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April 10, 2015

VIA RESS, EMAIL and COURIER

Ms. Kirsten Walli
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 26th Floor
Toronto, ON M4P 1E4

Re: Ontario Energy Board ("Board") File No.: EB-2014-0351
Application under section 38(3) of the OEB Act
Gas Storage Compensation
Enbridge Gas Distribution Inc. – Submission

In accordance with the Board's Procedural Order issued on January 15, 2015, enclosed please find the submission of Enbridge Gas Distribution Inc. ("Enbridge").

The submission will be available on Enbridge's website under the "Other Regulatory Proceedings" tab at www.enbridgegas.com/ratecase.

Please contact me if you have any questions.

Yours truly,

(Original Signed)

Bonnie Jean Adams
Regulatory Coordinator

Encl.

cc: Mr. Paul Babirad (via email and courier)

EB-2014-0351

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c. 15, (Schedule B) (the "Act");

AND IN THE MATTER OF an Application by Paul Babirad on behalf of Jim Babirad under section 38(3) of the Act for an Order of the Board determining the quantum of compensation that Jim Babirad is entitled to have received from Enbridge Gas Distribution Inc.

ENBRIDGE GAS DISTRIBUTION INC.
WRITTEN SUBMISSION

Filed April 10, 2015

A. Facts

1. This proceeding was commenced by a filing received by the Board on November 20, 2014 (the "Babirad Application"). The Babirad Application states that Jim Babirad owns 40 acres of land on top of the Crowland Pool in the Region of Niagara. The Babirad Application also states that Mr. Babirad has owned this property from 1962 to present.

> Babirad Application filed on November 20, 2014, page 1, attached at Appendix A to Notice of Application and Procedural Order No. 1 dated January 15, 2015 ("Babirad Application").

2. In response to an Interrogatory, Mr. Babirad has indicated that the size of the property referred to in the Babirad Application was 42 acres (the "42 Acre Parcel"). The Interrogatory response goes on to say that, in July of 1975, the 42 Acre Parcel was subdivided and 24 acres were sold to a third party. It appears to be the case, then, that Mr. Jim Babirad owns approximately 18 acres of property (the "Property").

Babirad Response to Enbridge Interrogatory #3.

3. Enbridge Gas Distribution Inc. ("Enbridge") is a natural gas distributor and the operator of the designated gas storage area known as the Crowland Pool in the Niagara area.

Responding Material of Enbridge Gas Distribution Inc. ("Responding Material"), paragraphs 3, 26 and 39.

4. On September 17, 1964, the Board heard an application by The Consumers' Gas Company Ltd. ("Consumers Gas", now Enbridge) for a regulation designating the Crowland Pool as a gas storage area. On October 19, 1964, in its report to the Lieutenant Governor in Council, the Board recommended that the application be granted and that the Crowland Pool be designated as a gas storage area. The Crowland Pool was designated as a gas storage area by Ontario Regulation 299/64 and the Property is included within the lands that comprise the designated storage area.

Responding Material, paragraph 22 and Tabs "I" and "J".

5. On February 12, 1965, the Board issued an order granting authority to Consumers Gas to inject into, store gas in and remove gas from the Crowland Pool and to enter upon the lands in such Pool and use such lands for such purpose (the "Leave to Inject, Store and Withdraw Order").

Responding Material, paragraph 26 and Tab "K".

6. At the time of the designation of the Crowland Pool as a gas storage area, and at the time of the Leave to Inject, Store and Withdraw Order, the 42 Acre Parcel was not owned by Mr. Jim Babirad. The registered owners of the 42 Acre Parcel were Theresa Babirad and Theresa A. M. Babirad.

Babirad Response to Board Staff Interrogatory #1(a), under the headings “March 1959” and “1962-1965”.

7. Subsequent to the granting of the Leave to Inject, Store and Withdraw Order, discussions ensued between Consumers Gas and Mr. Babirad about the 42 Acre Parcel. These discussions culminated in a payment of $800.00 that was made by Consumers Gas to the owners of the 42 Acre Parcel at the time, namely, Theresa A. M. Babirad and Theresa Babirad. The payment of $800.00 is referred to in an Indenture dated August 3, 1965 (the “Indenture”), as consideration for a grant made by Theresa A. M. Babirad and Theresa Babirad to Consumers Gas.

Responding Material, paragraphs 27 to 31 and Tab “N”.

8. Pursuant to the Indenture, Theresa A. M. Babirad and Theresa Babirad granted to Consumers Gas in fee simple “ALL MINES, MINERALS AND MINING RIGHTS AND THE RIGHT TO WORK THE SAME in, under or upon” the 42 Acre Parcel. The Indenture stated that Theresa A. M. Babirad and Theresa Babirad retained to themselves all “Surface Rights to the said lands”, except for a right of ingress, egress and regress to a specified part of the 42 Acre Parcel for a period of one year.

Responding Material, Tab “N”.

9. The records of Consumers Gas indicate that the 42 Acre Parcel was “expropriated” on February 12, 1965, the date of the Leave to Inject, Store and Withdraw Order, and that an “amicable settlement” was reached on August 3, 1965, the date of the Indenture.

Responding Material, paragraph 32 and Tab “P”.

10. More than 49 years later (November 20, 2014), Mr. Babirad applied to the Board under section 38(3) of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B (the "OEB Act") for an order of the Board for compensation for storage rights in respect of lands within the Crowland Pool designated gas storage area.

Babirad Application.

B. Governing Legislation

11. The granting of authority to inject gas into, store gas in and remove gas from a designated gas storage area is provided for in subsection 38(1) of the OEB Act. Specifically, subsection 38(1) of the OEB Act states that:

> The Board by order may authorize a person to inject gas into, store gas in and remove gas from a designated gas storage area, and to enter into and upon the land in the area and use the land for that purpose.

OEB Act, S.O. 1998, Chapter 15, Schedule B, subsection 38(1).

12. The legislation in effect at the time of the Leave to Inject, Store and Withdraw Order was the *Ontario Energy Board Act, 1964* (the "1964 Act"), which came into force on January 1, 1965. The wording of subsection 21(1) of the 1964 Act was the same as the wording of subsection 38(1) of the OEB Act.

1964 Act, S.O. 1964, chapter 74, subsection 21(1) attached hereto at Tab "A".

13. The payment of compensation by a person in whose favour a leave to inject, store and withdraw order has been made is provided for in subsection 38(2) of OEB Act. Paragraph (a) of subsection 38(2) states that the person authorized by a leave to inject, store and withdraw order,

> …shall make to the owners of …any right to store gas in the area just and equitable compensation in respect of …the right to store gas.
>
> OEB Act, subsection 38(2), paragraph (a).

14. The wording of paragraph (a) of subsection 21(2) of the 1964 Act was the same as the wording of paragraph (a) of subsection 38(2) of the OEB Act, except that the 1964 Act used the words "fair, just and equitable compensation", rather than "just and equitable compensation" (and except for a very minor difference in the use of the word "such" rather than the word "the").

> 1964 Act, subsection 21(2), paragraph (a).

15. The determination of compensation payable under section 38 of the OEB Act is addressed in subsection 38(3). Subsection 38(3) states that:

> No action or other proceeding lies in respect of compensation payable under this section and, failing agreement, the amount shall be determined by the Board.
>
> OEB Act, subsection 38(3).

16. The wording of subsection 21(3) of the 1964 Act was similar to the wording of subsection 38(3) of the OEB Act, except that subsection 21(3) provided for compensation to be determined by a "board of arbitration", as provided for in regulations that were in force at the time, rather than by the Board.[1]

> 1964 Act, subsection 21(3).

[1] In his response to Enbridge Interrogatory #12, Mr. Babirad said that Enbridge had suggested binding arbitration and that he had agreed, as long as he was allowed to choose the arbitrator. This reference to binding arbitration is consistent with the provisions of subsection 21(3) of the 1964 Act. However, as to the choice of an arbitrator, section 3 of O.Reg. 323/64 made under the 1964 Act states that the members of the board of arbitration shall be appointed by the Lieutenant Governor in Council. A copy of O.Reg. 323/64 is attached hereto at Tab "B".

C. Procedural History

17. On January 15, 2015, the Board issued its Notice of Application and Procedural Order No. 1 in respect of the application by Mr. Babirad. The Board's Procedural Order established a process for: (a) the filing of supporting evidence by Mr. Babirad and responding material by Enbridge; (b) questions and answers on the supporting evidence and responding material; and (c) submissions and reply submissions.

18. Procedural Order No. 1 stated that any supporting evidence in addition to that filed with the application was to be filed by Mr. Babirad by February 17, 2015. Mr. Babirad made the following filings in support of his application:

(i) an email received by the Board on November 18, 2014, requesting information on application procedure and briefly summarizing the Babirads' position on the application;

(ii) a document titled "Lambton v. Crowland" received by the Board on January 29, 2015, comparing storage compensation rates in Ontario;

(iii) a document titled "Who owns the Pore Space? Surface Estate vs. Mineral Estate" received by the Board on February 4, 2015, describing an article discussing property rights in underground resources;

(iv) an email received by the Board on February 11, 2015, requesting eligibility for a cost award;

(v) a document titled "Review of past Ontario Energy Board Cases" received by the Board on February 11, 2015, describing three prior Board decisions; and

(vi) a document titled "Addendum to Review of Past OEB Cases" received by the Board on February 12, 2015, describing a fourth prior Board decision.

19. In accordance with Procedural Order No. 1, Enbridge filed its Responding Material on February 27, 2015. In its Responding Material, Enbridge provided copies of documents from its files to show that, after the granting of the Leave to Inject, Store and Withdraw Order in

February of 1965, the issue of compensation arising from the Order was resolved in August of 1965.

20. Enbridge and Mr. Babirad filed responses to questions by March 27, 2015, in accordance with Procedural Order No. 1. This Written Submission by Enbridge is also filed in accordance with Procedural Order No. 1.

D. Issues

21. Subsection 38(3) of the OEB Act provides that, "failing agreement", the Board shall determine compensation payable under section 38. Paragraph (a) of subsection (2) of section 38 indicates that such compensation shall be just and equitable. Accordingly, the fundamental issues in this proceeding are as follows:

(i) Was there an agreement regarding compensation for the rights granted to Enbridge in the Leave to Inject, Store and Withdraw Order?

(ii) If there was no such agreement, what is just and equitable compensation for the storage rights granted to Enbridge?

22. In the event that the Board finds there was no agreement regarding compensation for the rights granted to Enbridge, the following issues arise in relation to the determination of just and equitable compensation by the Board:

(i) Has there been undue delay (or "laches") in the filing of an application for determination of storage compensation, such that it would not be equitable to allow the claim for compensation made in the Babirad Application?

(ii) Apart from the issue of delay or laches, how should the Board determine just and equitable compensation?

23. On the issue of how the Board should determine just and equitable compensation, the following are relevant considerations for the Board:

(i) the compensation agreed to by other Crowland Pool landowners;

(ii) assessment of gas reservoir performance; and

(ii) the expert assessment of compensation carried out by Elenchus Research Associates Inc. ("Elenchus").

E. Submissions

Agreement Regarding Compensation

24. On October 19, 1964, the Board recommended that the Crowland Pool be designated as a gas storage area and on February 12, 1965, the Board granted the Leave to Inject, Store and Withdraw Order. As a result of the Leave to Inject, Store and Withdraw Order, Consumers Gas held (and Enbridge still holds) storage rights in respect of the Crowland Pool designated storage area and the only remaining matter following the granting of the Order, insofar as the Babirads and Consumers Gas were concerned, was the determination of the appropriate compensation to be paid for storage rights in respect of the 42 Acre Parcel.

25. The evidence on the record in this proceeding reveals that discussions ensued between Consumers Gas and Mr. Babirad after the Board granted the Leave to Inject, Store and Withdraw Order. These discussions culminated in an agreement under which a lump sum of $800 was paid to the then owners of the 42 Acre Parcel, Theresa Babirad and Theresa A. M. Babirad, in return for a conveyance of all mines, minerals and mineral rights associated with the 42 Acre Parcel.

26. The only logical conclusion to be drawn from these facts is that, rather than agreeing on annual payments as compensation for the storage rights granted to Enbridge by the Leave to Inject, Store and Withdraw Order, the parties agreed on lump sum compensation that was evidenced by a conveyance of mineral rights.

27. Enbridge therefore submits that compensation for the rights granted to Enbridge (then Consumers Gas) was agreed upon with the owners of the 42 Acre Parcel at the time and that such compensation (a lump sum of $800) was paid. Thus, there is no issue of compensation to be determined by the Board under subsection 38(3) of the OEB Act.

28. Of course, at the time of the lump sum payment of $800 to Theresa Babirad and Theresa A. M. Babirad, a regulation had been passed designating the Crowland Pool as a gas storage area. It is illogical to think that anyone, least of all Consumers Gas, would expect to extract minerals from, and operate a mine on, property that is part of a designated gas storage area. The only plausible reason for the lump sum payment of $800 was for Consumers Gas to acquire (rather than lease) storage rights in respect of the 42 Acre Parcel from Theresa Babirad and Theresa A. M. Babirad.

29. According to case law and legal commentary, if the ownership of the mines and mineral rights associated with a property has been severed from ownership of the surface rights, the storage rights are held by the owner of the severed mineral estate, not by the owner of the surface rights. This so-called “English rule” applying to ownership of storage rights is confirmed by the 1922 decision of the Alberta Supreme Court, Appellate Division in *Little v. Western Transfer & Storage Co.*

> *Little v. Western Transfer & Storage Co.* 1922 CarswellAlta 81, [1922] 3 W.W.R. 356 [“*Little v. Western Transfer*”] attached hereto at Tab “C”.

30. In the *Little* case, the owner of the “coal and surface rights” of a property had entered into a lease of the coal rights, “together with the right to work the same”. The defendant was the lessee of these rights from the plaintiff Little and, after putting in a shaft on the Little property, and removing coal from under the Little property, the defendant also made tunnels into other properties, from which it conveyed coal through the tunnels and up the shaft on the Little

property. The Court said that the right of the defendant to move coal from other properties up through the shaft on the Little property depended on whether the defendant had acquired "property in the strata" below the surface, or whether the defendant had merely acquired a "privilege, servitude or easement", that is, a right to take away the coal.

> *Little v. Western Transfer*, above, at paragraph 23.

31. The Alberta Court followed English case law indicating that, where ownership of mines is granted separately from ownership of the land except for the mines, the effect is to carve out ownership in "superimposed layers", leaving the owner of the mineral rights with "the property and exclusive right of possession of the whole space occupied by the layer containing the minerals" and, after the minerals are taken out, the owner of the mineral rights is entitled to the entire and exclusive "user" of that space for all purposes.

> *Little v. Western Transfer*, above, at paragraph 29.

32. Canadian legal commentary confirms the proposition that, in Ontario, ownership of storage rights is vested in the owner of mineral rights. According to a paper on natural gas storage regimes in Canada published by the University of Calgary Institute for Sustainable Energy, Environment and Economy ("ISEEE"),

> The literature on the ownership of natural gas storage rights in Canada suggests that there is some uncertainty as to who owns pore space for storage purposes. Is this pore space owned by the owner of the mineral estate or is it owned by the owner of the surface estate? Given this uncertainty, governments in Canada have responded in several ways.
>
> First, some governments have responded by vesting natural gas storage rights in the Crown or the government. … Second, a single jurisdiction, Alberta, has chosen to enact legislation to clarify the ownership position … . … A third group of provinces has not seen the need to clarify the ownership rules for natural gas storage, although each seems to proceed on the assumption that storage rights follow mineral ownership and that, as a result, storage may be vested in the

Crown or a private owner depending on the background mineral ownership. This is the case in Ontario, Manitoba, and Saskatchewan.

> N. Bankes, and J. Guance, *Natural Gas Storage Regimes in Canada: A Survey*, ISEEE Research Paper, Institute for Sustainable Energy, Environment and Economy, University of Calgary, December, 2009, pages 121-122 attached hereto at Tab "D".

33. The conclusion reached in this paper about the law regarding storage rights in Ontario is reflected in the decision made by the Board in proceeding RP-2000-0005. In that case, a number of landowners applied for a determination of just and equitable compensation in respect of the Union Gas Limited ("Union Gas") designated storage area known as the Century Pools Phase II development. At a Status Hearing in the proceeding, the Board addressed, among other things, the status of Knox Dawn Presbyterian Church (the "Church") to claim compensation for storage rights.

> Responding Material, paragraphs 42 to 46 and Tabs "V" and "W".

34. It is clear from the transcript of the Status Hearing that the issue of the Church's status to claim compensation for storage rights turned on whether the Church held mineral rights, as opposed to surface rights. Union Gas argued that the Church did not have standing because it did not hold title to the mineral rights. Counsel for the Church argued that the Church held at least a "beneficial interest" in the mineral rights, if not a full legal interest, and that this was sufficient for the storage compensation claim. The Board determined that the Church had a "beneficial interest" which entitled it to obtain a storage compensation order. Given the respective positions of Union Gas and the Church, as revealed in the transcript of the Status Hearing, the "beneficial interest" referred to by the Board that underpinned the right to claim storage compensation was an interest in mineral rights.

> Responding Material, paragraphs 44 to 46; Tab "V", paragraphs 595-596 and 612-613; and Tab "W", paragraph 3.9.4.

35. In the context of carbon capture and storage ("CCS"), Canadian legal commentary again indicates that storage rights are held by the owner of mines and mineral rights. An article addressing the legal framework for CCS in Alberta says that, if it can be assumed that there is a single owner of the "mines and minerals" estate, it seems relatively clear that a CCS operator must obtain the consent of that owner in order to commence an operation. This statement is supported by a footnote stating: "The assumption here is that Alberta adopts the so-called English rule, pursuant to which storage rights are held by the owner of a severed mineral estate and not by the surface owner."

> N. Bankes, J. Poschwatta and E. Shier, *The Legal Framework for Carbon Capture and Storage in Alberta*, (2008), 45 Alta. L. Rev. 585-630, at paragraph 51 and footnote 88 attached hereto at Tab "E".

36. Based on this case law and commentary, the effect of the Indenture was that, unlike a lease of storage rights, Theresa Babirad and Theresa A. M. Babirad ceded the storage rights associated with the 42 Acre Parcel. The Indenture therefore confirms that, in return for the lump sum payment of $800, the Babirads were giving up any further entitlement to storage compensation.

