S.C.C. FILE NO. 33880

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

BETWEEN:

MANITOBA MÉTIS FEDERATION INC., YVON DUMONT, BILLY JO DE LA RONDE, ROY CHARTRAND, RON ERICKSON, CLAIRE RIDDLE, JACK FLEMING, JACK McPHERSON, DON ROULETTE, EDGAR BRUCE JR., FREDA LUNDMARK, MILES ALLAIRE, CELIA KLASSEN, ALMA BELHUMEUR, STAN GUIBOCHE, JEANNE PERRAULT, MARIE BANKS DUCHARME and EARL HENDERSON

APPELLANTS

- and -

ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF MANITOBA

RESPONDENTS

- and -

ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF SASKATCHEWAN, MÉTIS NATIONAL COUNCIL, MÉTIS NATION OF ALBERTA, MÉTIS NATION OF ONTARIO, TREATY ONE FIRST NATIONS and ASSEMBLY OF FIRST NATIONS

INTERVENERS

FACTUM OF THE INTERVENER ASSEMBLY OF FIRST NATIONS

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I: STATEMENT OF FACTS RELEVANT TO ISSUE TO INTERVENE

A. Overview of Position

1. The legal duties to which the honour of the Crown gives rise are the modern implications of Canadian nation-building. In *Haida Nation*[1], this Honourable Court located fiduciary duties, treaty obligations and the duty to consult along a continuum of Crown obligations that first arose with the assertion of sovereignty and continue to formal claims resolution and beyond. In *Mikisew Cree First Nation,* this Court confirmed the underlying goal of reconciliation of the pre-existence of Aboriginal societies with the *de facto* sovereignty of the Crown as the fundamental objective of modern aboriginal law.[2]

2. Different circumstances give rise to different duties. The present case provides this Court with an opportunity to examine the honour of the Crown in the context of government commitments in legislation to an Aboriginal people – Métis people. While the Assembly of First Nations ("AFN") does not take a position on the merits of the Métis claim, it supports in principle the position of the Appellants on the issues of fiduciary duty, honour of the Crown and limitations and laches. The AFN urges the Court to consider the issues in this case in light of the honour of the Crown and to confirm the role of the fiduciary concept and statutory interpretation in the process of reconciliation.

3. In this factum, the AFN addresses the submissions by the Attorney General of Canada at paragraphs 98–123 of his factum as to why Canada says ss. 31 and 32 of the *Manitoba Act*[3] did not give rise to a fiduciary obligation, at paragraphs 124 to 126 as to why Canada says the honour of the Crown cannot otherwise operate as a source of substantive rights in this case, and at paragraphs 71-87 as to why Canada says the Appellants' fiduciary claims are barred by limitations and laches.

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[1] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73 [*Haida Nation*], at paras. 16-20, Book of Authorities of the Attorney General of Canada ("AGC BoA") Tab 25

[2] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69 [*Mikisew Cree First Nation*], at para. 1, Book of Authorities of the AFN ("AFN BoA") Tab 3

[3] *Manitoba Act, 1870*, 33 Vict, c. 3, SC 1870, c. 3, reprinted in R.S.C. 1985, App. II, No. 8 [*Manitoba Act*], Appellants' Legislation, Tab 1

B. Statement of Facts

4. The AFN is a national organization representing more than 630 First Nations throughout Canada and their respective members. The AFN is mandated to represent and protect the rights and interests of First Nations peoples across Canada, particularly Aboriginal and treaty rights. The mission of the AFN includes the protection and advancement of the rights, interests, cultures and jurisdictions of First Nations and their members, including rights and interests arising from treaties and Aboriginal rights and title, as well as the constitutional protection of those rights, interests, cultures and jurisdictions.

5. The AFN adopts the statement of facts by the Appellants.

PART II: STATEMENT OF POSITION WITH RESPECT TO THE APPELLANTS' QUESTIONS

6. The AFN does not take a position on the Appellants' questions.

PART III: STATEMENT OF ARGUMENT

A. Fiduciary Duty

7. Canada argues that fiduciary principles are engaged only when a property interest is ceded to the Crown to be administered for the exclusive benefit of Aboriginal peoples, or when the Crown undertakes to exercise discretionary control in the management of property for the benefit of Aboriginal peoples.[4]

8. Canada's position overstates the requirements for a finding of fiduciary obligation. It is correct that the fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests. But the requirement of a "cognizable Indian interest" does not equate, as Canada suggests, with a pre-existing, legal interest in property.

