 1871 had stipulated that patents would only issue when a claimant reached the age of eighteen (though the age of majority was actually twenty-one) thus giving some protection to the interests of children below that age. Yet, even that modicum of protection was to be stripped away. Order-in-Council July 4, 1878 was passed with “the object of facilitating the final disposal” of the land grant to the children.⁵¹ Now authority was given:

...for the issue forthwith of Patents to all claimants of Half-breed lands, irrespective of age or sex, whose claims may have been approved, such Patent to vest the lands in the several claimants in fee simple, free of any conditions as to settlement of otherwise.... [emphasis added].⁵²

This was an instance not merely of neglect but of taking active steps to undermine the whole purpose of the grant. At this point the federal government’s policy ceased to be one of resisting (even half-heartedly) the drive to transfer Métis lands into non-Métis ownership and became one of promoting such transfer. In this, it converged with the policy of the Province, as non-Métis influence in the Legislature became ascendant and Métis influence receded.

Beginning in 1877, the provincial legislature passed a series of enactments designed to facilitate sales of the Métis children’s lands, regardless whether the grants had been completed or the children had reached their majority. On February 8, 1878, the legislature passed two

⁴⁹ MMF SCC, *supra* note 1 (Factum of the Appellant at para 120).

⁵⁰ MMF SCC, *supra* note 1 (Factum of the Appellant at para 177).

⁵¹ MMF SCC, *supra* note 1 (Factum of the Appellant at para 179).

⁵² *Ibid.*

statutes relating to infants' estates. The first was a conventional *Infants Act*, based on Ontario legislation.⁵³ The second statute singled out Métis children over the age of eighteen years and their section 31 lands, denying them the same measure of protection that all infants (*i.e.*, persons under twenty-one) would enjoy under the first statute.⁵⁴ In 1881, a statute passed that any deed of conveyance in respect of the Métis children's land, whenever made, whether before or after allotment or patent, would be effective to vest all the rights of the child in the purchaser, including the right to receive the patent from the Crown.⁵⁵

This series of provincial enactments culminated in 1885 in a statute validating retroactively all transactions involving Métis infant lands patented, allotted or to be allotted notwithstanding any defect, irregularity or omission and declaring that all the proper parties had joined therein and that in every case the child whose land was transferred had been eighteen. The plaintiffs had joined Manitoba as a defendant out of an abundance of caution, in order to complete the narrative. We challenged the provincial legislation on constitutional grounds (section 91(1) and section 91(24) of the *Constitution Act, 1867*) but the Supreme Court of Canada found it unnecessary to reach these issues, and the Province was discharged from the action.

In the early 1880s, acting on the mistaken estimate of 5,833 children, the Crown allotted in convenient 240-acre parcels, all of the land set aside for the children's grant. However, it turned out that the 1870 census had been more or less correct. There were indeed approximately 7,000 children, not 5,833. Therefore, 993 children were left out. The Crown decided these children were to receive "scrip" in lieu of land. Each received \$240 worth. Since the price of land had advanced from \$200 to \$250 an acre, the "scrip" they received would only buy 96 or 120 acres of Dominion land. These children therefore received only one-quarter to one-half of the ostensible value of their "scrip."

By the time the grants in the names of the Métis children had been made, the Métis had been swamped by the influx of the settlers. They had

⁵³ *An Act Respecting Infants and Their Estates*, SM 1878, 41 Vict, c 7.

⁵⁴ *An Act to Enable Certain Children of Half-Breed Heads of Families to Convey Their Lands*, SM 1878, 41 Vict, c 30.