37. The material filed in support of the Babirad Application refers to a paper included in a book published in England in 2014. The author of the paper says that "principle and authority tend towards a broader role than has been suggested by some writers for the rights of the land owner, and a lesser one for the mineral owner". In his own words, though, the author presents this point as one that he "argues". The paper is the expression of the opinion of a particular author and his opinion clearly is not consistent with the Canadian legal commentary discussed above.

> B. Barton, "The Common Law of Subsurface Activity: General Principle and Current Problems", in D. N. Zillman *et al*, eds., *The Law of Energy Underground Understanding New Developments in Subsurface Production, Transmission and Storage* (Oxford: Oxford University Press, 2014), at page 21 attached hereto at Tab "F".

38. Enbridge submits that the argument made by the author of the paper referred to in Mr. Babirad's material cannot be applied in any practical way to provide a basis for storage compensation in the circumstances of this case. In other words, it is not a practical or realistic notion that the Babirads can accept lump sum compensation in return for giving another party the subsurface mines, minerals and mining rights in respect of their property and yet still be in a position to claim compensation for subsurface gas storage rights in respect of the same property. The Babirads cannot reasonably expect to be compensated for each of two mutually incompatible activities on the Property.

39. Further, regardless of an argument made by the author of a book published in England in 2014, the accepted proposition in Ontario has been that status to claim compensation for storage rights depends on ownership of mines and mineral rights, not ownership of surface rights. This is clear from the transcript and Board decision in the EB-2000-0005 proceeding and it is stated in the paper on Canadian natural gas storage regimes from the University of Calgary ISEEE. There was no reason for Consumers Gas to have acquired mines, minerals and mining rights other than on the basis of the accepted proposition that these were the rights that would underpin a claim for storage compensation. And, of course, the outright grant to Consumers Gas of the rights that would have underpinned a claim for storage compensation is consistent with the fact that the Babirads were paid lump sum compensation of $800, rather than annual payments of very much smaller amounts.

40. Moreover, the outright grant to Consumers Gas of the rights that would have underpinned a claim for storage compensation is consistent with the course of events since

1965. In response to Board Staff Interrogatory 1(a), Mr. Babirad has provided his chronology of events from April of 1957 to September of 2011. For its part, Enbridge has obtained from the Board's files a record from the designation proceeding in 1964 that sheds additional light on these events. The notes made by the Board Secretary during the designation proceeding reveal that:

> (i) Mr. Babirad stated that he was not opposed to the amount of compensation and that he had been approached about 5 times;
>
> (ii) Mr. Babirad stated that he was really waiting for a letter from the Energy Board explaining who was on the Board and what it was all about;
>
> (iii) on a number of occasions, Mr. Babirad repeated his unfamiliarity with the Energy Board and indicated he felt that the Board should have explained to him before the date was fixed just what the procedure was; and
>
> (iv) the Chairman explained several times the various steps following designation, what was being dealt with at these proceedings and Mr. Babirad's rights regarding compensation.
>
> Babirad Response to Board Staff Interrogatory #1(a).
>
> Hearing of Consumers' Gas Company Application for a Regulation Designating Crowland Pool 10 a.m. September 17, 1964; "Some Notes made by Secretary for portion of proceeding observed" attached hereto at Tab "G".

41. Mr. Babirad's response to Board Staff Interrogatory 1(a) questions why "Consumers Gas/Enbridge" did not contact him during the period from June of 1965 to June of 2013. There was no reason for Enbridge to contact Mr. Babirad about storage compensation during this period because a lump sum payment was made to acquire rights in respect of the 42 Acre Parcel and, as indicated in the records of Consumers Gas, an "amicable settlement" was reached at the time of the Indenture. The fact that almost 50 years passed after the date of the Indenture before an application was made to the Board in respect of storage compensation -- despite the Chair of the Board in 1964 explaining storage compensation rights several times -- supports the conclusion that an "amicable settlement" was indeed reached in August of 1965.

42. Enbridge therefore submits that there is no basis for the Board to determine compensation under subsection 38(3) of the OEB Act, because compensation was agreed upon in 1965.

Just and Equitable Compensation

43. As stated above, Enbridge's submission is that compensation for the rights granted under the Board's Leave to Inject, Store and Withdraw Order was agreed upon in a lump sum amount and was paid by Enbridge. In the event that the Board does not agree with Enbridge's submission in this regard, the Board's mandate is to determine just and equitable compensation under subsections 38(2) and (3) of the OEB Act.

44. Enbridge submits that, if any further compensation is awarded to Mr. Jim Babirad, the Babirad family will in effect receive double compensation, because the lump sum payment of $800 has already been paid and any further compensation would be in addition to the lump sum payment. It is not just and equitable for the Babirad family to receive double compensation for rights granted to Enbridge in respect of the Crowland Pool.

45. Before turning to the appropriate basis for determining just and equitable compensation, Enbridge will address the delay that occurred from the time of the Leave to Inject Store and Withdraw Order to the filing of the Babirad Application with the Board. Then, Enbridge will set out its submissions about considerations that the Board should take into account in the determination of just and equitable compensation.

(a) Delay or Laches

46. Under section 38 of the OEB Act and under section 21 of the 1964 Act, the jurisdiction of the Board to determine compensation (failing agreement) is or was triggered by the making of an order authorizing a person to inject gas into, store gas in and remove gas from a designated

gas storage area. In this instance, the Leave to Inject, Store and Withdraw Order triggering the jurisdiction of the Board to determine compensation was made on February 12, 1965. No application for the determination of such compensation was made for almost 50 years, until, on November 20, 2014, the Board received the Babirad Application.

47. During the period of almost 50 years that elapsed after the making of the Leave to Inject, Store and Withdraw Order, the Board considered many applications by Enbridge (formerly Consumers Gas) for the approval of just and reasonable rates to be paid by gas distribution ratepayers. Because there was never any determination of storage compensation payable in respect of the 42 Acre Parcel over that period of almost 50 years, the costs of such compensation were not included in any of Enbridge's rate applications over the same period. The claim for compensation made in the Babirad Application raises issues of intergenerational inequity because any (additional) compensation payable in respect of the 42 Acre Parcel stretching back over a period of almost 50 years should have been included for recovery from ratepayers in rate applications that were made during the same period.

48. The OEB Act provides for the determination of "just and equitable" compensation and the 1964 Act provided for the determination of "fair, just and equitable" compensation. Enbridge submits that nothing turns on the use of the additional word "fair" in the earlier legislation. Enbridge submits, though, that it is simply not "just and equitable" to determine compensation stretching back over a period of almost 50 years when the cost of any such compensation was not included in rate applications that were considered by the Board during that period.

49. Because the governing legislation provides for a determination of "equitable" compensation, it is appropriate to look to the equitable doctrine of laches for guidance as to the

implications of such a long delay.[2] This doctrine was addressed in a recent decision of the Supreme Court of Canada, where the majority of the Court said that:

> The equitable doctrine of laches requires a claimant in equity to prosecute his claim without undue delay. It does not fix a specific limit, but considers the circumstances of each case. In determining whether there has been delay amounting to laches, the main considerations are (1) acquiescence on the claimant's part; and (2) any change of position that has occurred on the defendant's part that arose from reasonable reliance on the claimant's acceptance of the *status quo* … .
>
> *Manitoba Metis Federation Inc. v. Canada (Attorney General)* [2013] 1 S.C.R. 623, at page 687 ["*Manitoba Metis Federation*"] attached hereto at Tab "I".

50. The majority of the Supreme Court of Canada went on to quote from earlier decisions indicating that two circumstances are always important in these cases. The two important circumstances are, first, the length of the delay, and, second, the nature of the acts done "during the interval", which might affect either party and cause a balance of justice or injustice.

> *Manitoba Metis Federation*, above, at page 687.

51. In this case, the length of the delay is extremely long: it is almost 50 years. During most of this "interval", little or nothing was done by the Babirads to bring forward the issue of storage compensation. A balance of injustice has arisen from the acts "done during the interval" -- or lack thereof -- because Enbridge has not been including any costs for (additional) compensation payable in respect of the 42 Acre Parcel in its rate proceedings before the Board. This is a "change of position" on the part of Enbridge that arose from reasonable reliance on acceptance of the *status quo* by the Babirads.

[2] Reliance on equitable defences is not precluded merely because the claim arises under a statute and, in this regard, it is appropriate to take into account that a particular claim made under a statute may have a "distinctively equitable flavor": see *Perry, Farley & Onyschuk v. Outerbridge Management Limited*, (2001), 54 O.R. (3d) 131, 2001 CarswellOnt 1564 (Ontario Court of Appeal), at paragraph 35 attached hereto at Tab "H".

52. In short, given the very lengthy delay that has occurred since the Leave to Inject, Store and Withdraw Order that triggered the Board's jurisdiction to determine storage compensation (failing agreement), Enbridge submits that it would not be "just and equitable" for the Board to allow the claim for compensation made in the Babirad Application.

(b) Compensation Agreed to by Other Landowners

53. Should the Board decide that it will proceed to determine just and equitable compensation, the best available evidence of just and equitable compensation for storage rights in the Crowland Pool is the evidence on the record in this proceeding regarding the amount of compensation agreed to by other Crowland Pool landowners. There were 74 landowners who, as of 1962, owned lands within the area designated as the Crowland Pool storage area and Enbridge entered into storage leases with 71 of these landowners.

Responding Material, paragraph 47.

54. For properties of less than 20 acres, the agreement with Crowland Pool landowners provided for compensation for storage rights at a flat rate of $20 per year. For properties larger than 20 acres, the agreement provided for compensation at a rate of $1.00 per acre per year.[3]

Responding Material, paragraph 47.

55. The Crozier Report (May 4, 1964) indicated that owners of over 99% of the Crowland Pool lands (other than railways and a municipality) had agreed to an annual storage rental of $1.00 per acre. The Crozier Report went on to set out the following findings with regard to storage compensation generally for lenticular pools and, specifically, for the Crowland Pool:

[3] One lease agreement for a flat rate of $20 per year was entered into in respect of a 23 acre property; Enbridge has been unable to determine the reason for this variance from the norm.

> For these pools [lenticular pools], which have capacities not exceeding 10 million cubic feet per acre of productive area, the formula used in connection with pinnacle reef pools would not be appropriate. Acreage rentals so computed would work out to amounts less than $1.00 … . As stated earlier, the Board considers that a minimum of $1.00 per acre per year is reasonable … .
>
> …On this basis, rates already agreed upon in Dawn No. 3, Zone and Crowland Pools respectively appear to be fair and reasonable.
>
> Responding Material, paragraph 11.
>
> Crozier Report, at pages16 and 29, Responding Material, Tab "C", pages 19 and 32 of 70.

56. The storage compensation agreed to by most of the Crowland Pool landowners, and found to be fair and reasonable in the Crozier Report, has been periodically increased to reflect the passage of time since the original agreements. All increases have been applied uniformly to Crowland landowners receiving annual compensation payments.

> Responding Material, paragraph 48.

57. Enbridge therefore submits that, if the Board does not accept the submission that agreement was reached regarding storage compensation, the Board should look to the compensation paid to other Crowland landowners as a just and equitable standard for the amount of compensation to be paid in respect of the Property.

(c) Assessment of Gas Reservoir Performance

58. The designated storage areas in the Lambton area of Ontario are pinnacle reef reservoirs. From at least the time of the Langford Report in June of 1962, the features of pinnacle reef pools that make them particularly well-suited to the storage of gas have been recognized and indeed emphasized. In the Langford Report itself, it was said that pinnacle reef pools "offer exceptionally good storage characteristics and are most easily converted to storage" and that these reefs undoubtedly are "the first choice for development when more storage

space is required". The Board has referred to Ontario's pinnacle reef pools as "an important natural resource" and "some of the best storage reservoirs in North America".

Responding Material, paragraphs 5-15 and Tabs "B" and "D".

59. Enbridge's Lambton area storage reservoirs are located in proximity to the Dawn hub and are operated as an integrated system. The market access and liquidity available to Enbridge through its ability to trade gas at Dawn is of immeasurable value. The integrated operation of the Lambton area storage reservoirs enables Enbridge to optimize system performance by matching reservoir performance to system demand. The storage compensation paid for the Lambton area reservoirs is not based on individual characteristics of the reservoirs, but instead reflects the integrated nature of these operations.

Responding Material, paragraph 39(c).

60. The Crowland Pool is not a pinnacle reef reservoir; it is a lenticular, sandstone pool. It is not operated as part of a storage-transmission integrated system. It is isolated; it lacks any meaningful connectivity to the Province's gas infrastructure; and it is only used to support Enbridge's Niagara Region gas distribution system. The independent nature of the Crowland Pool means that system performance is dictated by a single reservoir, leaving little opportunity for optimization.

Responding Material, paragraph 39(c).

61. In its Responding Material, Enbridge explained a number of factors that are important in assessing the value of a pinnacle reef gas reservoir, as compared to the Crowland Pool. By any reasonable measure, the Crowland Pool is significantly outperformed by Enbridge's

pinnacle reef pools. The vast difference in capability and performance of the pinnacle reef pools compared to the Crowland Pool shows up in many areas, including the following:

> (i) when normalized to the Crowland Pool gas withdrawal rate, the withdrawal rate of Enbridge's pinnacle reef pools ranges from two to 36 times higher and, on average, the withdrawal rate for the pinnacle reef pools is 15 times higher than the Crowland Pool;
>
> (ii) as to productivity per well (reservoir capacity divided by well count), the wells in Enbridge's lowest rated pinnacle reef pool are 26 times more productive than those in the Crowland Pool and, on average, each well in the pinnacle reef pools is 68 times more productive than each well in the Crowland Pool;
>
> (iii) the Crowland Pool accounts for 14% of the total number of storage wells operated by Enbridge, but less than 0.30% of the total gas storage volume and this disproportionate number of wells means that the Crowland Pool absorbs a disproportionate amount of Enbridge's operating and maintenance budget; and
>
> (iv) the integrated nature of Enbridge's Lambton area system combined with the economies of scale provided by that system result in a cost (per unit of storage) to operate and maintain the system that is 10% of the cost to operate the Crowland Pool.
>
> Responding Material, paragraphs 38 and 39.

62. In short, the performance of the Crowland Pool falls significantly short of the performance of Enbridge's pinnacle reef pools when assessed using any reasonable metric that bears on the value of a gas storage reservoir. In today's market, the Crowland Pool would likely not be developed and, indeed, none of the numerous other sandstone reservoirs in the Niagara region have been developed into gas storage areas.

> Responding Material, paragraphs 40 and 41.

(d) Expert Assessment of Compensation

63. In response to the application made by Mr. Babirad, Enbridge engaged Elenchus to provide an independent expert opinion with regard to storage compensation for Crowland Pool landowners. Elenchus concluded that, if storage compensation paid to landowners in Lambton

County is used as a reference point, and this compensation level is adjusted to reflect the relative quality of the Crowland Pool as compared to Enbridge's Lambton County storage areas, the result would be storage compensation for Crowland Pool landowners that is less than the amount paid now. Elenchus also noted that applying performance metrics to determine storage compensation for Crowland Pool landowners would result in a lower level of compensation than the minimum rate recommended in the Crozier Report, adjusted for inflation.

> Responding Material, paragraph 49 and Tab "X", pages 1 and 21 (pages 5 and 25 of 33).

64. Despite these conclusions about the storage compensation currently paid to Crowland Pool landowners, Elenchus took into account a broader range of considerations as it developed its recommendation for storage compensation. Elenchus used the principles in the Crozier report as a basis for further analysis and it considered the history of storage compensation payments both to Crowland Pool landowners and to landowners at other Enbridge designated storage areas. In seeking to achieve a fair balance of all of these considerations, Elenchus recommended that the current amount of $6.00 per acre per year paid to Crowland Pool landowners should be increased by 43.5% to $8.61 per acre per year to account for the fact that Crowland Pool storage compensation was not adjusted during the period from 2004 to 2014. Elenchus also recommended an additional increase of 2.36% to bring forward the 2014 amount of $8.61 per acre per year to a 2015 amount of $8.81 per acre per year.

> Responding Material, Tab "X", pages 1 and 21 (pages 5 and 25 of 33).

65. Should the Board conclude, that there was not an agreement for payment of lump sum storage compensation to the Babirads (and subject to Enbridge's submissions, above, about

delay[4] and payment of double compensation[5]) Enbridge submits that storage compensation determined in accordance with the recommendations in the Elenchus report is just and equitable compensation to Mr. Babirad.

F. Conclusion

66. Enbridge therefore submits that:

> (i) the Babirad Application should be dismissed because storage compensation in respect of the Property has been agreed upon and paid as a one-time lump sum payment and the Board's jurisdiction to determine compensation arises only "failing agreement";
>
> (ii) even if the Board decides that it will determine just and equitable compensation, there should be no further compensation payable to Mr. Jim Babirad, because a lump sum payment of $800 was made in 1965 and any further compensation in addition to the lump sum payment would be double compensation;
>
> (iii) given the very lengthy delay that has occurred since the Leave to Inject, Store and Withdraw Order that triggered the Board's jurisdiction to determine storage compensation (failing agreement), it would not be just and equitable for the Board to allow the claim for compensation made in the Babirad Application; and
>
> (iv) should the Board nonetheless decide that it will proceed to determine just and equitable compensation in addition to the lump sum payment of $800 that has already been made, any such (additional) compensation should be determined by taking into account compensation agreed to by other landowners and the recommendations in the Elenchus report.

67. Enbridge submits further that it would be contrary to the evidence on the record in this proceeding to conclude that the Crowland Pool should be treated in a similar manner to Enbridge's Lambton area pinnacle reef storage reservoirs insofar as storage compensation is concerned. For this reason, and the other reasons set out above, the Board should reject any

[4] See "Delay or Laches", above.
[5] See paragraph 44, above.

arguments about payment of Lambton area storage compensation rates to Crowland Pool landowners.

All of which is respectfully submitted.

April 10, 2015

ORIGINAL SIGNED

Counsel for Enbridge Gas Distribution Inc.