9. In *Guerin*[5], Justice Dickson (as he then was) was careful to distinguish the fiduciary concept from that of a trust, which would require words of settlement, certainty of object and

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[4] Canada's factum, at para. 109

[5] *Guerin v. The Queen*, [1984] 2 S.C.R. 335 [*Guerin*], Book of Authorities of the Appellants ("Appellants BoA"), Tab 18

certainty of obligation. No property interest was present in *Guerin* which could constitute the trust *corpus*, so even if the other indicia of an express or implied trust could be made out, the basic requirement of a settlement of property was not met. Instead, the general nature of Aboriginal title and the Aboriginal interest in land, coupled with the obligations assumed by the Crown in the *Indian Act*, gave rise to a fiduciary obligation.

10. *Guerin* can properly be regarded as the first of the modern cases that recognize the honour of the Crown as a core precept in the process of reconciliation. Decided outside the constitutional framework of s. 35(1), the Court found that, once the Crown assumes discretionary control over a specific Aboriginal interest (in that case, lands surrendered for lease according to certain terms), the honour of the Crown will then supervise the relationship by holding the government to a fiduciary's strict standard of conduct. As Justice Dickson said:

> … the Crown, in my view, was not empowered by the surrender document to ignore the oral terms which the Band understood would be embodied in the lease. The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act. <u>After the Crown's agents had induced the Band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms.</u> [emphasis added][6]

11. The focus of fiduciary law is on relationships, not property interests. As Justice Dickson put it in *Guerin*: "It is the nature of the relationship... that gives rise to the fiduciary duty."[7] The underlying purpose of fiduciary law is to protect and enforce the integrity of relationships in which one party is given a discretionary power to affect the interests of the other. Unlike the law of trusts, however, the interests which fiduciary law serves to protect are not limited to property or even legal interests. Consider, for example, the doctor-patient relationship in *Norberg v. Wynrib*[8] or the advisor-client relationship in *Hodgkinson v. Simms*. As La Forest J. said in *Hodgkinson*:

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[6] *Guerin*, at p. 388, Appellants BoA Tab 18
[7] *Guerin*, at p. 384, Appellants BoA Tab 18
[8] *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, AFN BoA Tab 4

> **32** … In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue….[9]

12. Thus in *Wewaykum*, where Justice Binnie said the Crown's fiduciary obligation "depends on identification of a cognizable Indian interest," he could not have meant a pre-existing, legal interest in property. Indeed, Justice Binnie held that the proper focus was "on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation." Justice Binnie's point was simply that "not all obligations existing between parties to a fiduciary relationship are themselves fiduciary in nature."[10]

13. There can be no doubt following *Guerin* that the Crown may, by legislation, agreement or unilateral undertaking, assume an obligation to act for the benefit of Aboriginal people, and that when the obligation carries with it a discretionary power, the Crown becomes a fiduciary. Further, it is clear that this principle is not limited to the Crown's dealings with an Aboriginal interest in land or a surrender of the Aboriginal interest in land to the Crown.[11]

14. A "cognizable Indian interest" may therefore derive from a treaty, a unilateral undertaking by the Crown or legislation, including an order in council, without a pre-existing legal interest. Surrender of Aboriginal title or rights in exchange for defined benefits is a clear example of circumstances giving rise to a fiduciary duty; however, it is not exhaustive of those circumstances. The necessary "obligation or interest" may be found in a government commitment that carries with it a discretionary power or control. A statute that creates a legal entitlement may give rise to a fiduciary duty on the part of government in relation to administering that interest.[12]

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[9] *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at para. 32, AGC BoA Tab 27

[10] *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79 [*Wewaykum*], AGC BoA Tab 51, at paras. 85 and 83; *Haida Nation*, at para. 19, AGC BoA Tab 25

[11] *Authorson (Litigation guardian of) v. Canada (Attorney General)* (2002), 215 D.L.R. (4th) 496 (Ont. C.A.), at paras. 67-73, AFN BoA Tab 1; *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746, 2001 SCC 85 [*Osoyoos*], at paras. 51-52, AFN BoA Tab 5

[12] *Alberta v. Elder Advocates of Alberta Society*, [2011] 2 S.C.R. 261, 2011 SCC 24 [*Elder Advocates of Alberta*], at paras. 45, 48-51, Appellants BoA Tab 21

15. This is not to say that every statutory benefit creates an interest sufficient to attract a fiduciary duty. A careful examination of the legislative provision in issue is required. But Canada is wrong to say that a statutory benefits scheme is necessarily inconsistent with the existence of a fiduciary obligation.[13]