⁵⁵ *An Act Respecting Half-Breed Lands and Quieting Certain Titles Thereto*, SM 1881, 44 Vict, c 19.

become marginalized and were to a great extent, a landless minority. It is estimated that half the population had left Manitoba by 1881.⁵⁶ There was an attitude of linguistic and religious intolerance among the new settlers arriving from Canada, as well as the Wolseley soldiers towards the Métis. Professor Ens stated that “virtual mob rule” prevailed in Winnipeg in 1871-72, adding that “there were, in fact, a number of deaths and scores of attacks and beatings attributed to the soldiers in Winnipeg.”⁵⁷ Lieutenant-Governor Archibald, in a letter to Macdonald on October 9, 1871, referred to “a frightful spirit of bigotry among a small but noisy section of our people.”⁵⁸

Apart from expert testimony and that of David Chartrand⁵⁹, the evidence before the Court was entirely based on historical documentation including diary entries, letters, parliamentary debates, and newspaper reports. What happened to the children’s grant? Speculators wound up with much of it. As early as January 22, 1877 Colonel Dennis, on behalf of the Minister of the Interior, David Mills, stated, “...owing to the designs of speculators the Majority of Claims of Half-Breed Children, as the same mature, will pass from the owners for comparatively a mere nominal consideration.”⁶⁰ He went on:

...the probable practical operation of the Grant as proposed will (for the reason already given) fall very far short of realizing the benefit to the claimants which was contemplated and there remains also the serious objection to the scheme, that is to say, the locking up for years of the greater portion of the lands.⁶¹

On March 11, 1878, Mills was pressed in the House of Commons to explain the continued delay, referred to the lieutenant governor who was in charge of the administration of the grant under section 31. Mills told

⁵⁶ Canada, Department of Justice, *Métis Family Study: A Report Prepared for the Department of Justice*, by Thomas Flanagan and Gerhard Ens (December 1990) at 4, quoted in MMF SCC, *supra* note 1 (Factum of the Appellant at para 200): Professor Ens concluded, on the basis of 105 families in his Métis Family Study, comprising 718 individuals, that “close to 50% of these individuals still resided in Manitoba in 1881, which means that close to 50% have left Manitoba.”

⁵⁷ MMF SCC, *supra* note 1 (Factum of the Appellant at para 143).

⁵⁸ *Ibid.*

⁵⁹ David Chartrand is the current President of the Manitoba Métis Federation (MMF). He was elected in 1997, and has served on the MMF board since 1988.

⁶⁰ MMF SCC, *supra* note 1 (Factum of the Appellant at para 174).

⁶¹ *Ibid.*

the house that “the Lieutenant Governor, being busily engaged, was only able to give a portion of his leisure to this work.”⁶² This was in 1878, eight years after Manitoba entered Confederation and the land had not yet been allotted, let alone deeds to the land provided to the Métis. Professor Flanagan wrote that “weeks, months or years might elapse between the Lieutenant Governor’s Certification [of the allotments] and the Department’s approval of the grant.”⁶³

On July 16, 1885,⁶⁴ Macdonald reaffirmed that the object of section 31 had been settlement, not speculation, and he stated that Canada had failed to carry out its obligations:

Oh no. The claims of the half-breeds in Manitoba were bought up by speculators. It was an unfortunate thing for those poor people, but it is true that this grant of scrip and land to those poor people was a curse and not a blessing. The scrip was bought up; the lands were bought up by white speculators, and the consequences are apparent.⁶⁵

The Crown’s defence was that it was only obligated to conduct a process over the course of 15 years to grant land in the names of 6,000 of the 7,000 Métis children. There was no obligation to provide a real head start and an opportunity to become settlers; hence the Crown’s obligation was fulfilled. If the Crown had made mistakes, if there had been continual delays, even if the Crown’s whole object after 1878 was simply to hasten the transfer of the children’s land to non-Métis ownership, the Crown’s defence is that the patents were ultimately issued in the names of the children (except, of course, for 993 children). We had developed a strong case, which established that the distribution of the children’s grant had not been carried out in accord with the honour of the Crown.

However, we still had to escape from the strait-jacket of limitations and laches. We found a way. It was this: we argued that the Supreme Court of Canada—as the guardian of the Constitution—has held that in a federal state no statute of limitations can bar the highest court from ruling on constitutional questions. In such cases, the Court will issue a

⁶² MMF SCC, *supra* note 1 (Factum of the Appellant at para 205).

⁶³ MMF SCC, *supra* note 1 (Factum of the Appellant at para 173).