Tab “A”

CHAPTER 74

The Ontario Energy Board Act, 1964

Assented to March 25th, 1964
Session Prorogued May 8th, 1964

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

1. In this Act, Interpretation

1. "associate" means a person, whether directly or indirectly through one or more intermediaries,

   i. who has the power to direct or to cause to be directed the management and policies of any gas transmitter, distributor or storage company,

   ii. whose management and policies any gas transmitter, distributor or storage company has the power to direct or to cause to be directed,

   iii. whose management and policies any other person has the power to direct or to cause to be directed, provided that such other person has such power to direct or to cause to be directed the management and policies of any gas transmitter, distributor or storage company;

2. "Board" means the Ontario Energy Board;

3. "distributor" means a person who supplies gas or fuel oil to a consumer, and "distribute" and "distribution" have corresponding meanings;

4. "fuel oil" means a hydrocarbon within the meaning of Specification 3-GP. 2C of the Canadian Government Specification Board that has a flash-point of not less than 100°F.;

5. "gas" means natural gas, manufactured gas or liquefied petroleum gas or any mixture of any of them;

6. "hydrocarbon" means a chemical compound of carbon and hydrogen, and includes any gaseous substance that may be used as fuel;

7. "land" includes any interest in land;

8. "manufactured gas" includes a mixture of liquefied petroleum gas and air distributed by pipe line;

9. "Minister" means the Minister of Energy and Resources Management;

10. "oil" means crude oil, and includes any hydrocarbon that can be recovered in liquid form from a pool through a well;

11. "owner" includes a person who is a mortgagee, lessee, tenant and occupant of land and a guardian, committee, executor, administrator or trustee in whom land is vested;

R.S.O. 1960, c. 191

12. "person", in addition to its meaning in *The Interpretation Act*, includes a municipality;

13. "pipe line" means a pipe that carries a hydrocarbon, other than undiluted liquefied petroleum gas, and includes every part thereof and adjunct thereto;

14. "producer" means a person who has the right to remove gas or oil from a well, and "produce" and "production" have corresponding meanings except when referring to documents or records;

15. "regulations" means the regulations made under this Act;

16. "station" means a compressor station, a metering station, an odorizing station or a regulating station;

17. "storage company" means a person engaged in the business of storing gas;

18. "transmission line" means a pipe line, other than a production line, a distribution line, a pipe line within an oil refinery, oil or petroleum storage depot, chemical processing plant or pipe line terminal or station;

19. "transmitter" means a person who carries a hydrocarbon by transmission line, and "transmit" and "transmission" have corresponding meanings;

20. "utility line" means a pipe line, a telephone, telegraph, electric power or water line, or any other line that supplies a service or commodity to the public;

21. "well" means a well drilled or bored for gas or oil, and includes a hole drilled or bored for obtaining sub-surface information, an injection well, a well for the disposal of waste substances and any other type of service well, a well for the storage of hydrocarbons, and an observation well, but does not include a well for the extraction of salt or brine or a well for the supply of water, except that, where gas or oil is encountered during any drilling or boring operation, the operation thereupon becomes a well;

22. "work" means a well, equipment or pipe line and every part thereof and adjunct thereto that is used in the drilling for or production of gas or oil or the storage or distribution of gas or fuel oil, or the transmission of a hydrocarbon or the manufacture of gas. R.S.O. 1960, c. 271, s. 1, *amended*.

PART I

THE BOARD

Board, composition

2.—(1) The Ontario Energy Board shall continue to consist of not fewer than three and not more than five members as the Lieutenant Governor in Council may from time to time determine.

appointment

(2) The members of the Board shall be appointed by the Lieutenant Governor in Council, and one of them shall be designated chairman and one or more of them may be designated vice-chairmen.

vacancies

(3) Vacancies in the membership of the Board caused by death, resignation or otherwise may be filled by the Lieutenant Governor in Council.

quorum

(4) Two members of the Board form a quorum and are sufficient for the exercise of all the jurisdiction and powers of the Board whether or not a vacancy in the membership of the Board exists. R.S.O. 1960, c. 271, ss. 2-4, *amended*.

Secretary 1961-62, c. 121

3.—(1) A secretary of the Board and such assistant secretaries as are deemed necessary may be appointed under *The Public Service Act, 1961-62*. R.S.O. 1960, c. 271, s. 6 (1), *amended*.

Acting secretary

(2) Where the office of secretary is vacant or in his absence or inability to act, the Board may designate a member of the Board or an assistant secretary to act *pro tempore* as secretary. R.S.O. 1960, c. 271, s. 6 (3).

Staff

4. The staff of the Board shall consist of such officers and employees as are deemed necessary. R.S.O. 1960, c. 271, s. 6 (4).

Power to administer oaths

5. Every member of the Board and its secretary has, for the purposes of this Act and every other Act under which the Board functions, the same powers as a commissioner for taking affidavits in Ontario. R.S.O. 1960, c. 271, s. 5.

Protection from being called as witnesses

6.—(1) No member of the Board or its secretary or any of its staff shall be required to give testimony in any proceedings with regard to information obtained by him in the discharge of his official duties.

Protection from personal liability

(2) No member of the Board or its secretary or any of its staff is personally liable for anything done by it or by him under the authority of this or any other Act. R.S.O. 1960, c. 271, s. 7.

Certified copies

7. Upon application of any person and upon payment of the prescribed fee, a member of the Board or the secretary shall certify and deliver to such person a true copy of any order or reasons for decision of the Board. R.S.O. 1960, c. 271, s. 8, *amended*.

Assistance

8. The Lieutenant Governor in Council may appoint from time to time one or more persons having technical or special knowledge of any matter in question to inquire into and report to the Board and to assist the Board in any capacity in respect of any matter before it. R.S.O. 1960, c. 271, s. 9.

Annual report

9.—(1) The Board shall make a report annually to the Minister containing such information as the Minister requires.

Idem

(2) The Minister shall submit the report to the Lieutenant Governor in Council and shall then lay the report before the Assembly if it is in session or, if not, at the next ensuing session. R.S.O. 1960, c. 271, s. 39, *amended*.

Money

10. The moneys required for the purposes of the Board shall be paid out of the moneys that are appropriated therefor by the Legislature. R.S.O. 1960, c. 271, s. 10.

11.

11.—(1) The Board shall adopt an official seal. R.S.O. 1960, c. 271, s. 11 (1). Seal

(2) All orders made by the Board shall be signed by the chairman, a vice-chairman, the secretary or an assistant secretary and sealed with the seal of the Board, and, when purporting to be so signed and sealed, shall be judicially noticed without further proof. R.S.O. 1960, c. 271, s. 11 (2), *amended.* Signing of orders

(3) *The Regulations Act* does not apply to the orders of the Board. R.S.O. 1960, c. 271, s. 11 (3). R.S.O. 1960, c. 349, not to apply

12. No authority given by the Board under this or any other Act shall be assigned without the leave of the Board. *New.* Assignment of authority

13.—(1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact. Power to determine law and fact

(2) Subject to subsection 2 of section 35, where a proceeding before the Board is commenced by the filing of an application, the Board shall proceed by order. R.S.O. 1960, c. 271, s. 12 (1), *amended.* Applications

(3) Where a proceeding before the Board is commenced by a reference to the Board by the Minister, the Board shall proceed in accordance with the reference. References

(4) Where a proceeding before the Board is commenced by requirement of the Lieutenant Governor in Council, the Board shall proceed in accordance with the requirement. *New.* Orders in council

(5) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act. R.S.O. 1960, c. 271, s. 12 (2). Jurisdiction exclusive

14. The Board for the due exercise of its jurisdiction and powers and otherwise for carrying into effect this or any other Act has all such powers, rights and privileges as are vested in the Supreme Court with respect to the amendment of proceedings, addition or substitution of parties, attendance and examination of witnesses, production and inspection of documents, entry on and inspection of property, enforcement of its orders and all other matters necessary or proper therefor. R.S.O. 1960, c. 271, s. 13. Powers of Supreme Court exercisable by Board

15.—(1) The Board may at any time on its own motion and without a hearing approve the form of a document or Board's powers, miscellaneous

give

give directions or require the preparation of evidence incidental to the exercise of the powers conferred upon the Board by this or any other Act.

ex parte orders

(2) The Board, if it is satisfied that the special circumstances of the case so require or that the delay necessary to give notice of an application might entail serious mischief, may make an *ex parte* order respecting the practice and procedure in any proceeding before it. *New.*

Hearings

(3) Subject to subsections 1 and 2 of this section, subsection 5 of section 19, subsection 2 of section 22, section 23 and subsection 2 of section 37 of this Act and to subsection 2 of section 6 of *The Energy Act, 1964*, the Board shall not make any order or proceed in accordance with any reference or order in council under this or any other Act until it has held a hearing upon notice in such manner and to such persons as the Board directs.

1964, c. 27

Proceedings, public

(4) Every proceeding before the Board shall be open to the public. R.S.O. 1960, c. 271, s. 14 (1, 2), *amended.*

place of

(5) The Board may hear any application or deal with any matter at any place in Ontario that it appoints. R.S.O. 1960, c. 271, s. 14 (3).

use of court house

(6) Where sittings of the Board are to be held in a municipality in which a court house is situate, the Board and its members have in all respects the same authority and right as a judge of the Supreme Court with respect to the use of the court house and any part thereof and of other buildings and rooms set aside in the municipality for the administration of justice.

use of municipal hall

(7) Where sittings of the Board are to be held in a municipality in which there is a hall belonging to the corporation thereof, but no court house, the corporation shall, upon request, allow such sittings to be held in such hall and shall make all arrangements necessary and suitable for such purpose. *New.*

adjournment and interim orders

(8) The Board may adjourn any proceeding from time to time and may make interim orders pending the final disposition of the matter before it. R.S.O. 1960, c. 271, s. 14 (4), *amended.*

Terms and conditions of orders

16. The Board in making an order may impose such terms and conditions as it deems proper, and an order may be general or particular in its application. R.S.O. 1960, c. 271, s. 14 (5).

17.

17.—(1) Where an application has been opposed, the Board shall prepare written reasons for its decision. Reasons for decision

(2) Where an application has been unopposed, the Board may, and at the request of the applicant shall, prepare written reasons for its decision. Idem

(3) All written reasons of the Board shall be kept by the secretary or an assistant secretary and made available to any person upon payment of the prescribed fee. R.S.O. 1960, c. 271, s. 14 (6), *amended*. Idem

18. An order of the Board is a good and sufficient defence to any action or other proceeding brought or taken against any person in so far as the act or omission that is the subject of such action or other proceeding is in accordance with the order. R.S.O. 1960, c. 271, s. 16. Obedience to orders of Board a good defence

19.—(1) Subject to the regulations, the Board may make orders approving or fixing just and reasonable rates and other charges for the sale of gas by transmitters, distributors and storage companies, and for the transmission, distribution and storage of gas. R.S.O. 1960, c. 271, s. 17 (1). Rates

(2) Notwithstanding anything to the contrary, the Board may dispense with the determination of a rate base, Where rate base may be dispensed with

(*a*) in the case of a transmitter, distributor or storage company that has been carrying on business by itself and by its predecessor, if any, for less than two years;

(*b*) in the case of the approval or fixing of rates or other charges that, in the opinion of the Board, are of limited application and will not materially affect the revenues and expenditures of the transmitter, distributor or storage company; or

(*c*) in the case of an order under subsection 8 of section 15 or subsection 5 of this section. 1961-62, c. 91, s. 1 (1).

(3) Subject to the regulations, no transmitter, distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract entered into prior to the day upon which this Act comes into force. R.S.O. 1960, c. 271, s. 17 (2). Prohibition as to sale, etc., of gas

(4) Subject to subsection 6, at any hearing with respect to rates or other charges for the sale, transmission, distribution or storage of gas, the burden of proof is on the applicant. Burden of proof

(5)

Interim rate orders

(5) The Board may, at the request of any applicant, without a hearing, make one or more orders under subsection 1, each effective for a period of not more than one year, pending a final disposition of the application,

(*a*) where the rates or other charges proposed in the application are the initial rates or other charges for the sale, transmission, distribution or storage of gas by the transmitter, distributor or storage company in the municipality or area named in the application;

(*b*) where, after notice of the application has been given in accordance with the regulations, no one has filed an answer within the time limited therefor;

(*c*) where the application is for approving or fixing prompt-payment discounts or delayed-payment penalties;

(*d*) where the transmitter, distributor or storage company is selling, transmitting, distributing or storing gas, as the case may be, at a loss; or

(*e*) where the application does not contain a request for an increase in the rates or other charges then being charged for the sale, transmission, distribution or storage of gas by the transmitter, distributor or storage company.

Idem

(6) The Board of its own motion may, and upon the request of the Lieutenant Governor in Council shall, hold a hearing for the purpose of inquiring into and determining whether any of the rates or other charges for the sale, transmission, distribution or storage of gas by any transmitter, distributor or storage company are just and reasonable, and shall, after such hearing, make an order under subsection 1, and in any such hearing the burden of establishing that such rates or other charges are just and reasonable is on the transmitter, distributor or storage company, as the case may be. 1961-62, c. 91, s. 1 (2), *amended.*

Where section does not apply

R.S.O. 1960 c. 335

(7) This section does not apply to any municipality or municipal public utility commission transmitting or distributing gas under *The Public Utilities Act*. *New.*

Prohibition

20. No person shall inject gas for storage into a geological formation unless the geological formation is within a designated gas storage area and unless, in the case of gas storage areas designated after the 31st day of January, 1962, authorization so to do has been obtained under section 21 or its predecessor. 1961-62, c. 40, s. 2 (4), *amended.*

21.

Authority to store

21.—(1) The Board by order may authorize a person to inject gas into, store gas in and remove gas from a designated gas storage area, and to enter into and upon the land in the area and use the land for such purposes. R.S.O. 1960, c. 271, s. 19 (1), *amended.*

Right to compensation

(2) Subject to any agreement with respect thereto, the person authorized by an order under subsection 1,

(*a*) shall make to the owners of any gas or oil rights or of any right to store gas in the area fair, just and equitable compensation in respect of such gas or oil rights or such right to store gas; and

(*b*) shall make to the owner of any land in the area fair, just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by such order. R.S.O. 1960, c. 271, s. 19 (2).

Recovery of compensation

(3) No action or other proceeding lies in respect of such compensation, and, failing agreement, the amount thereof shall be determined by a board of arbitration in the manner prescribed in the regulations, and *The Arbitrations Act* does not apply. R.S.O. 1960, c. 271, s. 19 (3), *amended.*

R.S.O. 1960, c. 18

Appeal

(4) An appeal lies to the Ontario Municipal Board from an award of the board of arbitration.

Notice of appeal

(5) Notice of an appeal under subsection 4 shall set forth the grounds of appeal and shall be sent by registered mail by the party appealing to the secretary of the Ontario Municipal Board and to the other party within fourteen days after the making of the award or within such further time as the Ontario Municipal Board, under the special circumstances of the case, allows.

Nature of appeal

(6) The hearing of an appeal under subsection 4 shall be a hearing *de novo*, and *The Ontario Municipal Board Act* applies thereto.

R.S.O. 1960, c. 274

Further appeal

(7) An appeal within the meaning of section 95 of *The Ontario Municipal Board Act* lies from the Ontario Municipal Board to the Court of Appeal, in which case that section applies. R.R.O. 1960, Reg. 459, s. 5 (5-8), *amended.*

Determination of compensation

(8) For the purposes of subsection 3 of section 10 of *The Expropriation Procedures Act, 1962-63*, this section shall be deemed to be section 19 of *The Ontario Energy Board Act* referred to therein. *New.*

1962-63, c. 43

R.S.O. 1960, c. 271

22.

Allocation of surplus storage facilities

22.—(1) Upon the application of a transmitter or distributor, the board, by order, may direct a storage company having storage capacity and facilities that are not in full use to provide all or part of such storage capacity and facilities for the applicant upon such terms and conditions as are determined by the Board.

Gas storage agreements to be approved

(2) No storage company shall on or after the day on which this Act comes into force enter into any agreement or renew any agreement with a transmitter or distributor with respect to the storage of gas unless,

(*a*) the parties to the agreement or renewal;

(*b*) the period for which the agreement or renewal is to be in operation; and

(*c*) the storage that is the subject of the agreement or renewal,

have first been approved by the Board with or without a hearing. *New.*

Applications to drill well to be referred to Board

23. The Minister shall refer every application for a permit to bore, drill or deepen a well in a designated gas storage area to the Board, and the Board shall report to the Minister thereon, but, where the applicant does not have authority to store gas in the area or where, in the opinion of the Board, the special circumstances of the case so require, the Board shall hold a hearing before reporting to the Minister, and in either event the Minister shall grant or refuse to grant the permit in accordance with the report. *New.*

Allocation of market demand and joining interests in spacing units and pools

24. The Board by order may,

(*a*) allocate a just and equitable share of the market demands for gas or oil to the several sources from which such gas or oil is produced and to the several interests within a field or pool;

(*b*) require the joining of the various interests within a spacing unit for the purpose of drilling or operating a well and the apportioning of the costs and the benefits of such drilling or operation; or

(*c*) require and regulate the joining of the various interests within a field or pool for the purpose of drilling or operating wells, the designation of management and the apportioning of the costs and the benefits of such drilling or operation. *New.*

25.

Discontinuation of gas supply

25. Subject to *The Public Utilities Act* and to *The Energy Act, 1964*, and in the absence of an agreement to the contrary between the parties affected, no transmitter shall voluntarily discontinue transmitting gas to a distributor without the leave of the Board, and no distributor shall voluntarily discontinue distributing gas by pipe line to a consumer without the leave of the Board. R.S.O. 1960, c. 271, s. 21, *amended*.

R.S.O. 1960, c. 335
1964, c. 27

Payment out of Fund

26. The Board may order the payment of money out of the Abandoned Works Fund under *The Energy Act, 1964*. R.S.O. 1960, c. 271, s. 20.

Practice and procedure

27. Subject to the approval of the Lieutenant Governor in Council, the Board may make rules regulating its practice and procedure. R.S.O. 1960, c. 271, s. 22.

Costs

28.—(1) The costs of and incidental to any proceeding before the Board are in its discretion and may be fixed in any case at a sum certain or may be taxed.

Idem

(2) The Board may order by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed.

Idem

(3) The Board may prescribe a scale under which such costs shall be taxed.

Idem

(4) In this section, the costs may include the costs of the Board, regard being had to the time and expenses of the Board. R.S.O. 1960, c. 271, s. 23.