16. Sections 31 and 32 of the *Manitoba Act* were nothing like the statutory benefits at issue in *Elder Advocates of Alberta,* on which Canada relies. The Court of Appeal found that the *Manitoba Act* was enacted in the process of nation-building, and evolved from negotiations between the federal government and delegates of the Métis of Red River. Those negotiations took place at a time when the Métis were a political and military force to be reckoned with and the Crown's interests lay in securing their peaceful co-operation. The Court of Appeal found that the following passage written by Professor Slatterly, and quoted with approval by Justice Binnie in *Wewaykum,* resonated with the facts of this case:

> **79** … The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a "weaker" or "primitive" people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help.[14]

17. The *Manitoba Act* was therefore much more than an administrative benefits scheme. It was, and remains, a component of the constitutional structure of Canada.

18. Canada argues that an undertaking to act exclusively in the best interests of the beneficiary is the "*sine qua non* of <u>all</u> fiduciary relationships." Canada submits that, in the present case, there is no evidence of an express undertaking by the government to give exclusive preference to the interests of the Métis, and that an implied undertaking would be incompatible with the Crown's role in "establishing a new province."[15]

19. The AFN submits that evidence of an undertaking is not required in the Crown-Aboriginal context. Evidence of an undertaking to act in the bests interests of the beneficiary is only a requirement of *ad hoc* fiduciary obligations; that is, fiduciary obligations outside the recognized categories. In the Aboriginal context, the Crown's obligation to act

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[13] Canada's factum, para. 111
[14] *Wewaykum*, at para. 79, AGC BoA Tab 51

honourably is well-recognized; what is required is a specific obligation or an interest over which the Crown has assumed discretionary control. Where these circumstances exist, the honour of the Crown will require that the government act in the best interests of the Aboriginal beneficiaries, without any necessity for the Crown's express undertaking to so act.[16]

20. Moreover, the spectre of unmanageable conflict between the Crown's fiduciary duties to Aboriginal people and its obligation to govern in the public interest was laid to rest by this Court in *Osoyoos*. The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. What is required by the fiduciary standard is to act with reference to the Aboriginal group's best interest in exercising the discretionary control over the specific interest at stake.[17]

21. In short, there is no reason in principle why the fiduciary concept should not apply to the government's implementation of ss. 31 and 32 of the *Manitoba Act*. At the end of the day, the question should be: is this a case in which the general duty of the Crown to act honourably crystallized through legislation as specific fiduciary obligations?

B. Honour of the Crown

22. Regardless of whether fiduciary obligations arose through legislation, ss. 31 and 32 of the *Manitoba Act* must be read and applied in accordance with the honour of the Crown principle. Canada argues, however, that, apart from the circumstances this Court has articulated and defined - treaty interpretation, fiduciary duties and the modern-day duty to consult – the honour of the Crown cannot operate as a source of substantive obligations.[18]

23. Canada's restrictive view of the honour of the Crown should be rejected. In *Haida Nation*, the Court described the honour of the Crown as a "core precept that finds its application in concrete practices." The potential applications of this constitutional principle are no more limited than the interests it may serve to protect.[19]

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[15] Canada's factum. paras. 112, 118
[16] *Galambos v. Perez*, [2009] 3 S.C.R. 247, 2009 SCC 48, at para. 76, AGC BoA Tab 21; *Elder Advocates of Alberta*, at paras. 48-49, Appellants BoA Tab 21
[17] *Osoyoos*, AFN BoA Tab 5; *Haida Nation*, at para. 19, AGC BoA Tab 25
[18] Canada's factum, para. 124
[19] *Haida Nation*, at para. 16, AGC BoA Tab 25

24. There can be no doubt that the honour of the Crown infuses the interpretation and implementation of every treaty, and gives rise to a duty to consult with respect to government action which may have an adverse effect on treaty rights.[20] In *R. v. Marshall,* Justice Binnie said, in connection with the admissibility of evidence relating to oral promises that were made before a "peace and friendship" treaty was signed:

> **12** … where a treaty was concluded verbally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written terms…[21] [emphasis added]

25. Justice Binnie observed that the principle that the Crown's honour is at stake when it enters into treaties with Aboriginal peoples dates back at least to the Court's decision in *Province of Ontario v. Dominion of Canada and Province of Quebec; In re Indian Claims* (1895), 25 S.C.R. 434. Justice Binnie endorsed the following passage from the dissenting reasons of Justice Gwynne:

> **50** ... what is contended for and must not be lost sight of, is that the British sovereigns, ever since the acquisition of Canada, have been pleased to adopt the rule or practice of entering into agreements with the Indian nations or tribes in their province of Canada, for the cession or surrender by them of what such sovereigns have been pleased to designate the Indian title, by instruments similar to these now under consideration to which they have been pleased to give the designation of "treaties" with the Indians in possession of and claiming title to the lands expressed to be surrendered by the instruments, and further that the terms and conditions expressed in those instruments as to be performed by or on behalf of the Crown, have always been regarded as involving a trust graciously assumed by the Crown to the fulfilment of which with the Indians the faith and honour of the Crown is pledged, and which trust has always been most faithfully fulfilled as a treaty obligation of the Crown. [emphasis by Binnie J.] [22]

26. Similar principles must apply to legislation of the kind at issue in this case. After the government's representatives had induced delegates of the Métis to recommend the terms of the *Manitoba Act* to their people, it would be unconscionable for the government to ignore those promises and assurances, simply because there was no mechanism in the legislation to enforce their compliance.

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[20] *Mikisew Cree First Nation*, at paras. 49 and 57, AFN BoA Tab 3
[21] *R. v. Marshall*, [1999] 3 S.C.R. 456 [*Marshall*], at para. 12, AFN BoA Tab 6
[22] *Marshall,* at para. 50, AFN BoA Tab 6

27. In this way, the honour of the Crown breathes life into the government's legislative commitments to Aboriginal peoples in the process of nation-building.

C. Limitations and Laches

28. It is well-settled that statutory limitation periods cannot apply to bar a declaration of constitutional invalidity, such as a declaration that legislation contravenes s. 35(1) of the *Constitution Act, 1982*[23]. This Court should confirm that, likewise, statutory limitation periods do not apply to bar a declaration that the Crown acted dishonourably or in breach of fiduciary duty.

29. The declaration is a uniquely flexible and useful remedy. Declaratory relief is available without a cause of action, and courts make declarations whether or not any consequential relief is, or could, be claimed. These features allow judges to structure remedies which are responsive to the needs of the case. Since it merely states the law, a declaration is not awarded "against" the defendant in the same sense as coercive relief.[24]

30. In *Solosky v. The Queen,* Justice Dickson wrote in language that resonates with the Crown-Aboriginal relationship[25]:

> Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a 'real issue' concerning the relative interests of each has been raised and falls to be determined.

31. In some cases, declaratory relief may be the only way to vindicate the rights of Aboriginal people and give effect to the honour of the Crown. In this regard, a purposive approach should be adopted. In *Doucet-Boudreau v. Nova Scotia (Minister of Education),* Iacobucci and Arbour, J.J., laid down a purposive approach to Charter remedies[26]:

> …. A purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft responsive remedies.

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[23] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, Appellants Legislation, Tab 4

[24] *Cheslatta Carrier Nation v. British Columbia* (2000), 193 D.L.R. (4th) 344, 2000 BCCA 539, at paras. 11-16, AGC BoA Tab 14

[25] *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 830, AFN BoA Tab 7

[26] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, 2003 SCC 62, at para. 25, AFN BoA Tab 2

> Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies. [emphasis in original]

32. In its previous judgments, this Court has commented on the way in which Aboriginal rights and interests have historically been vulnerable to governmental disrespect. The process of reconciliation has been bedevilled by government delay and inaction. Now the government seeks to rely on the passage of time to preclude access to justice. A purposive approach consistent with the honour of the Crown suggests that declaratory relief should remain available to Aboriginal people in appropriate cases, despite the expiry of a limitation period that might bar a cause of action.

33. A purposive approach consistent with the honour of the Crown also suggests that laches have no application. What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches. Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties.[27]

34. In any case in which government relies on the doctrine of laches, the notion that Aboriginal people caused the Crown to alter its position in reasonable reliance on their acceptance of the status quo, or allowed a situation to arise which it would be unjust to disturb, should be viewed with skepticism. Concepts of acquiescence, estoppel and waiver, which underlie the doctrine of laches, are fundamentally at odds with historical reality of Crown-Aboriginal relations. In the modern legal context, the assertion of laches to bar declaratory relief in an otherwise appropriate case is at odds with the objective of reconciliation, and should not be applied by the courts, except in the clearest of cases.

PART IV: COSTS SUBMISSION

35. The AFN does not seek costs and asks that it not be subject to any costs orders.

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[27] *Wewaykum*, at para. 109, AGC BoA Tab 51

PART V: NATURE OF ORDER SOUGHT

36. The AFN seeks an order that it be granted leave to present oral argument of 15 minutes on the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: November 23, 2011

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PART VI: TABLE OF AUTHORITIES

Paragraph(s)

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PART VII: STATUTORY PROVISIONS

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