⁶⁴ House of Common debates, 06 July, 1885, p 3113: Macdonald was speaking in the great debate in the House of Commons in 1885 following the Northwest Rebellion, after the defeat of the Métis at Batoche, and as Riel was awaiting trial on a charge of high treason.

⁶⁵ *Ibid.*

declaration of unconstitutionality even if an action is otherwise statute-barred. Here we called in question the constitutional behavior, not of Parliament but of the Crown, the executive branch of the federal government. We argued that notwithstanding the passage of time, the Court could determine whether the Crown had fulfilled its constitutional obligations under the *Manitoba Act*. We argued that since the Court had held that lapse of time was not a bar to challenge unconstitutional legislation, the principle should be applied by extension to unconstitutional behavior of the Crown. The Court so held.

In the course of its reasoning on the point, the Court adopted the view expressed by one of my colleagues on the case, Harley Schachter, in an article on the application of limitations to the Aboriginal context. Schachter argued that, in weighing rationales for limitations, “the real analysis that ought to be undertaken...is one of reconciliation and justification.”⁶⁶ Indeed, Justice Rothstein in his dissenting reasons suggested that the approach of the majority favoured giving priority to reconciliation.⁶⁷ But what about laches? When it came to laches the trial judge had held that, since many Métis, including Father Ritchot, had been named as plaintiffs in the Roman Catholic school litigation in the 1890s, why could the Métis not have proceeded with their own case at that time? This overlooked the fact that the Catholics were faced with a swift and sudden abrogation of their rights. They had only to read the title page of the 1890 statute to realize what had happened. Moreover, they had the wealth and influence of the Roman Catholic Church behind them. The situation of the Métis was in no way comparable. The Supreme Court of Canada held that the Métis had sufficiently explained this delay. In any event, the Court stated that “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 had not been fulfilled as required by the honour of the Crown.”⁶⁸

There was still another important issue determined by the Supreme Court of Canada, that of standing. The Manitoba courts held that the

⁶⁶ Harley Schachter, “Selected Current Issues in Aboriginal Rights Cases: Evidence, Limitations and Fiduciary Obligations,” in *2001 Isaac Pitblado Lectures: Practising Law In An Aboriginal Reality* (2001), XI at X-21.

⁶⁷ MMF SCC, *supra* note 1 at para 254.

⁶⁸ MMF SCC, *supra* note 1 at para 153.

Manitoba Métis Federation had no standing to sue, that is, only the individual plaintiffs who were descendants from the Métis who lived at Red River in 1870 could bring this lawsuit. But how could the individuals have by themselves brought such a suit? Only the Manitoba Métis Federation could have raised the funds, retained counsel, and supported the case over a period of thirty years. The case had already gone to the Court in 1990 on a motion to dismiss by Canada on the ground that the lawsuit was a purely academic exercise. We had won on that issue in 1989 in Manitoba's Court of Queen's Bench, but then lost before a five-judge bench of its Court of Appeal. The Supreme Court of Canada reversed that Court of Appeal in 1990, in a unanimous judgment from the bench.⁶⁹ Then there was an extended dispute over particulars, which led to a decision by that Court of Appeal requiring very extensive particulars. Then there was the researching of the documents. At the trial, over 2000 documents went in as evidence, many of them dozens of pages in length.⁷⁰ The trial took four months, while the appeal took the better part of two weeks. The appellants' factum (the brief of argument) filed in the Court of Appeal was 139 pages, in the Supreme Court of Canada 80 pages. The Métis land rights had been eroded over a period of two decades. Riel and other Métis leaders had been forced to flee. Métis had been driven out of Manitoba. How could the skein be unravelled? It was not until the 1960s and 1970s that the Manitoba Métis Federation was organized and could undertake a search to discover what had happened. In fact, our firm spent months, even years, uncovering the truth; this could not have been done without the backing of the Manitoba Métis Federation. How could any individual plaintiff or plaintiffs have litigated the issue?

The Supreme Court of Canada held, at paragraph 44, that the claim was:

"...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. The collective claim merits allowing the body representing the collective Métis interest [the Manitoba Métis Federation] to come before the Court."⁷¹

⁶⁹ . *Dumont v Canada*, [1990] 1 SCR 279 [*Dumont*].