Enforcement of orders

29.—(1) A certified copy of any order made by the Board, exclusive of the reasons therefor, may be filed in the office of the Registrar of the Supreme Court, whereupon the order shall be entered in the same way as a judgment or order of that court and is enforceable as such. R.S.O. 1960, c. 271, s. 15 (1), *amended*.

Effect of filing

(2) Any order so filed may be rescinded or varied by the Board at any time in the manner provided in section 30.

Direction to sheriff

(3) An order of the Board requiring a person to pay money to the Board, to any party to a proceeding before the Board or to any other person as costs or otherwise may be enforced by a written direction from the Board to the sheriff of any county or district endorsed upon or annexed to a certified copy of the order.

Effect of direction

(4) The sheriff receiving such a direction shall levy the amount named therein with his costs and expenses in like manner and with the same power as if the endorsed order were an execution issued out of the Supreme Court against

the

the goods of the person named in the order, and the order so endorsed constitutes a lien and charge upon the property, real or personal, or the interest therein of the person named in the order, that is situate in such county or district to the same extent and in the same manner as the property would be bound by the filing with the sheriff of an execution issued after judgment of the Supreme Court.

Land titles

(5) Where the person named in any such order holds lands or any interest therein that is registered in a land titles office, the Board may register a certified copy of the order with the proper master of titles, and, when so registered, it constitutes a lien and charge upon the land to the same extent and in the same manner as an execution issued after judgment in the Supreme Court and registered with the proper master of titles.

Idem

(6) The amount ordered to be paid by any order registered under subsection 5 may be realized in the same manner and by the same proceedings *mutatis mutandis* as the amount of any registered execution of the Supreme Court. R.S.O. 1960, c. 271, s. 15 (2-6).

Power to review

30. The Board may at any time and from time to time rehear or review any application before deciding it, and may by order rescind or vary any order made by it. R.S.O. 1960, c. 271, s. 24, *amended*.

Stated case

31.—(1) The Board may, at the request of the Lieutenant Governor in Council or of its own motion or upon the application of any party to proceedings before the Board and upon such security being given as it directs, state a case in writing for the opinion of the Court of Appeal upon any question that, in the opinion of the Board, is a question of law.

Idem

(2) The Court of Appeal shall hear and determine the stated case and remit it to the Board with the opinion of the Court thereon. R.S.O. 1960, c. 271, s. 26.

Appeal to Court of Appeal

32.—(1) An appeal lies to the Court of Appeal from any order of the Board upon a question of law or jurisdiction, but no such appeal lies unless leave to appeal is obtained from the Court within one month of the making of the order sought to be appealed from or within such further time as the Court under the special circumstances of the case allows.

Board may be heard

(2) The Board is entitled to be heard by counsel or otherwise upon the argument of any such appeal.

Board to act on Court's opinion

(3) The Court of Appeal shall certify its opinion to the Board and the Board shall make an order in accordance with such opinion, but in no case shall such order be retroactive in its effect.

Costs, rules of practice

(4) The Supreme Court may fix the costs and fees to be taxed, allowed and paid upon appeals under this section and make rules of practice respecting such appeals, but, until such rules are made, the rules of practice applicable to appeals from a judge of the Supreme Court to the Court of Appeal are applicable to appeals under this section.

Board not liable for costs

(5) The Board, or any member thereof, is not liable for costs in connection with any appeal or application for leave to appeal under this section.

Order to take effect notwithstanding appeal

(6) Every order made under section 19 takes effect at the time prescribed in the order, and its operation is not suspended by an appeal. R.S.O. 1960, c. 271, s. 27.

Lieutenant Governor in Council may confirm, vary or rescind orders

33.—(1) Upon the petition of any party or person interested, filed with the clerk of the Executive Council within sixty days after the date of any order or decision of the Board, the Lieutenant Governor in Council may,

(*a*) confirm, vary or rescind the whole or any part of such order or decision; or

(*b*) require the Board to hold a new public hearing of the whole or any part of the application to the Board upon which such order or decision of the Board was made,

and the decision of the Board after the public hearing ordered under clause *b* is not subject to petition under this section. R.S.O. 1960, c. 271, s. 25, *amended*.

Orders of Board heretofore made

(2) For the purposes of this section, the date of every order heretofore made by the Board shall be deemed to be the date this Act comes into force. *New*.

Offences

34.—(1) Every person who contravenes any provision of this Act or the regulations or any order of the Board is guilty of an offence and on summary conviction is liable to a fine of not less than $200 and not more than $2,000 for each day over which the offence continues or to imprisonment for a term of not more than two years less a day, or to both.

Permission of the Minister

(2) No information may be laid under this section without the written permission of the Minister in the form prescribed in the regulations. R.S.O. 1960, c. 271, s. 38, *amended*.

Regulations

35.—(1) The Lieutenant Governor in Council may make regulations,

(*a*) limiting, restricting or taking away any rights to use or consume gas without charge or at a reduced rate;

(*b*) requiring the Board to approve or fix rates or other charges under section 19;

(*c*) providing for compensation procedure for the owners of gas or oil rights and the rights to store gas and for the owners of land who are referred to in subsection 2 of section 21;

(*d*) prescribing the duties of the secretary, assistant secretary and officers of the Board;

(*e*) prescribing forms and providing for their use;

(*f*) prescribing fees payable to the Board;

(*g*) requiring and providing for the making of returns, statements or reports concerning energy by any person;

(*h*) prescribing classes of gas transmitters, distributors and storage companies;

(*i*) respecting the manner in which the accounts of gas transmitters, distributors and storage companies are to be kept;

(*j*) prescribing a uniform system of accounts applicable to any of the classes of gas transmitters, distributors or storage companies;

(*k*) upon the recommendation of the Board, designating any area as a gas storage area;

(*l*) exempting any person from the operation of or compliance with any provision of this Act;

(*m*) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act. R.S.O. 1960, c. 271, s. 28, *amended*.

Gas storage areas

(2) An application for a regulation designating a gas storage area shall be made to the Board, which shall hold a hearing thereon and make its recommendation to the Lieutenant Governor in Council. *New*.

References

36. The Lieutenant Governor in Council may require the Board to examine and report on any question respecting energy that, in the opinion of the Lieutenant Governor in Council, requires a public hearing. R.S.O. 1960, c. 271, s. 28, cl. (*j*), *amended*.

PART II

PART II

PIPE LINES

Leave to construct a transmission line

37.—(1) No person shall construct a transmission line without first obtaining from the Board an order granting leave to construct the transmission line. R.S.O. 1960, c. 122, s. 11, *amended*.

Exception

(2) The Board may, if in its opinion the special circumstances of a particular case so require, without a hearing exempt a person from the requirements of subsection 1. *New*.

Leave to construct in other cases

38. Any person may, before he constructs a production line, distribution line or station, apply to the Board for an order granting leave to construct the production line, distribution line or station. *New*.

Route map

39.—(1) An applicant for an order granting leave to construct a transmission line, production line, distribution line or a station shall file with his application a map showing the general location of the proposed line or station and the municipalities, highways, railways, utility lines and navigable waters through, under, over, upon or across which the proposed line is to pass.

Notice of application

(2) Notice of the application shall be given by the applicant in such manner as the Board directs and shall be given to the Department of Agriculture, the Department of Municipal Affairs, the Department of Highways and such persons as the Board directs. R.S.O. 1960, c. 122, s. 12 (1, 2), *amended*.

Objections

(3) Where an interested person desires to make objection to the application, such objection shall be given in writing to the applicant and filed with the Board within fourteen days after the giving of notice of the application and shall set forth the grounds upon which such objection is based.

Reply

(4) A reply to an objection may be given to the objector in writing and filed with the Board within fourteen days after the giving of the objection. R.S.O. 1960, c. 122, s. 12 (3, 4).

Hearing

(5) Where an application is opposed, it shall not be heard for at least thirty days after the day on which it was filed with the Board.

Idem

(6) Where an application is unopposed, it shall not be heard for at least fourteen days after the day on which it was filed with the Board. R.S.O. 1960, c. 122, s. 12 (5), *amended*.

Notice of hearing

(7) Notice of the time and place fixed by the Board for the hearing shall be given in accordance with subsection 2.

Power to grant leave

(8) Where after the hearing the Board is of the opinion that the construction of the proposed line or station is in the public interest, it may make an order granting leave to construct the line or station.

Agreements

(9) Leave to construct the line or station shall not be granted until the applicant satisfies the Board that it has offered or will offer to each landowner an agreement in a form approved by the Board.

Right to enter land

(10) Any person to whom the Board has granted leave to construct a line or station, his officers, employees and agents, may enter into or upon any land at the intended location of any part of the line or station and may make such surveys and examinations as are necessary for fixing the site of the line or station, and, failing agreement, any damages resulting therefrom shall be determined in the manner provided in section 41. R.S.O. 1960, c. 122, s. 12 (6-8, 10), *amended*.

Expropriation

40.—(1) Any person who has leave to construct a line or station under this Part or a predecessor of this Part may apply to the Board for authority to expropriate land for the purposes of the line or station, and the Board shall thereupon set a date for the hearing of such application, and such date shall be not fewer than fourteen days after the date of the application, and upon such application the applicant shall file with the Board a plan and description of the land required, together with the names of all persons having an apparent interest in the land. R.S.O. 1960, c. 122, s. 13 (1), *amended*.

Procedure

(2) The applicant shall serve notice of the application and notice of the hearing on such persons and in such manner as the Board directs.

Power to make order

(3) Where after the hearing the Board is of the opinion that the expropriation of the land is in the public interest, it may make an order authorizing the applicant to expropriate the land. R.S.O. 1960, c. 122, s. 13 (2, 3).

1962-63, c. 43, to apply

(4) Any person who is authorized under this section to expropriate land, and who desires so to do, shall do so in the manner set out in *The Expropriation Procedures Act, 1962-63*, and that Act applies to every such expropriation. *New*.

Compensation

41.—(1) The applicant shall make to the owner of land acquired by expropriation under this Part, or any predecessor of this Part, due compensation for the land and for any damages resulting from the exercise of such power.

(2) No action or other proceeding lies in respect of such compensation, and, failing agreement between the applicant and the owner, the amount thereof shall be determined in the manner provided in this section, and *The Arbitrations Act* does not apply. R.S.O. 1960, c. 122, s. 14 (1, 2), *amended*. Determination of amount; R.S.O. 1960, c. 18

(3) The Minister shall appoint one or more persons as a board of arbitration to determine in a summary manner the amount of such compensation. Board of arbitration

(4) Where the board of arbitration is composed of more than one person, the Minister shall designate one of them as chairman. Chairman

(5) The Lieutenant Governor in Council may make regulations governing the practice and procedure of the board of arbitration, and, until such regulations are made, the practice and procedure of the Ontario Municipal Board apply to any arbitration under this section. Procedure

(6) Where the board of arbitration is composed of more than one person, the decision of the majority of the members is the decision of the board, and, if a majority of the members fails to agree upon any matter, the decision of the chairman upon such matter is the decision of the board. Decision

(7) An appeal lies to the Ontario Municipal Board from an award of the board of arbitration. Appeal

(8) Notice of an appeal under this section shall set forth the grounds of appeal and shall be sent by registered mail by the party appealing to the secretary of the Ontario Municipal Board and to the other party within fourteen days after the making of the award or within such further time as the Ontario Municipal Board, under the special circumstances of the case, allows. Notice of appeal

(9) The hearing of an appeal under this section shall be a hearing *de novo*, and *The Ontario Municipal Board Act* applies thereto. Nature of appeal; R.S.O. 1960, c. 274

(10) An appeal within the meaning of section 95 of *The Ontario Municipal Board Act* lies from the Ontario Municipal Board to the Court of Appeal, in which case that section applies. R.S.O. 1960, c. 122, s. 14 (3-10). Further appeal

(11) For the purposes of subsection 2 of section 10 of *The Expropriation Procedures Act, 1962-63*, Determination of compensation; 1962-63, c. 43

(a) an applicant under this Part shall be deemed to be a corporation; and

(*b*) this section shall be deemed to be section 14 of *The Energy Act*, being chapter 122 of the Revised Statutes of Ontario, 1960. *New.*

Crossings with leave

42.—(1) Any person who has leave to construct a line may apply to the Board for authority to construct it upon, under or over a highway, utility line or ditch.

Procedure

(2) The procedure set forth in subsections 1 and 2 of section 40 applies *mutatis mutandis* to an application under this section.

Order

(3) Without any other leave and notwithstanding any other Act, where after the hearing the Board is of the opinion that the construction of the line upon, under or over a highway, utility line or ditch, as the case may be, is in the public interest, it may make an order authorizing the applicant so to do upon such terms and conditions as it considers proper. R.S.O. 1960, c. 122, s. 15, *amended.*

Right to compensation for damages during construction

43. Any person who has acquired land for the purposes of his line or station by agreement with the owner of the land shall make to the owner of the land due compensation for any damages resulting from the exercise of his rights under the agreement, and, if the compensation is not agreed upon by them, it shall be determined in the manner prescribed by section 41. R.S.O. 1960, c. 122, s. 16, *amended.*

Right of entry and compensation

44. Any person, his servants or agents, who,

(*a*) require at any time to enter upon any land to gain access to his right of way established under this Part, or a predecessor thereof, for the purpose of maintaining, repairing, renewing or removing his line or part of it;

(*b*) require at any time to enter upon any land to gain access directly to his pipe line or any part thereof for the purpose of effecting emergency repairs to his pipe line,

have the right to do so without the consent of the owner of the land so entered, and compensation for any damages resulting from the exercise of such right, if not agreed upon by such person and the owner of the land, shall be determined in the manner prescribed by section 41. R.S.O. 1960, c. 122, s. 17, *amended.*

Board's decision final

45. The decision of the Board on any application to it under this Part is final and conclusive. R.S.O. 1960, c. 122, s. 18.

46.

Where R.S.O. 1960, c. 335, s. 58 not to apply

46. Where leave to construct a line has been granted under this Part, section 58 of *The Public Utilities Act* does not apply to such line. R.S.O. 1960, c. 122, s. 19 (2).

Inspectors 1961-62, c. 121

47.—(1) One or more inspectors may be appointed under *The Public Service Act, 1961-62* for the purposes of this Part.

Idem

(2) The Minister may, with the approval of the Lieutenant Governor in Council, make regulations prescribing the duties of such inspectors. R.S.O. 1960, c. 122, s. 20.

PART III

ENERGY RETURNS OFFICER

Energy Returns Officer 1961-62, c. 121

48.—(1) There may be appointed under *The Public Service Act, 1961-62* an officer known as the Energy Returns Officer who shall assist the Board. R.S.O. 1960, c. 271, s. 29 (1), *amended.*

Staff

(2) The staff of the Energy Returns Officer shall consist of such deputy officers and employees as are deemed necessary.

Information privileged

(3) Neither the Energy Returns Officer nor any of his staff shall be required to give testimony in any civil suit with regard to information obtained by him in the discharge of his official duties.

No personal liability

(4) Neither the Energy Returns Officer nor any of his staff is personally liable for anything done by him under the authority of this Act or the regulations.

May take oaths

(5) The Energy Returns Officer and every deputy officer has, for the purposes of this Act and the regulations, the same powers as a commissioner for taking affidavits in Ontario. R.S.O. 1960, c. 271, s. 29 (2-4, 6).

Assistance

49. The Lieutenant Governor in Council may appoint from time to time one or more persons having technical or special knowledge of any matter in question to inquire into and report to the Energy Returns Officer and to assist the Energy Returns Officer in any capacity. R.S.O. 1960, c. 271, s. 30.

Production of documents, etc.

50. The Energy Returns Officer may for the purposes of this Act and the regulations, by registered letter or by a demand served personally, require from any gas transmitter, distributor, storage company or associate any information relating to the business of transmitting, distributing or storing gas or transactions with gas transmitters, distributors

or

or storage companies, or further explanation or details of such information or the production, or the production on oath, of any document or record connected with the business of transmitting, distributing or storing gas within such reasonable time as is stipulated in such letter. R.S.O. 1960, c. 271, s. 31.

Power to enter, etc.

51. When authorized in writing by the chairman of the Board in the form prescribed by the regulations, the Energy Returns Officer and every other person so authorized may, for the purposes of this Act and the regulations, at all reasonable times, enter into any premises or place where any gas transmitter, distributor, storage company or associate is carrying on business or keeps any document or record connected with the business of transmitting, distributing or storing gas, or connected with any transaction with a gas transmitter, distributor or storage company, or does or has done anything to any such document or record, and may examine any such document or record, and may conduct audits, and may require any such gas transmitter, distributor, storage company or associate or its officers or directors to give all reasonable assistance with such examination or audit and to answer all proper questions relating to the examination or audit, either orally or in writing, on oath or by statutory declaration, and may, upon giving a receipt therefor, remove any such document or record from such premises or place for the purpose of photocopying such document or record, provided that such photocopying is carried out with reasonable dispatch and such document or record is immediately thereafter returned to such gas transmitter, distributor, storage company or associate and the return thereof is acknowledged in writing. R.S.O. 1960, c. 271, s. 32.

Notifying Board

52. The Energy Returns Officer shall notify the Board of all matters he thinks relevant to Board proceedings or possible future Board proceedings. R.S.O. 1960, c. 271, s. 34.

Witnesses

53.—(1) The Energy Returns Officer, any deputy officer, any person authorized by the chairman of the Board in writing under section 51 and any inspector may be called as a witness by the Board. R.S.O. 1960, c. 271, s. 35 (1), *amended.*

No privilege

(2) No document, record or photocopy thereof in the hands of the Energy Returns Officer shall be excluded as evidence on the ground of privilege.

Owner to be party

(3) No document, record or photocopy thereof or any return made under this Part in the hands of the Energy Returns Officer shall be introduced in evidence in any proceeding unless the owner of the document or record or the

maker

maker of the return is a party to that proceeding or an associate of a party to that proceeding. R.S.O. 1960, c. 271, s. 35 (2, 3).

Information confidential

54.—(1) All information and material furnished to or received or obtained by the Energy Returns Officer, his deputy officers and employees or any person authorized by the chairman of the Board in writing under section 51 is confidential.

Idem

(2) No person shall otherwise than in the ordinary course of his duties communicate any such information or allow access to or inspection of any such material.

Offence

(3) Every person who contravenes any of the provisions of subsection 2 is guilty of an offence and on summary conviction is liable to a fine of not more than $1,000. R.S.O. 1960, c. 271, s. 36.

Permission of the Minister

(4) No information may be laid under this section without the written permission of the Minister in the form prescribed in the regulations. R.S.O. 1960, c. 271, s. 38 (2), *amended*.

Not evidence in certain proceedings

55. No document, record or photocopy thereof or any return made under this Part is admissible in evidence in any proceeding except proceedings respecting an order of the Board or in summary proceedings with respect to offences under section 34. R.S.O. 1960, c. 271, s. 37, *amended*.

PART IV

MISCELLANEOUS AND TRANSITIONAL

Conflict

56.—(1) In the event of conflict between this Act and any other general or special Act, this Act prevails.

Idem

(2) This Act and the regulations prevail over any by-law passed by a municipality.

Existing orders adopted

57.—(1) Every order and decision made under,

(*a*) *The Fuel Supply Act*, being chapter 152 of the Revised Statutes of Ontario, 1950;

(*b*) *The Natural Gas Conservation Act*, being chapter 251 of the Revised Statutes of Ontario, 1950;

(*c*) *The Well Drillers Act*, being chapter 423 of the Revised Statutes of Ontario, 1950;

1954, c. 63

(*d*) *The Ontario Fuel Board Act, 1954*;

1960, c. 75

(*e*) *The Ontario Energy Board Act, 1960*; or

(*f*) *The Ontario Energy Board Act*, being chapter 271 of the Revised Statutes of Ontario, 1960,

that were in force on the day this Act came into force shall be deemed to have been made by the Board under this Act.

Applications pending before Ontario Fuel Board

(2) Every application that was pending before the Ontario Fuel Board on the 31st day of August, 1960, shall be deemed to be an application before the Ontario Energy Board under this Act. R.S.O. 1960, c. 271, s. 40 (1, 2), *amended*.

References to Ontario Fuel Board

(3) Any reference in any Act to the Ontario Fuel Board shall be deemed to be a reference to the Ontario Energy Board. R.S.O. 1960, c. 271, s. 40 (3).

R.S.O. 1960, c. 271; 1960-61, c. 64; 1961-62, c. 91, repealed

58. *The Ontario Energy Board Act*, *The Ontario Energy Board Amendment Act, 1960-61* and *The Ontario Energy Board Amendment Act, 1961-62* are repealed.

Commencement

59. This Act comes into force on a day to be named by the Lieutenant Governor by his proclamation.

Short title

60. This Act may be cited as *The Ontario Energy Board Act, 1964*.

CHAPTER

ONTARIO ENERGY BOARD ACT

R.S.O. 1960, Chap. 271

Amended 1960-61, c. 64; in force March 29, 1961

Amended 1961-62, c. 91; in force April 18, 1962

Repealed by 1964, c. 74, s. 58 (proclaimed in force January 1, 1965) and superseded by the ONTARIO ENERGY BOARD ACT, 1964 *which see*

Section 14

(For cases 1930 to 1960 see *Ontario Statute Annotations*)

ONTARIO ENERGY BOARD ACT, 1964

1964, Chap. 74; assented to March 25, 1964 and proclaimed in force January 1, 1965.

Amended 1965, c. 83; in force June 22, 1965.

Amended 1967, c. 64; in force April 26th, 1967.

Amended 1968-69, c. 81; in force, except s. 7, October 31, 1969;

s. 7 deemed in force October 22, 1969

Amended 1970, c. 60; in force June 26, 1970

Administered by the Ontario Energy Board

Tab “B”

Publications Under The Regulations Act

December 26th, 1964

THE ONTARIO ENERGY BOARD ACT, 1964

O. Reg. 323/64.
General.
Made—December 10th, 1964.
Filed—December 11th, 1964.

NOTE: *This Regulation does not come into operation until The Ontario Energy Board Act, 1964 is proclaimed in force.*
See R.S.O. 1960, c. 191, s. 5.

REGULATION MADE UNDER
THE ONTARIO ENERGY BOARD ACT, 1964

GENERAL

FEES

1.—(1) The fee payable on filing an application in a proceeding before the Board under the Act or any other Act is $25, but where the application is made under section 40 of the Act and is withdrawn before the hearing of such application the applicant is entitled to a refund of $15.

(2) The fees payable for certified copies of documents are,

(*a*) for each certificate, 50 cents; and

(*b*) for each 100 words of the document, 15 cents with a minimum fee of 50 cents.

FREE GAS OR REDUCED CHARGE

2.—(1) No person shall furnish or supply any gas without charge or at a reduced rate under any agreement for which the supplying of gas without charge or at a reduced rate is a consideration.

(2) Subsection 1 does not apply to any agreement or renewal thereof made before the 1st day of January, 1955.

3.—(1) The board of arbitration referred to in subsection 3 of section 21 of the Act shall consist of not fewer than three and not more than five members as the Lieutenant Governor in Council may from time to time determine.

(2) The members of the board of arbitration shall be appointed by the Lieutenant Governor in Council and one of them shall be designated chairman.

(3) Vacancies in the membership of the board of arbitration caused by death, resignation or otherwise may be filled by the Lieutenant Governor in Council.

(4) Two members of the board of arbitration form a quorum and are sufficient for the exercise of all the jurisdiction and powers of the board of arbitration whether or not a vacancy in the membership of the board of arbitration exists.

(5) The board of arbitration shall proceed in a summary manner and the rules of procedure of the Ontario Energy Board apply to an arbitration under section 21 of the Act.

EXEMPTIONS

4. Any person who sells, transmits, distributes or stores liquefied petroleum gas is exempt from section 19 of the Act in respect of such sale, transmission, distribution or storage.

FORMS

5.—(1) The authorization of the chairman of the Board required by section 51 of the Act shall be in Form 1.

(2) The permission of the Minister to lay an information under section 34 or 54 of the Act shall be in Form 2.

6. Regulation 459 of Revised Regulations of Ontario, 1960, except section 4 and the Schedule, and Ontario Regulation 340/62 are revoked.

Form 1

The Ontario Energy Board Act, 1964

1. I,....., Chairman of the Ontario Energy Board, hereby give to..... .....the authority required under section 51 of *The Ontario Energy Board Act, 1964* in respect of..... .....

2. This authorization expires with the.....day of....., 19....

Dated at Toronto, this.....day of....., 19....

.....
Chairman
Ontario Energy Board

Form 2

The Ontario Energy Board Act, 1964

IN THE MATTER OF PROPOSED SUMMARY PROCEEDINGS AGAINST.....

1. I,....., Minister of Energy and Resources Management, hereby give permission to..... to lay an information against..... under section.....of *The Ontario Energy Board Act, 1964.*

2. I give this permission under subsection.....of section.....of the Act.

Dated at Toronto, this.....day of....., 19....

.....
Minister of Energy
and
Resources Management

(1660) 52

Tab “C”

1922 CarswellAlta 81, [1922] 3 W.W.R. 356, 18 Alta. L.R. 407, 69 D.L.R. 364

1922 CarswellAlta 81
Alberta Supreme Court [Appellate Division]

Little v. Western Transfer & Storage Co.

1922 CarswellAlta 81, [1922] 3 W.W.R. 356, 18 Alta. L.R. 407, 69 D.L.R. 364

Little (Plaintiff) Respondent v. Western Transfer and Storage Company, Limited and Edmonton Collieries Limited (Defendants) Appellants

Stuart, Beck and Hyndman, JJ.A.

Judgment: October 12, 1922

Counsel: *N. D. Maclean, K.C.* , for plaintiff, respondent.
G. B. O'Connor, K.C. , for defendants, appellants.

Subject: Natural Resources; Property

Related Abridgment Classifications

1922 CarswellAlta 81, [1922] 3 W.W.R. 356, 18 Alta. L.R. 407, 69 D.L.R. 364

Headnote

Mines and Minerals --- Ownership and acquisition of mineral rights — Mining lease — What constituting

Proper Time for Exercising the Right.

An owner of land, described in the lease as "owner of the coal and surface rights," leased "all the said coal together with the right to work the same and together with such portion of the surface rights as may be necessarily interfered with in the working of the mine."

Held , (1) As to the character of the title to the coal granted, the lessee acquired a lease of the property, in the strata in which the coal was contained, and not merely an easement to take the coal; (2) There was a lease of, and not a mere grant of servitude over, so much of the surface as fell within the description (and which area was reduced to a certainty by the acts of the parties as shown by the evidence); (3) The lessee's rights being rights of property as opposed to mere rights of easement and servitude, the lessee was entitled (a) to use the property for the purpose of working adjoining coal mining properties (into which a tunnel was made from the mine) — known as the right of "outstroke," and (b) to use the surface for the purpose of carrying over it the coal removed through the mine from the adjoining coal mining properties, known as "foreign" minerals.

The lessor was to have "the right to take delivery of two tons of pea slack coal per day for each and every day during which the mine is in operation."

Held , the lessor should exercise his "right to take delivery" of the two tons of coal each day, and if he omitted to do so he could not make up the quantity on subsequent days; though an omission of a day or two, not being any substantial delay, might not destroy his right to the coal for those days.

Appeal by defendants from judgment of Simmons, J. granting an injunction enjoining them from carrying through or over certain land coal raised or procured from mines beyond the limits of plaintiff's property. Cross-appeal by plaintiff for damages. Appeal allowed with costs and action dismissed with costs. Cross-appeal dismissed without costs.

The appeal was heard by STUART, BECK and HYNDMAN, JJ.A.

***Stuart, J.A.* :**

1 At first blush it would appear to me on reading the document in question in this action, that the trial Judge was right in granting the injunction. One would naturally assume that all the grantor intended was to give a right to take away the coal and such other rights as were necessary to the enjoyment of that right. The right, whatever it was, certainly would determine whenever the coal was exhausted because as a condition of the grant a minimum of 10,000 tons per year was to be produced. But it seems to me that the precedents which interpret practically similar grants (or reservations which are re-grants in effect) all point the other way with the exception of *Dand v. Kingscote*, 6 M. & W. 174 , 9 L.J. Ex. 279 (151 E.R. 370).

2 The case of *Proud v. Bates*, 34 L.J. Ch. 406, 11 Jur. (N.S.) 441, 13 L.T. 61 , decided by Wood, V.C. (afterwards Lord Hatherley) was re-affirmed at least by Lord Hatherley himself in *Hamilton* (*Duke*) *v. Graham* , L.R. 2 H.L. (Sc.) 166. The first of the two grounds of the decision in *Proud v. Bates* seems to me to be directly applicable here.

3 I am not entirely satisfied with the result and would have preferred to have found the law to be otherwise. But I think the case is settled by authority.

4 After all it is a question of the true interpretation of the document. It seems to me that we are bound to interpret it as granting an estate, a leasehold estate, in everything mentioned as being granted, and that the words which appear to be limitations upon the use are really only a method of describing the area granted. That, on the face of the grant, was uncertain as to the surface, but it was clearly rendered quite certain by the acts of the parties. See *Fry on Specific Performance* , par. 346: also 27 *Am. & Eng. Ann. Cases* , 1104.

5 I take this opportunity of suggesting that references handed in by counsel should be more carefully checked as to volume and page because I have wasted much time by being utterly misled by the references given us.

6 With regard to the two tons of pea slack coal per day my opinion is that it was the plaintiff's duty to remove this practically day by day. I do not say that an omission for a day or two to exercise the right would destroy the right to the coal for those days but certainly any substantial delay which would allow the slack to accumulate and deteriorate ought in my opinion to be held to be a surrender of the right during the period of delay.

7 Technically I think the plaintiff would be entitled to damages for the days on which he got only pure slack coal instead of the mixture called pea slack to which he was entitled but I do not find any evidence which would enable one to arrive at any amounts and in any case I gathered that that exact point was not now being pressed.

8 With regard to the deposit of refuse I also am unable to find any ground for liability for damage, at least at present. At the determination of the lease or even earlier if the plaintiff is so advised, I think he should be considered as at liberty notwithstanding the present judgment to raise by a new action the question of an infringement of his rights in that regard.

9 I would allow the appeal with costs and dismiss the action with costs. There should be no costs of the cross-appeal.

***Beck, J.A.* :**

10 This is an appeal from the judgment of Simmons, J. at the trial.

11 The action was for an injunction and for damages. An injunction was granted; damages refused.

12 The action arises out of a lease made by the plaintiff Little to the Western Transfer & Storage Co., Ltd., in trust for the Western Coal Co., Ltd., a company then about to be formed. The lease is as follows:

Western Transfer & Storage, Limited
Edmonton, Alta.
February 16th, 1918.

I, James B. Little, the registered owner of the coal and surface rights of River Lot numbered twenty (20) of the Edmonton Settlement, containing twenty-six (26) acres, Title No._____, do hereby lease to Western Transfer & Storage, Limited, in trust for the Western Coal Company, Limited, to be formed, all the said coal, together with the right to work the same and together with such portion of the surface rights as may be necessarily interfered with in the working of the mine, to be held by the said Western Transfer & Storage, Limited, as tenant for five (5) years from this date with the right of renewal for a further period of five (5) years upon the same terms, at a royalty rental of thirty (30c) cents per ton for all coal mined exceeding three (3) inches in size and a royalty of ten (10c) per ton for all coal mined, size 1 inch to 3 inches, royalty to be paid by the 10th of the following month.

No royalty is to be paid for coal mined which is less than 1 inch in diameter, but I am to have the right to take delivery of two (2) tons of pea slack coal per day for each and every day during which the mine is in operation.

Commencing when the mine is ready for operation, the tenant shall mine at least six thousand (6,000) tons during the first year, and at least ten thousand (10,000) tons in every subsequent year.

The tenant agrees that it will remove any mine timbers from our old workings, and will leave nine (9) foot pillars.

All disputes between landlord and tenant shall be settled by the arbitration of three persons, one to be chosen by the landlord, one by the tenant, the two arbitrators so chosen to choose a third.

[Sgd.] James B. Little,
Western Transfer & Storage, Limited.
Per C. W. Rickard, Secretary.

Witness as to Jas. B. Little:
J. S. Oliphant.
Witness as to Western Transfer:
L. C. Stevens.

13 One Rickard, is the secretary and treasurer of the Western Transfer & Storage Co. and president and manager of the Edmonton Collieries, Limited, the company in trust for which the lease was taken, the proposed name “The Western Coal Company Limited” having been refused upon application for incorporation.

14 One Duggan, a mining engineer, was formerly manager and subsequently advising engineer of the Edmonton Collieries. I shall refer to the two companies indifferently as the company.

15 Shortly after the signing of the lease the company’s officials came to the conclusion that it would be unprofitable to sink a shaft on the leased land if they were limited to the extraction of the coal under the leased land. They therefore went to

see Little about this difficulty. There were two properties adjoining the leased land known as the Fraser property and the Humberstone property. The evidence of Duggan is to the effect that the conversation at which were present himself, Rickard and Little was substantially as follows:

16 Rickard said that in view of the insufficient quantity of coal on the leased land the company could not go on under the lease, unless they got more coal; that Rickard suggested get ting the Humberstone property; that Little immediately suggested that they should get the Fraser property; that Little then telephoned to Fraser saying that the men who were leasing his land were with him (Little) and it would be a nice time for him (Fraser) to get his land in as well and that it would help to pay his taxes; that Little then said Fraser was ready to talk business. Duggan's evidence is to the same effect.

17 Little and his wife admit a conversation, evidently the one referred to. They both say that the Fraser property was spoken of but that it was Mrs. Little who telephoned Fraser and she says that Fraser answered that Rickard was to go up to Fraser's house.

18 I think that the evidence of Rickard and Duggan as to what took place at this conversation must be accepted as substantially correct and that substantially it amounts to this: That the company having got the lease from Little found, on further investigation, that it would be unprofitable to operate under the lease unless the company could acquire additional coal lands, the Fraser or Humberstone properties or at least one of them; that this situation was put to Little and that he himself approved of this proposal and himself got the company's officers in touch with Fraser.

19 Little's coal area is, as stated in the lease, twenty-six acres; that of Fraser about twelve acres; that of Humberstone about four acres.

20 As a result the company obtained leases from both Humberstone and Fraser. After getting these leases the company commenced operations.

21 The company started operations by sinking a new shaft on the Little property. There was already on the property an old shaft which it was considered by the company to be inadvisable to work and this was acquiesced in by Little. This old shaft had been put down by the Ritchie Company some five or six years before and that company had abandoned the work. The new shaft was commenced on July 4, 1918, and I think it must be found as a fact on the evidence that the conversation above referred to regarding the Humberstone and Fraser properties took place sometime in May, that is, before the commencement of the sinking of the new shaft.

22 Coming to the construction of the lease, it will be observed that Little is recited to be the registered owner of "the Coal and Surface rights" of his twenty-six-acre piece. This it seems to me suggests and indicates a parity of title between the coal rights and the surface rights and when, after this recital, the thing leased is stated to be "all the said coal" I think the proper construction is that the character of the title to the coal was of a like character to that which would have been given upon a lease of the surface, namely, a lease of the property — the stratum or strata — in which the coal was imbedded and not merely an easement to take the coal.

23 This distinction is important and was made much of in the argument, because one of the important questions arising in

the case is this: The defendant company made a shaft on the Little property and after commencing to take out coal therefrom made a tunnel into the Fraser and Humberstone properties and as part of their ordinary operations were conveying coal, not only from the Little property but also from these two other properties through the tunnel and up the shaft on the Little property. And I think the question whether the defendant company was entitled to do this depends upon the previous question whether the company acquired under the Little lease property in the strata below the surface in which the coal was contained or on the other hand the company acquired merely a privilege, servitude or easement, that is, merely the right to take away the coal.

24 Before discussing the decisions upon this question it is advisable to construe a further portion of the lease, namely, the words:

> Together with such portion of the surface rights as may be necessarily interfered with in the working of the mine.

25 These words, it may be observed, are preceded by the words "together with the right to work the same." The presumption is that the words in question are not mere surplusage but are intended to have some further effect. The intention is expressed to lease a "certain portion of the surface rights" and what follows is not the expression of the purpose for which the lease is made but of the quantity of land leased; and in my opinion, therefore, the effect of the lease is a lease of, and not a mere grant of servitude over, so much of the surface as comes within the description.