⁷⁰ . It should be said that counsel for Canada, Manitoba and the Métis spent many months going through the documents together; they agreed on the record to be placed before the trial judge.

⁷¹ . MMF SCC, *supra* note 1 at para 44.

But this all happened 140 years ago. What has it got to do with us? Well, Canada is still here. The Métis are still here; they are one of Canada's Aboriginal peoples, recognized as such under section 35 of the *Constitution Act, 1982*.⁷² And the Métis have proven their case: that a promise was made to them that their children would get 1.4 million acres, and that the promise embedded in our country's Constitution was not fulfilled. The Supreme Court of Canada reached back into Canada's collective past, fortified by a complete documentary record. The Court made clear that Canada failed to keep its promise, to fulfill its constitutional obligation.

This tale is not simply a footnote to the saga of Canada's westward expansion. In Canada, we have ceased to believe, if we ever did, in leaving behind a trail of historical wreckage as we moved from decade to decade. We don't simply sigh regretfully at any recollection of injustice and say that it was simply the price of progress. Our Supreme Court of Canada wrote that:

What is at issue is a constitutional grievance going back along a century and a half. So long as the issue remains outstanding, the goal of reconciliation and constitutional harmony...remains unachieved....The ongoing rift in the national fabric...remains un-remedied.⁷³

In such cases, of course, the statute of limitations having run, the plaintiffs can only ask the Court to grant a declaration. Here the Court made a formal declaration that the Crown had failed to implement the children's land grant provision in the *Manitoba Act* in accordance with the honour of the Crown. It could not award damages or any other relief. In such cases it is left to the parties to negotiate a settlement. And there is a precedent.

Speaking in Vancouver in 1968, the government of Pierre Trudeau had rejected the notion of Aboriginal title.⁷⁴ The Supreme Court affirmed the place of Aboriginal title in Canadian law in the decision in *Calder v. British Columbia (Attorney General)* in 1973, which forced the government

⁷² *Constitution Act 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 35.

⁷³ *Supra* note 1 at para 140.

⁷⁴ The Right Honourable Pierre Elliot Trudeau, "Remarks on Indian Aboriginal and Treaty Rights" (delivered at the Aboriginal and Treaty Rights Meeting, Vancouver, 8 August 1969): Prime Minister Trudeau had said that Canada could not be built on "historical might-have-beens."

to undertake a policy of negotiating settlements of comprehensive claims of First Nations and Inuit—wherever Aboriginal title had not been extinguished.⁷⁵ Since then, Canada has agreed to comprehensive land claims agreements in Québec, Newfoundland, Nunavut, the Northwest Territories, Yukon, and British Columbia. These modern land claims agreements now constitute the basis for a new relationship between the Crown and the First Nations and the Inuit under modern treaties which cover half the land mass of the country.

What would a negotiated settlement with the Manitoba Métis look like? It will be up to the parties to work out the contours and the contents of a modern land claims agreement for the Métis. However it turns out, it will be distinctive to the Métis. It will require statesmanship on both sides. But it can be done. It is still possible to complete this unfinished business of Confederation.

Let me conclude with the words of Louis Riel. We know that he returned from the United States in 1885 to lead the Métis and the Indians in the Northwest Rebellion. He was tried at Regina on a charge of high treason, convicted, and then hanged. During his closing speech to the jury he said this about the events of 1869-70:

...it is to be understood that there were two societies who treated together. One was small, but in its smallness had its rights. The other was great, but in its greatness had no greater rights than the small, because the right is the same for everyone.⁷⁶

And those words of Riel would not today be a compelling coda to the judgment of the Supreme Court of Canada if it had not been for the perseverance of the Manitoba Métis, in refusing to recede into the historical woodwork, in launching this journey into the past and establishing its relevance to our present. This is Métis history, to be sure, but it is just as much Canadian history. And it offers an opportunity to Canadians today to make history, by mending this rift in the national fabric.

⁷⁵ *Calder v AG (BC)*, [1973] SCR 313 [*Calder*].

⁷⁶ Louis Riel to the jury at his trial (1 August, 1885).