26 Taking the plans (Exs. 2, 3 and 8) and applying the evidence to them we find that surrounding the shaft there is a parcel of land fenced around containing about one acre (Little, 23, 24). On this acre are the shaft, the tipple and the mine buildings and it is this acre only which the company has made any use of. On the west is Government Avenue or 92nd Street, a main highway, but the fenced off acre is reached by a lane about 200 feet in length from Government Avenue. On the north is a garden — "Chinaman's garden," divided from the acre by shale and a fence. On the south, east and west are, for the most part, fences, besides other indications of boundaries by lanes and buildings. These fences appear to have been put up before or immediately after the commencement of the company's operations under the lease. Rickard says that the fence on the east was an old fence, there before the company started work; that on the south side Little put up a fence in 1921 or 1920 and before that there was no fence "except as those tenants who have their houses and were squatted on Mr. Little's land built a little garden fence there," — these houses facing on the street — Water Street — and the back of them being toward the mine property — most of them had fenced off the rear end of the pieces of land they occupied.

27 Rickard says: (45) "That acre is necessary for the working of the Little mine." (45) Little says: "That acre is needed for the mine, yes." (31) The clear inference from all the evidence is that "such portion of the surface rights as may be necessarily interfered with on the working of the mine" was quite definitely fixed by Little and the company concurring upon the delineation of the acre, that is, by actual agreement and by possession in accordance therewith. Thereby the generality and indefiniteness of the description was reduced to a certainty.

28 In *Batten-Poole v. Kennedy*, [1907] 1 Ch. 256 , 76 L.J. Ch. 162, Warrington, J. discussed the cases bearing on the distinction between a grant which was effective as a grant of mineral strata and a grant of a mere right to take the mineral. I think he makes the distinction quite clear. These decisions dealt with cases of grants, exceptions and reservations, but clearly the distinction depends, not on any such ground but solely on the ground that what was granted, excepted or reserved was or was not in such terms as to constitute on the one hand the grant of a stratum or on the other the grant of a mere right.

29 The decisions are also discussed in *Ruling Cases* , vol. 17. The proposition derived from the cases so far as the point now under consideration is concerned is thus stated, at p. 452:

> Where the owner of the freehold of inheritance grants the mines (opened as well as unopened) under his land to one, and the land excepting the mines to another, the effect is to carve out the land in superimposed layers; the grantee has the property and exclusive right of possession on the whole space occupied by the layer containing the minerals; and, after the minerals are taken out, is entitled to the entire and exclusive user of that space for all purposes.

30 The right which the company claims of working the Fraser and Humberstone mines from the Little mines is what is known as the right of "outstroke," a term well understood in relation to the law of mines and minerals. See, e.g., *Halsbury* , vol. 20, par. 1415.

31 The question of the right to exercise this right depends on the distinction already emphasized. If the lessee owns the property in the stratum containing the coal, this right of outstroke exists in the tenant, so far as regards the stratum both before and after it has been worked. Similarly with regard to the surface, the right to carry over it "foreign" minerals depends upon the rights of the lessee in the surface. If it is a mere easement to carry away the minerals mined upon the leased property, that right would not convey with it the right to transport over it foreign minerals. But if I am right in the interpretation and effect of the lease of the surface in this case, then the lessees had and have the right to transport the coal taken by outstroke from the Fraser and Humberstone property. In my opinion they have that right.

32 See generally 27 *Cyc.* tit., "Mines and Minerals," pp. 681, 687-8-9; 698-9; *Lindley on Mines* , secs. 9, 812, 813; *Halsbury, supra; Ruling Cases, supra; McSwinney on Mines* , 4th ed. 239.

33 There is an additional aspect of this question raised upon the evidence, namely, that the lease from Little to the company was actually executed before the plan of the workings — the making of such plans being obligatory by law — was found; that when it was found, the company realized that the Little property could not be profitably worked alone; that the company was so dissatisfied as practically to threaten to throw up the lease — probably making some claim that Little had misled them; that consequently a dispute for a difference arose sufficient to form the consideration for a further agreement; that in the result an agreement was made authorizing the company to acquire the two adjacent properties with the clear implication, though denied by Little, that these latter should be worked in conjunction with the Little property. I think this is established by the evidence.

34 For the reasons indicated I am of opinion that the plaintiff was not entitled to the injunction granted at the trial whereby the company was perpetually enjoined from carrying coal raised or procured from mines beyond the limits of the plaintiff's property, through or over the twenty-six acres.

35 There remains the question of damages in respect of the coal which the plaintiff was entitled to under the term of the lease, reading:

> But I am to have the right to take delivery of two tons of pea slack coal per day for each and every day during which the mine is in operation.

36 There was a claim raised at the trial for the rectification of this clause, on the ground that the words should be "pea coal" and not "pea slack coal" but this claim is expressly abandoned by the plaintiff's factum on this appeal.

37 The question of damages depends on the question whether the plaintiff, in order to be entitled to the two tons a day, was bound to demand delivery of it. What the plaintiff's counsel says about this claim is this, as they put it in their factum: The mine was in operation 838 days entitling the plaintiff to 1676 tons. Of this he received 930 tons, leaving him still entitled to 746 tons. According to the plaintiff the reason why he did not go each day to get his two tons was because of the dispute between himself and the defendants as to whether he was entitled to pea coal or pea slack and that he let the matter stand for a considerable time while endeavouring to get a board of arbitration to settle this question. These 746 tons have been sold by the defendants at prices varying from $2.25 to $3 a ton and the defendants refused to pay any of this amount to the plaintiff saying that unless he called for his coal each day he forfeited his right to it. Plaintiff's counsel submits that this is not the law and that as the defendants have been caused no inconvenience by the plaintiff's failure to take out the coal each day the plaintiff is entitled to a similar amount of coal or to payment for the value thereof.

38 Counsel for the company put it in their factum thus:

> The plaintiff reserved this right to take slack for the purpose of burning brick. For over a year he did not exercise this right. He subsequently removed more than two tons per day. The defendants never refused to deliver whatever coal he required except that at first he had to be content with other coal on two or three occasions because the pea slack was not available. The plaintiff admits he was never refused coal.
>
> Plaintiff's evidence:
>
> > Q. What I am coming at is this. On your examination I asked you this question, "Were you ever refused delivery of pea slack coal?" and you said "No." ' Is that correct?
> >
> > A. No.
> >
> > Q. That is not correct?
> >
> > A. Yes that is correct.
>
> So does his son, page 40, lines 1 to 6:
>
> > Q. Never mind what was charged up to you, I am just asking a plain question. Have you ever taken your wagon for a load of coal and come back empty?
> >
> > A. No.
> >
> > Q. You never did?
> >
> > A. No.
> >
> > Q. They were always willing to give you coal but they claimed that you would be owing them for what you took in excess of two tons?
> >
> > A. Yes.
>
> The lease entitles the plaintiff to take delivery of this coal. He has always exercised this right and has never been refused coal. Until this right is infringed the plaintiff's claim is premature. If and when the plaintiff is refused coal or sued for

slack delivered in excess of two tons per day, the question of interpretation will arise.

39 It seems to me that the proper meaning of the clause is that Little, the lessor, must exercise his "right to take delivery" of the two tons of coal each day and that if he omits to do so he cannot make up the quantity on subsequent days. I agree however with the observations of my brother Stuart in relation to this. As to the past it seems that the accounts are practically square and that our decision will be applicable only to the future.

40 In the result therefore I would allow the appeal with costs. There are practically no additional costs owing to the notice of cross-appeal, and I therefore would give none.

***Hyndman, J.A.* :**

41 I concur in the result arrived at by Mr. Justice Beck.

42 I merely wish to add that it is with some regret I feel compelled to do so as I think had Mr. Little taken the precaution to call in his solicitor a very different agreement would have been drafted safeguarding his rights and interests, including some of the items of which he now complains.

43 Though the present agreement was drafted by the lessee's representative and signed by Mr. Little during a temporary illness, no allegation of fraud is set up and rectification is not asked for.

44 The case therefore must be decided on the terms of the document as it stands. That being so, in my humble opinion, there can be no other result than that arrived at by my brother Beck.

Appeal allowed with costs; cross-appeal dismissed without costs.

Solicitors of record:
Short, Cross & Co. , solicitors for plaintiff, respondent.
Griesbach, O'Connor & Co. , solicitors for defendant, appellant.

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Tab “D”

Natural Gas Storage Regimes In Canada: A Survey

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Faculty of Law
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ISEEE Research Paper

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ABOUT ISEEE

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COMMENTS

This paper is posted as a working paper. Comments on the paper may be sent to Nigel Bankes at (ndbankes@ucalgary.ca).

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Table of Contents

1.0 INTRODUCTION

This working paper examines the natural gas storage regimes in place in the different jurisdictions in Canada. The paper tries to answer the following questions for each jurisdiction:

- What does the regime say about the ownership of storage rights? Does it vest such rights in the Crown or does it recognize that storage rights might be privately owned? Is the ownership of storage rights associated with ownership of the surface or ownership of the mines and minerals?
- To the extent that storage rights are owned by the Crown, how does the Crown dispose of those storage rights? Are storage rights associated with the rights to produce petroleum and natural gas, or does the relevant legislation provide for a distinct form of storage tenure (or some combination of the two)?
- To the extent that storage rights are privately owned, does the province provide any mechanism for the compulsory acquisition of storage rights from a holdout? If so, is there a mechanism to provide compensation?
- What is the regulatory mechanism in place for the approval of natural gas storage projects? Does responsibility for approval lie with the provincial energy department or a regulatory tribunal?
- How does the regime deal with the potential for resource use conflicts (e.g. sterilization of other resources as a result of designating lands for storage)?

The paper does not refer in any great detail to the technical regulation of storage facilities. Many jurisdictions apply the most recent version of the Canadian Standards Association CSA Z341, *Storage of Hydrocarbons in Underground Formations*.[1] Since the paper focuses on the design of gas storage regimes the paper does not deal with the private contractual arrangements relating to the use of storage. Neither does the paper discuss the potential liability issues that might arise as between adjacent owners, such as

[1] Second edition, Z341 SERIES-06, available for purchase from the Canadian Standards Association. online: <http://www.csa.ca/cm/home>.

where a mineral rights owner or working interest owner adjacent to a storage project is allegedly producing stored gas. This is properly the subject of another paper.[2]

A significant issue in recent years has been the economic regulation of storage. Early development of storage in Canada, and especially in Ontario, was closely associated with regulated natural gas distribution utilities. As a result, it was perhaps only natural that such storage came to be regulated as a utility service. More recently, there has been a trend towards the development of unregulated or market-based storage[3] and in some cases proposals to remove storage facilities from the rate base. The paper offers some coverage of these issues in the context of Ontario with some more limited reference to economic regulation issues in British Columbia and Alberta, but a more detailed and comprehensive discussion of these matters is again properly the subject of another paper.

Each of the provinces, except Newfoundland and Prince Edward Island, provide the basic elements of a gas storage regime. All of the provinces that have storage legislation have some experience with storage projects save Manitoba. Ontario has the most experience and the most transparent regulatory approach, featuring reasoned decisions of the Ontario Energy Board. Consequently, this paper offers more extended coverage of the law and practice in that jurisdiction. The analysis in this paper proceeds from west to east.

The concluding section of the paper offers a brief discussion of the storage rules in Yukon, the federal rules for the Northwest Territories and Nunavut, and for the east coast offshore. These rules have yet to be tested. In addition, this final section of the paper also addresses the potential role for federal regulation of storage operations where such

[2] These issues were to be raised in an application on behalf of the interest owners in the CrossAlta storage project before Alberta's Energy Resources Conservation Board. This was an application to shut in a well producing from a property adjacent to the storage area: ERCB Application No. 1601651. The application was set down to be heard on November 25, 2009 but the application was withdrawn on October 15, 2009 presumably on the basis of a settlement: see ERCB Decision 2009-068, CrossAlta Gas Storage & Services Ltd., Application for the Permanent Shut-in and Abandonment of the Crossfield East Basal Quartz A Pool, <http://www.ercb.ca/docs/documents/decisions/2009/2009-068.pdf >

[3] For discussion see Ontario Energy Board, Natural Gas Electricity Interface Review, EB-2005-0551, Decisions with Reasons, November 7, 2006 [NGEIR Decision], online: <http://www.oeb.gov.on.ca/documents/cases/EB-2005-0551/Decision_Orders/dec_reasons_071106.pdf>.

operations form an integral part of an interprovincial work or undertaking (i.e. a federally regulated interprovincial or international pipeline).

The paper is intended for lawyers and policy makers engaged in the development of gas storage projects, but it should also be of interest to those thinking through the possible application of gas storage rules to the analogous situation of carbon capture and storage (CCS).[4] The analogies of course are not precise: gas storage is intended to be cycled on a seasonal or more frequent basis, while CCS projects involve permanent disposal. Consequently, some would suggest that the better analogy for CCS is acid gas disposal (AGD) projects, since both involve disposal rather than storage, and both involve projects which aim to pressure up the storage formation, while in a gas storage project (or an enhanced oil or gas recovery project) the reservoir will be depleted upon abandonment.[5] Nevertheless, we have longer experience with gas storage than with AGD and it is worth reflecting on that experience, particularly in terms of ownership and tenure. One of the conclusions of the paper is that there is considerable variety in the storage regimes of the provinces. Some provinces have moved quite aggressively to vest gas storage rights in the Crown (Quebec, New Brunswick, and Nova Scotia); others recognize the possibility of private ownership of storage rights (Alberta, Saskatchewan, Manitoba, and Ontario); while British Columbia takes a middle road and provides for Crown vesting of storage rights on a case by case basis. What are the lessons here for the development of CCS regimes? Is the variety a good thing? Is one model to be preferred and if so on what grounds? We have provided a summary of lessons learned for CCS projects in a companion paper.

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[4] In a previous article, Nigel Bankes, Jenette Poschwatta, and E. Mitchell Shier, "The Legal Framework for Carbon Capture and Storage in Alberta" (2008) 44 Alberta Law Review 585 – 630, we explored the property, regulatory and liability issues associated with CCS projects and provided some limited discussion of the analogy between natural gas storage and CCS. See also Nigel Bankes and Martha M. Roggenkamp, "Legal Aspects of Carbon Capture and Storage" in Redgewell *et al*, eds., *Beyond the Carbon Economy* (Oxford: Oxford University Press, 2008). Also see the Report by Working Committee 2 on storage, from the 24th World Gas Conference, 5-9 October 2009, Buenos Aires, which states that, according to an international survey of storage operators, the new technique of interest is, overwhelmingly, CO2 sequestration, and reports on operators' readiness to implement that technology, at 2 and 20-22 of the "New Technologies" section, online: <http://www.igu.org/html/wgc2009/committee/WOC2/WOC2.pdf>.

[5] See Nigel Bankes and Jenette Poschwatta, "Carbon capture and storage in Alberta: learning from the acid gas disposal analogy" (2007), 97 Resources 1-6, online: <http://www.ucalgary.ca/~cirl/html/resources.html>.

1.1 The legal literature of natural gas storage in Canada

There is relatively little literature on the legal aspects of natural gas storage in Canada. An early focus was on the ownership of storage rights. Lyndon (1961) provides a synopsis of a report of the Underground Storage Committee to the Mines' Ministers' Conference in 1960.[6] The authors of that report concluded that a reservation of the mines and minerals would "except from the title oil and gas or the strata or formation or reservoir in which the substances are found."[7] But they went on to say that where non oil and gas strata were being used then "the owner of the lands other than the mines and minerals, would have to consent or grant another document for the use of such strata."[8]

At about the same time (1962), a Committee appointed by Ontario to advise on oil and gas resource matters for that province (the Langford Committee) issued a separate report on underground storage of natural gas.[9] Chapter 5 of the Langford Report was devoted to legal issues. The Committee identified three types of legal issues for discussion: legislative issues, regulatory issues, and contractual issues.[10]

The key concerns of the Committee under the heading of legislative issues appear to have been constitutional in nature. The Committee wanted to ensure that storage remained under the control of the province and wanted to ensure that the benefits of storage accrued to the province rather than to the country as a whole. Ontario domestic customers should, in the opinion of the Committee, have first call on available storage.[11] The Committee also discussed under this head the manner in which the storage industry should be organized. It toyed briefly with an analogy to Ontario Hydro (a Crown corporation and then the monopoly generator of electricity in the province) but soon

[6] J. Lyndon, "The Legal Aspects of Underground Storage of Natural Gas – Should legislation be considered before the problem arises?" (1955- 61) 1 Alberta Law Review 543 – 548.
[7] Lyndon, *ibid*., at 546.
[8] Lyndon, *ibid*.
[9] Ontario, *Report of the Committee on Oil and Gas Resources, (The Langford Committee Report)*, Part II, Underground Storage of Gas, June 1962 [Langford Report].
[10] *Langford Report*, *ibid*. at 38.
[11] Langford Report, *ibid*. at 41.

recognized that there was little appetite for such an approach in the gas industry where the private investment model, through the vehicle of a regulated utility, seemed to offer a better strategy.[12] However, the Committee clearly believed that there was a role for regulation and in particular endorsed the idea that the provincial regulator, the Ontario Energy Board, should be able to authorize a storage project in a designated area (subject to the duty to compensate) even if not all owners consented.[13] Thus the Committee recognized the need to deal with the potential holdout problem in putting together a storage project.

Under the heading of regulatory issues, the Langford Committee was principally concerned with ensuring that oil and gas operations (and the information collected in the course of those operations) were carried out in such a way so as not to prejudice the prospect of using depleted formations for storage operations in the future.[14]

Finally, on the contractual side of things, a significant issue for the committee was the contractual relationship between the storage operator and the owners. The committee was concerned that in some cases owners had given up storage rights without realizing it (thinking that they were merely leasing oil and gas exploration and production rights). The Committee considered whether it should be necessary for parties to deal with storage rights separately[15] from other oil and gas rights. The Committee was reluctant to accept this, noting that there may be advantages in combining production and storage rights (having earlier noted the possibility of concurrent storage and oil production operations[16]) to facilitate long-term planning. Perhaps surprisingly, the Committee did not deal explicitly with the question of the ownership of storage rights. Rather, and as the last discussion suggests, the Committee seems to have proceeded on the basis that storage was owned by the owner of the petroleum and natural gas estate and not by the surface owner.

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[12] Langford Report, *ibid*.
[13] Langford Report, *ibid*. at 42.
[14] Langford Report, *ibid*. at 44.
[15] Langford Report, *ibid*. at 46. This brings to mind the practice of the western provinces (discussed *infra*) to require oil and gas operators to deal separately with surface rights.
[16] Langford Report, *ibid*. at 41.

After these early beginnings there seems to be a long gap in the specialized legal literature[17] until the 1990s. At that time Alberta introduced legislation to deal with the ownership of gas storage rights and the royalty treatment of gas in depleted reservoirs led to a number of articles authored by some of the parties involved in negotiations with the Crown, or by the key drafters of that legislation. Winter (1993), for example, provided a detailed analysis of the original natural gas storage agreement between the province of Alberta and the Alberta Energy Company in relation to the Suffield Mannville Storage project.[18] Winter emphasizes the royalty issues associated with gas storage agreements; in particular, he notes that the Suffield Agreement varied the existing royalty regime for the treatment of stored gas so as to reduce the complexity that might otherwise be associated with multiple parties storing in the same facility. Acorn and Ekelund followed this in 1995 with a very valuable commentary on Alberta's amendments to its *Mines and Minerals Act* to address many of the legal issues associated with natural gas storage projects.[19] While much of the Acorn and Ekelund article deals with reforms in the Alberta natural gas royalty regime (and here the article confirms Winter's comment that the province was moving generally to a position in which it was no longer deferring royalty on gas injected for storage purposes but was requiring that royalty be paid upon production and prior to injection[20]), the second part of the article comments in detail on the property aspects of storage law. A crucial point of the amendments was to settle, once and for all, that storage rights in Alberta are owned by the party who owns the petroleum

[17] There were short discussions of storage in successive editions of John Bishop Ballem, *The Oil and Gas Lease in Canada* (various editions) (Toronto: University of Toronto Press). In his first edition (1973), Ballem (at 97 – 98) noted that Ontario and British Columbia had taken the lead on issues of storage. He also suggested that an oil and gas lessee who did not receive a grant of "mines" would not likely obtain natural gas storage rights, but Ballem's principal concern seems to have been the rights of the lessee versus the rights of the owner, rather than the competing claims of the owners of the surface estate and mineral estate. Subsequent editions treat the issue in a similar manner: see the second edition (1985) at 103 – 105, and the third edition (1999) at 122 – 125 and the fourth edition (2008) at 144 – 147.

[18] Colin Q. Winter, "Alberta Gas Storage Reservoirs: A New Direction for Royalty Administration" (1993) 31 Alta. L. Rev. 107. Winter reproduces the Suffield Agreement in an appendix to the paper. With this agreement, Winter suggests, the Crown moved from charging royalty on a first-in first-out system to a pay-as-you-go system, thereby making it easier for parties to trade and to account for their royalty obligations.

[19] Glen Acorn and Michael W. Ekelund, "An Overview of Alberta's Recent Legislation on Natural Gas Royalty Simplification and Gas Storage" (1995) 33 Alberta Law Review 342; and see discussion in Part 4, *infra*.

[20] Acorn and Ekeland, *ibid*. at 355.

and natural gas rights rather than by the party who owns the surface rights.[21] The authors note that the legislation also served to clarify how the Crown would dispose of its storage rights, suggesting that the principal vehicle would be by means of unitization agreements. There is further discussion of this important article in Part 4 on Alberta, *infra*. Since then there has been little new legal writing on storage issues in Canada.[22] However, recent interest in carbon capture and storage has certainly triggered renewed interest in analogous operations like gas storage.[23]

[21] Acorn and Ekeland, *ibid*. at 362: "the time for putting this ownership problem to rest was long overdue".
[22] Robert J. McKinnon, "The Interplay Between Production and Underground Storage Rights in Alberta" (1998) 36 Alberta Law Review 400 (focusing on the ownership of injected gas and principally discussing relevant US case law).
[23] For example, Bankes et al., *supra* note 4.

2.0 NATURAL GAS STORAGE: GENERAL

2.1 Introduction

This section of the paper provides some general background on natural gas storage operations. It begins by examining the different purposes for which proponents might develop a storage project, either an upstream project close to production or a downstream project close to market.

2.2 Purposes of Storage

Natural gas storage serves a number of functions within an overall scheme for the production, transmission and distribution of natural gas from the wellhead to the ultimate consumer. Storage may be located at any point along that chain at the upstream end (upstream storage) or at the distribution end of the system. In Canada, most storage facilities are located close to the ultimate market and thus at the distribution end of the chain (especially in Ontario), but there is significant upstream storage in both British Columbia and in Alberta.[24]

Upstream storage serves a number of different functions. It can be combined with petroleum recovery to help maintain reservoir pressure. It can be used to balance production in relation to fluctuating demands, and it can be used to allow producing wells to maintain a relatively constant production rate to avoid damaging the reservoir. Furthermore, upstream storage can be used to meet contractual commitments and can also be used to hedge the market by injecting gas when prices are low in hopes that it

[24] The Energy Resources Conservation Board of Alberta draws a distinction between "production-motivated" storage and "commercial operations". The Board suggests that: "Production-motivated schemes are usually characterized by the temporary storage of gas occurring at or near the producing pools. They can allow for the more efficient use of production and processing facilities and may also be of benefit in market-related situations. Commercial gas storage schemes are designed to provide an efficient means of balancing supply with a fluctuating market demand. These schemes store third-party nonnative gas, allowing marketers to take advantage of seasonal price differences, effect custody transfers, and maintain reliability of supply. Gas from many sources may be stored at commercial facilities under fee-for-service, buy-sell, or other contractual arrangements." Board Directive 65, Resources Applications for Conventional Oil and Gas Reservoirs, online: <http://www.ercb.ca/docs/documents/directives/Directive065.pdf>, Unit 4.3.

may be produced and sold when prices recover, either on a seasonal basis or over some longer or shorter period.[25]

Downstream storage serves additional purposes. Distributors are particularly reliant on storage in order to supply adequate gas, on the best possible terms, notwithstanding fluctuations in demand.[26] Storage ensures adequate gas inventory to meet potential emergency demands—in the event of pipeline breach, for example,[27] or other interruption in supply.[28] More predictable (and inevitable) are seasonal fluctuations in demand for natural gas, with demand in most cases at its lowest in summer, and peaking in winter, when demand may exceed the maximum flow of a pipeline and the distributor draws on stored inventory in order to provide adequate supply. In addition to this seasonal cycle, natural gas demand may also fluctuate daily or even hourly, throughout the year, for other reasons including the recent proliferation of gas-fired electric plants (with increased summer demand—from air conditioners, for example—and shorter-term fluctuations),[29] and gas market trading as the spot price of gas changes. In general, underground natural gas storage is a less expensive means of managing supply and demand than: (a) increasing the capacity of a supply pipeline in order to meet peak loads (since this will

[25] In the U.S., the Federal Energy Regulatory Commission's Order 636 (1992) opened up the natural gas market to deregulation so as to make storage available not only for operational requirements of pipelines supplying utilities, but to anyone seeking storage for commercial purposes or operational requirements. See the website of the Natural Gas Supply Association online: <http://www.naturalgas.org> [NGSA website]. For another example of the use of natural gas storage in an upstream context see Application by Shell Canada to the ERCB for approval of Three Creeks … Underground Gas Storage Scheme, September 2009. In this application Shell seeks approval to store sour gas produced as a product of thermal heavy oil production in the Peace River Area. Shell wanted to be able to store some of that gas to maximize subsequent use of the gas for boiler fuel, thereby reducing sulphur emissions.

[26] *Current State of and Issues Concerning Underground Natural Gas Storage*, Federal Energy Regulatory Commission (FERC), Staff Report, September 30, 2004 at 2, online: <http://www.ferc.gov/EventCalendar/Files/20041020081349-final-gs-report.pdf> [FERC Staff Report]. In a European Union context, as dependency on imported gas increases, so too does the need for storage as a seasonal balancing tool, especially if imports are not diversified and are vulnerable to disruption—see Ramboll Oil & Gas, *Study on natural gas storage in the EU*, Draft Final Report, October 2008, prepared for EU DG TREN C1 at 28, 32) [*EU Gas Storage*], online: <http://ec.europa.eu/energy/gas_electricity/studies/gas_en.htm>. For a discussion of the value of storage in the context of a regulated utility see EUB Decision 2002-072, Re ATCO Gas, Transfer of Carbon Storage Facilities, July 30, 2002.

[27] See the discussion in S.D. McGrew, "Selected Issues in Federal Condemnations for Underground Natural Gas Storage Rights: Valuation Methods, Inverse Condemnation and Trespass" (2000-2001) 51 Case W. Res. L. Rev. 131 at 131 – 2.

[28] For example as a result of political issues in transit countries: a major issue for Europe (*EU Gas Storage*, *supra* note 26.

[29] NGSA website, *supra* note 25.

mean that the pipeline will run at less than capacity most of the time),[30] and (b) surface storage (i.e., large steel tanks).[31]

Finally, it seems fair to say that the availability of storage is crucial to the functioning of a short term and highly liquid gas market. Aggregations of storage and transmission capacity allows centres such as Dawn (Ontario)[32] and AECO (Alberta) to serve as gas hubs where spot prices may be quoted.

2.3 Features of a storage reservoir

Underground natural gas storage sites are situated in porous rock zones (or leached cavities) overlain by impermeable rock and / or water barriers.[33] The capacity and deliverability of the storage site, as well as market location, are key factors in determining a site's suitability for underground storage.[34] Total capacity refers to the maximum volume of gas that can be contained within a reservoir, usually expressed in terms of cubic feet—thousands of cubic feet (Mcf) or billions (Bcf). The size of a geological formation is a key factor in total capacity, as is the volume of injectable space in that formation (i.e. its porosity). A large capacity can figure importantly in achieving economies of scale in the operation of a storage facility.[35] However, the breakdown of that total capacity figure into each of: (1) physically unrecoverable gas, (2) cushion gas, and (3) working gas provides the crucial determinants of a formation's performance as a storage facility. Physically unrecoverable gas refers to gas that cannot be recovered when the pressure differential in a reservoir becomes insufficient to push gas out.[36] Cushion or base gas refers to the gas that has to remain in a reservoir as "permanent inventory" in

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[30] Further: "… the costs of building 'excess' capacity in pipelines increases radically with pipeline length… the longer the pipeline the higher the benefits from optimizing the utilization of the pipeline and the higher the loss will be if the pipeline is built with excess capacity" (*EU Gas Storage*, *supra* note 26 at 51).
[31] Langford Report, *supra* note 9 at 35.
[32] NGEIR Decision, *supra* note 3 at 7 – 8.
[33] Langford Report, *supra* note 9 at 18; FERC Staff Report, *supra* note 26 at 5.
[34] See the Energy Information Administration (Official Energy Statistics from the U.S. Government) website, "The Basics of Underground Natural Gas Storage" online: <http://www.eia.doe.gov/pub/oil_gas/natural_gas/analysis_publications/storagebasics/storagebasics.html> [DOE Basics].
[35] *EU Gas Storage*, *supra* note 26 at 144.
[36] NGSA website, *supra* note 25.

order to maintain adequate pressure, to prevent water encroachment, and to facilitate delivery until the end of operations, at which point a portion may be extractable.[37] Working gas or deliverable gas refers to that gas that can be recovered and made available to the market.[38] Cushion gas is one of most expensive elements of a storage project (since it represents an up-front capital cost). The more cushion gas that is required to sustain pressure and deliverability, the higher the cost, but also the less volume capacity available for working gas.[39] The term "capacity" as used in relation to a storage facility usually refers to working gas capacity. Storage sites may have widely varying ratios between these categories depending on particular geological and operational characteristics.

Permeability (the rate at which natural gas can flow through a porous formation) and pressure determine the rate at which a storage facility can accept and yield natural gas (injectivity and deliverability). Deliverability is expressed in terms of the amount of gas that can be withdrawn on daily basis (Mcf/d, or Bcf/d).[40] Maximum deliverability is achieved by reaching both maximum storage pressure and maximum "gas-in-place" volume (gas present) in the storage facility. These are mutually informing points (injecting more gas requires and creates increasingly more pressure) and will vary according to formation type, porosity, depth, and other conditions such as the character of surface facilities.[41] Deliverability decreases throughout a withdrawal period because as gas is withdrawn, pressure decreases.[42] Formations that can withstand higher pressures have a greater gas capacity (compression capability) and higher potential deliverability. The shape of a formation contributes to its character in these respects: a relatively deep dome formation over a relatively compact area may be capable of higher pressures, higher capacity, and greater deliverability than a formation which, though otherwise

[37] See "Underground Natural Gas Storage", Report by Simmons & Company International, June 28, 2000, online: < http://www.simmonsco-intl.com/files/63.pdf> [Simmons and Co] at 13.
[38] DOE Basics, *supra* note 34 at 4.
[39] FERC Staff Report, *supra* note 26 at 19.
[40] DOE Basics, *supra* note 34 at 4.
[41] *EU Gas Storage*, *supra* note 26 at 144; FERC Staff Report, *supra* note 26 at 6.
[42] NGSA website, *supra* note 25.

having the same geological character and volume, is relatively shallow and spreads over a wide area.[43]

Cycling refers to the completion of the process of gas injection and withdrawal. Cycling times are determined by the facility's physical capabilities (injectivity and deliverability) but will also reflect the purpose for which gas is being stored, whether that is to meet seasonal or shorter demand fluctuations. Shorter cycling times—and thus multiple cycles per year— offer increased flexibility and deliverability and also lower the per unit costs of operating a storage facility.[44]

There are three main types of naturally occurring geological formations used for underground natural gas storage: depleted oil and gas reservoirs, salt caverns, and aquifers.[45] So far as we are aware, there are no aquifer storage projects in Canada. Geological opportunity—the actual occurrence and location of a formation—is the primary determinant of patterns of storage development, but the intended function of storage is also relevant in assessing what particular type of formation will be most effective.[46] For example, for seasonal gas demands, depleted fields and aquifers will likely operate most economically; for gas demands that require higher withdrawal rates, salt caverns offer greater deliverability and may achieve the lowest per unit costs.[47]

2.3.1 Depleted reservoirs

Depleted reservoirs are the most common type of storage facility. Depleted reservoirs are usually relatively shallow, large-volume formations (larger than both salt caverns and

[43] Langford Report, *supra* note 9 at 18.
[44] It is also "operationally improper" to simply let gas sit in a storage field, as this can result in a loss of pressure and of gas (FERC Staff Report, *supra* note 26 at 6).
[45] A storage facility has also been developed in an abandoned coal mine, in the U.S. (DOE Basics, *supra* note 34 at 1).
[46] *EU Gas Storage*, s*upra* note 26 at 148.
[47] *EU Gas Storage*, *ibid.* at 152. A combination may be most desirable (at 15): "where depleted fields and aquifers have larger storage capacity but provide less flexibility in terms of withdrawal rate compared with salt cavities… [the former are] more suitable for fulfilling the role of storage as seasonal balancing tool. while the salt cavities are more suitable as high-frequency market-balancing tools".

aquifers). They are geologically secure and known, in the sense that they have already effectively contained hydrocarbons and have already been surveyed and developed.[48]

Roughly 50% of the capacity of a depleted reservoir (and typically approximately 30% of its overall capital cost)[49] is taken up by cushion gas.[50] That portion of gas which will remain physically unrecoverable may already exist in the formation, and thus may not figure as a development need.[51] Reservoir injectivity and deliverability are similar to those of aquifers, and lower than those of salt cavern facilities.[52] A reservoir cycle is typically seasonal, with one injection period (April to October in the northern hemisphere) and one withdrawal period (November to March) per year—though some facilities may also be used for some peak-day demands.[53]

Depleted reservoirs can be the least costly of the three main types to develop, operate, and maintain. A depleted reservoir will already have been surveyed, and will have existing wells, gathering systems, pipeline connections, and extraction and distribution (though these may require modification for a new storage operation).[54]

The extent to which it is less expensive to develop a depleted reservoir rather than another type of formation will depend on how the field was originally developed.[55] Some reservoirs may have suffered from poor procedures in drilling, operating and abandonment, which increases the cost of their adaptation for storage purposes. Depleted

[48] *EU Gas Storage*, *ibid*. at 134; FERC, Staff Report, *supra* note 26 at 5; Simmons and Co, *supra* note 37 at 3.
[49] EU Gas Storage, *supra* note 26 at 13.
[50] FERC Staff Report, *supra* note 26 at 5.
[51] NGSA website, *supra* note 25.
[52] EU Gas Storage, s*upra* note 26 at 135.
[53] FERC Staff Report, *supra* note 26 at 5.
[54] DOE Basics, *supra* note 34 at 1; FERC Staff Report, *supra* note 26 at 5; Simmons and Co, *supra* note 37 at 3. Further, storage development in the U.S. has developed a trend toward re-engineering existing (especially "high-quality") storage reservoirs to improve cycling capability and reduce cushion gas requirements (through horizontal drilling, unclogging wells, using fracturing technology to keep clays from sealing off parts of reservoir) rather than developing new storage (FERC Staff Report, *supra* note 26 at 9, 14, 16, 19). In Europe, the biggest expansion in recent storage development has been in depleted reservoirs (*EU Gas Storage*, *supra* note 26 at 16).
[55] Langford Report, *supra* note 9 at 19.

reservoirs are often old and may require substantial well maintenance and monitoring.[56] The increasing interest in underground natural gas storage will therefore likely bring obligations as well as benefits to upstream operators, who will be expected to recover oil and gas in such a way as not to destroy or impair the potential for subsequent use of those reservoirs for storage, and to minimize the expense and planning required for storage by employing proper (and more costly) procedures in drilling, operating and abandoning wells.

2.3.2 Salt caverns

Salt caverns are underground cavities created by solution mining (leaching) of salt formations. These formations occur in two forms: salt domes, which are highly gas retentive and resilient to degradation, and salt beds, which are wide and thin (and thus more prone to degradation and with higher development costs).[57] Salt cavern storage facilities must be located close to water resources for the initial leaching process, and incur high development and operational costs.[58] However, because salt caverns also tend to have the highest injectivity and deliverability of any of the three main types of storage formations, they are considered to be the most versatile mode of storage, and have the potential to achieve low per unit storage costs.[59]

Salt caverns are typically much smaller in volume than depleted reservoirs or aquifers. Base gas requirements, however, are lowest among the three types of formations (20-30%),[60] and the injection and deliverability rates are "ultra-high".[61] Working gas in a salt cavern can be cycled up to 10-12 times a year,[62] and these facilities are typically used for

[56] Simmons and Co, *supra* note 37 at 4.
[57] FERC Staff Report, *supra* note 26 at 6; NGSA website *supra* note 25.
[58] *EU Gas Storage*, *supra* note 26 at 136.
[59] *EU Gas Storage*, *ibid*. at 143.
[60] This may approach 0% in an emergency (Simmons and Co, *supra* note 37 at 4).
[61] FERC, *supra* note 26 at 4; DOE Basics, *supra* note 34 at 1; Simmons and Co, *supra* note 37 at 4. A salt cavern can begin delivery on as little as one hour's notice (NGSA website, *supra* note 25).
[62] FERC Staff Report, *supra* note 26 at 4. Reported elsewhere is a typical cycle period of 10-30 days (*EU Gas Storage*, *supra* note 26 at 135). Another document states that salt caverns can be cycled 4 to 5 times per year (Simmons and Co, *supra* note 37 at 4).

short peak-day deliverability purposes—e.g. for fueling electric power plants, or for exploiting short-term price gains in the natural gas market.[63]

Salt caverns are the most expensive to develop on a capacity basis: leaching and brine disposal costs are high,[64] as are operational costs (because of higher operational pressures, the corrosive environment, and the increased environmental regulation that such storage may be exposed to).[65] Higher-volume salt caverns are especially vulnerable to problems arising from the high operating pressures and the costs (including environmental) of leaching and brining.[66] However, the cushion gas requirements of a salt cavern are low, and cushion gas is one of most expensive elements of a storage project.[67] Also, salt cavern formations have extremely high gas retention, and therefore little waste gas.[68] Finally, because salt caverns achieve high injectivity, deliverability, and cycling (much higher than those of aquifers or depleted reservoirs), the cost per storage unit is lower.

2.3.3 Aquifers

Aquifers are porous, permeable rock formations that act as natural water reservoirs, with contents ranging from fresh water to nearly saturated brine.[69] In the course of developing an aquifer for natural gas storage, gas is injected into the formation from the top, displacing water downward.[70]

Aquifer volume, injectivity, deliverability, and cycling tend to be similar to those of depleted reservoirs, though deliverability may be enhanced using an active water drive.[71]

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[63] FERC Staff Report, *supra* note 26 at 5. The report on gas storage in the EU predicts an increase in demand for high-frequency short-term storage "as markets integrate" (*EU Gas Storage*, *supra* note 26 at 68).
[64] *EU Gas Storage*, *supra* note 26 at 141.
[65] *EU Gas Storage*, *ibid*. at 136.
[66] *EU Gas Storage*, *ibid*. at 151; DOE Basics, *supra* note 34 at 5.
[67] FERC Staff Report, *supra* note 26 at 19.
[68] NGSA website, *supra* note 25.
[69] FERC Staff Report, *supra* note 26 at 5.
[70] Simmons and Co, *supra* note 37 at 4.
[71] DOE Basics, *supra* note 34 at 1.

Aquifer stored gas may be cyclable more than once per season.[72] Aquifers have higher cushion gas requirements (50-80%) than other formations.[73] Like depleted reservoirs, aquifers are usually employed for seasonal demands though they may also be used to meet some peak load requirements.[74]

Aquifer storage facility development is more costly than that of a depleted reservoir: the former requires more infrastructure investment (including powerful injection equipment);[75] a longer development period (geology will not be known); more cushion gas (both a higher percentage relative to working gas, and because there will be no original gas in cavity to function as cushion gas, a high percentage of which will be permanently unrecoverable—also because of lower retention capabilities);[76] closer management of injection and withdrawal (for example, although injected gas has already been processed, on extraction from an aquifer it will typically require further dehydration).[77] On the other hand, though aquifers tend to be more expensive to develop and maintain than depleted reservoirs, an advantageous location close to a market may offset development costs.[78] Also, if an aquifer storage facility achieves multiple cycles per year, per unit storage costs will be reduced. Finally, although aquifers are considered the least economically attractive formation for natural gas storage, they may be the only geological formation available for development.[79]

2.3.4 Gas storage facilities in Canada

A study published in 2000 estimated Canadian underground natural gas storage capacity at approximately 500 bcf (15% of contemporaneous total U.S. working gas capacity) with

[72] Simmons and Co, *supra* note 37 at 4.
[73] FERC Staff Report, *supra* note 26 at 5.
[74] FERC Staff Report, *ibid*. at 5, 6.
[75] *EU Gas Storage*, *supra* note 26 at 137.
[76] *EU Gas Storage*, *ibid*. at 137; Simmons and Co, *supra* note 37 at 4.
[77] NGSA website, s*upra* note 25.
[78] FERC Staff Report, *supra* note 26 at 6; Langford Report, *supra* note 9 at 37.
[79] FERC Staff Report, *supra* note 26 at 6; *EU Gas Storage*, *supra* note 26 at 136; DOE Basics, *supra* note 34 at 4. It is observed, however, that most existing aquifers were developed when the price of gas was low enough to bear such heavy cushion gas requirements, and this will not always be the case, even given an advantageous location with no geological alternatives (NGSA website, *supra* note 25).

facilities comprising mainly depleted reservoirs.[80] A 2007 survey specified Canadian capacity as 583.8 bcf, consisting of 44 depleted reservoirs, and 8 salt caverns,[81] while the National Energy Board's 2009 report on *Canada's Energy Infrastructure* reported as follows:[82]

> Currently, the working gas capacity of all storage facilities in Canada is estimated at over 18.5 billion m3 (654 Bcf). In Canada, the majority of gas storage is split between Ontario and Alberta. In Alberta, storage facilities are owned by utilities, midstream companies, pipelines and producers. Storage facilities in Ontario were developed and are owned primarily by utilities. Over the next few years, additional high-deliverability storage will be developed in Ontario in response to gas-fired power generation requirements. Ontario also draws upon gas storage in Michigan, through several pipe connections between the state and the province. Michigan has a total of 30 billion m3 (1 060 Bcf) of storage capacity.

At the time that we were preparing this manuscript (Fall 2009) depressed natural gas prices resulted in record storage levels in both Canada and the United States.[83]

The following parts of the paper examine the natural gas storage regime as it has developed in different jurisdictions.

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[80] Simmons and Co, *supra* note 37 at 10.
[81] Canadian Underground Natural Gas Storage Statistics 2007, American Gas Association, online: <http://www.aga.org/NR/rdonlyres/8439B684-61F0-46B4-A385-6A1D6A90FF52/0/0902Table45.pdf>.
[82] National Energy Board, *Canada's Energy Future: Infrastructure Changes and Challenges to 2020*, October 2009 at 20 – 21, online: <http://www.neb.gc.ca/clf-nsi/rnrgynfmtn/nrgyrprt/nrgyftr/2009/nfrstrctrchngchllng2010/nfrstrctrchngchllng2010-eng.pdf>.
[83] Dina O'Meara, "Natural Gas Storage Sets Records", Calgary Herald, October 2, 2009, E4 referring to 3.589 tcf in storage in the US and "nearing" 600 bcf in Canada.

3.0 BRITISH COLUMBIA

3.1 Introduction

The legal position in relation to natural gas storage in British Columbia is anomalous. The province's *Petroleum and Natural Gas Act*[84] (*PNGA*) has a relatively clear legislative framework for developing storage projects but the only significant storage project in the province, the Aitken Creek Gas storage facility in the northeastern part of the province, is a depleted reservoir which was originally developed (and is continued) on the basis of a production tenure rather than a separate storage tenure. The Aitken Creek storage is at the upstream or production end of the system; there is no significant storage close to market in the Lower Mainland area[85] and there has been significant public resistance to allowing exploratory drilling in the Fraser Valley to help identify possible natural gas production or storage sites. For example, faced with a proposal from a consortium known as the Fraser Valley Gas Project to drill three deep exploratory wells during the 1980s, the government of the Province of British Columbia appointed David Anderson (who was subsequently to become a federal liberal MP and Minister of the Environment) in May 1990 to conduct a formal public inquiry under the terms of the provincial *Inquiries Act*.[86] The subsequent report documented the various public concerns including the effect of well drilling on groundwater supplies, potential concerns with

[84] R.S.B.C. 1996, c. 361 [PNGA], Part 14, and Petroleum and Natural Storage Reservoir Regulation, B.C. Reg. 350/97 [Storage Reservoir Regulation].

[85] National Energy Board, *The British Columbia Gas Market, An Overview and an Assessment*, April 2004, online: <http://dsp-psd.pwgsc.gc.ca/Collection/NE23-117-2004E.pdf>, noting (at 16): "Natural gas storage is extremely limited in B.C. and consists of one underground storage production area facility, Aitken Creek Storage (Aitken Creek), in northeast B.C. and a small liquefied natural gas (LNG) facility on Tilbury Island in the Lower Mainland used by Terasen to meet the peaking needs of its own system. There is no large underground market area gas storage facility in the Lower Mainland. Upstream storage facilities, while beneficial for producers and shippers, have limited usefulness for downstream consumers during times of pipeline constraint which typically occur during peak demand periods when storage is most critical." The report goes on to note that gas distributors may be able to make some use of storage in the US in Washington and Oregon by swapping gas in storage at those facilities with gas that would otherwise flow across the international border at Sumas\Huntingdon.

[86] Commission of Inquiry into Fraser Valley Petroleum Exploration (B.C.) and D. Anderson, *Report of the Commission of Inquiry into Fraser Valley Petroleum Exploration* (Victoria: The Commission, 1991) [The Anderson Report]. See also, Ministry of Energy, Mines and Petroleum Resources, *Fraser Valley Drilling: Response to the Report of the Commission of the Inquiry into Fraser Valley Petroleum Exploration* (Toronto: Micromedia Ltd., July 4, 1991). The response did not deal with natural gas storage issues.

respect to seismic activity, and the possible effects of a gas storage project on surface property values. While some of these concerns were directed at any oil and gas exploration, it is clear that many of the concerns specifically related to natural gas storage. Anderson's own conclusions suggested that many of these concerns were, based on experience elsewhere, seriously overstated.

In recent years there has been significant controversy as to whether Aitken Creek should be treated as a public utility, and, if so, as to the degree of economic regulation that should be associated with such a designation.[87] We discuss this issue briefly at the end of this section.

This section begins with an account of BC's early legislation, the *Underground Storage Act*[88] (later renamed the *Petroleum Underground Storage Act*)[89], followed by its amendment in 1988 to incorporate the storage regime within the *PNGA*. We then turn to discuss a significant provincial policy paper on gas storage (1995) before turning to examine the manner in which the Aitken Creek storage project came to be approved.

3.2 The 1964 *Underground Storage Act*

British Columbia's original storage legislation, the *Underground Storage Act* of 1964, established five different steps for the recognition and creation of a natural gas storage facility: (1) designation by the Lieutenant Governor in Council that the Act applied to that area of the province,[90] (2) application for an exploration licence (s.3), (3) application by a licensee to have an area declared to be a storage area and for the declaration of a storage reservoir (s.5), (4) declaration of an area as a storage area and a reservoir as a

[87] The BC Utilities Commission decided by way of a letter decision (Letter No. L-47-06, August 25, 2006) that Unocal as owner/operator of Aitken Creek fell within the definition of a public utility. This triggered Unocal's application for an exemption from the Act. We have drawn heavily on the public filings in this application in writing the account that follows. The filings are available, on the BCUC website, online: <http://www.bcuc.com/ApplicationView.aspx?ApplicationId=136> [Unocal filings]. See, in particular, Exhibit B-5.
[88] S.B.C. 1964, c.62.
[89] R.S.B.C. 1979, c.325 [*PUSA*].
[90] *PUSA*, *ibid*., s.2. The *Act* was not a law of general application. It only applied to those areas designated by the Lieutenant Governor in Council.

storage reservoir[91] by the Lieutenant Governor in Council on the recommendation of the Minister (ss.6-7), and, (5) application for, and grant of, an exclusive storage right for a period not to exceed 21 years (but subject to extension) (ss.8-9).

The legislation also contained the basic prohibition that (except as otherwise authorized by statute), no person shall (s.4(3)) "carry out exploration of any land or its subsurface to determine the suitability of the subsurface for underground storage of hydrocarbons". On the face of it, this prohibition, and indeed the entire statute, potentially,[92] applied to publicly and privately owned storage rights.

The *PUSA* did not regulate drilling operations for storage purposes but left this to the *Petroleum and Natural Gas Act*. Neither did the *PUSA* deal expressly with the question of the ownership of storage rights. Thus, the *Act* did not contain a statutory vesting clause and did not deal with the question of whether the minister really could grant exclusive storage rights with respect to a storage reservoir where such rights might be privately owned. The *Act* dealt with Crown surface rights expressly[93] and private surface rights more indirectly by incorporating[94] the terms of Part 3 of the *PNGA*, (the surface rights provisions), thereby allowing a licensee or the holder of a storage right to use the compulsory acquisition provisions of that part of the *Act*. The *Act* dealt expressly with prior rights[95] and with one other possible resource use conflict (that with mine workings[96]), but the Minister would also have ample discretion to resolve potential conflicts with oil and gas operations as part of the approval of an area as a storage area\storage reservoir.

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[91] The *Act* defined a storage reservoir as "a naturally occurring underground cavity or system of cavities or pores, or an underground space or spaces created by some external means, that may be used for the storage or a hydrocarbon and designated as a storage reservoir by the Lieutenant Governor in Council". The first part of the definition embraces depleted reservoirs, the second part ("created by external means") would include salt caverns.

[92] I say "potentially" simply because, as noted above, the legislation only applied to "designated" parts of the Province.

[93] *PUSA*, *supra* note 89, s. 3(5) authorized the Minister to provide a licence for entry.

[94] *PUSA*, *ibid*., s.11.

[95] *PUSA*, ibid., s.4(1) provided that a licence "is subject to all rights existing prior to the issuance of the licence".

[96] *PUSA*, s. 4(2).

3.3 The storage regime under the current *Petroleum and Natural Gas Act*

The *PUSA* was repealed in 1987 and a somewhat revised version was incorporated into what is now Part 14 of the *Petroleum and Natural Gas Act* (ss. 126 – 132). This new Part was amended in 1998 to take account of the creation of the BC Oil and Gas Commission[97] and in 2008[98] to extend the concept of storage to include storage for the purposes of disposal. Hence, the definition of storage reservoir now reads as follows:[99]

> … a naturally occurring underground reservoir that is capable of being used for the introduction, disposal, storage or recovery of petroleum, natural gas, water produced in relation to the production of petroleum or natural gas, waste or any other prescribed substance;

This provision is broad enough to embrace acid gas disposal or carbon capture and storage projects to the extent that the substances that are the subject of such schemes are "prescribed" by regulation.

Section 126 continues the basic prohibition of the earlier legislation to the effect that no person may engage in any geophysical exploration for storage without obtaining a licence. The Division Head has broad discretion in determining whether or not to grant a licence and the terms and conditions of any such licence.[100]

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[97] *Oil and Gas Commission Act*, S.B.C. 1998, c. 39.
[98] *Oil and Gas Activities Act*, S.B.C. 2008, c.36, s. 152(g).
[99] *PNGA*, *supra* note 84, s.1. Note that this definition is now confined to naturally occurring reservoirs; it would not include a salt cavern.
[100] The legislation continues the idea that a licensee may not carry out exploration within 3 km of a mine or an existing storage reservoir without express permission; and see s.6 of the Drilling and Production Regulation, B.C. Reg. 362/98. Also relevant is the Storage Reservoir Regulation, *supra* note 84. The regulation does not apply to the Fraser Valley (s.3). Section 4 of the Regulation provides that the applicant under each of ss. 126, 130 and 131 should include "the information specified in section 12 of the British Columbia Oil and Gas Handbook". The Handbook appears to have been withdrawn and replaced by a set of Guidelines including a Guideline on storage (discussed *infra*). This Guideline does not specifically refer to a section of the *Act* but it does refer to a licence for storage which suggests that it is directly relevant only to s.131. Certainly some of the information required or referred to by the Guideline goes far beyond what would be available to an applicant for an exploration licence.

Section 127 also continues the idea of government designation of a storage area (by the Lieutenant Governor in Council on the recommendation of the Minister of Energy, Mines and Petroleum Resources) although the section does not draw a clear connection between designation and an application on the part of a licensee. Section 128, however, introduces a significant innovation in the *Act* and seeks to clarify the ownership of storage rights. Thus s. 128 (entitled "vesting of storage reservoir") provides that:

> (1) Ninety days after designation of land as a storage area, a right, title and interest in a storage reservoir in or under the storage area and in any water inside the storage reservoir is vested in the government free of encumbrances unless, before the expiry of the 90 days, the Lieutenant Governor in Council rescinds the designation.
> (2) A right, title or interest in anything other than water that is found, naturally occurring, inside the storage reservoir is not vested in the government merely because of the vesting under subsection (1).
> (3) If a right, title or interest in land has vested in the government under subsection (1), that interest, for the purposes of the application of section 23 (2) (a) of the *Land Title Act*, is deemed to be held by the government pursuant to a subsisting exception and reservation contained in the original grant of that land from the government.

In short, Crown vesting is a necessary consequence of a designation order unless the designation is revoked.[101] And a vesting order will necessarily divest any other owner of storage related property rights (but no other rights). Section 129 goes on to provide that:

> A person who had a right, title or interest in land that vested in the government under section 128 may apply under section 16 (1) (c) for compensation for the loss of that right, title or interest.

[101] The language of the vesting does not further describe the nature of that right (other than to note that it is free of encumbrances). We are simply left to infer that it is an exclusive and perpetual right. The vesting extends to water and presumably this includes the right to use the water for storage purposes (i.e. storage\disposal by dissolving the gas stream in solution).

As explained further below, the section is deliberately agnostic as to whom such a person might be. In particular, the section takes no position on whether applications might be forthcoming from surface owners or mineral rights owners.[102] Presumably, any party bringing such an application would have the onus to establish that it previously owned storage rights that the Crown had acquired through the vesting effect of the designation order. The Crown might resist that application by showing that storage rights were already vested in the Crown by virtue of its ownership of the mines and minerals. It is the genius of this legislation that it postpones the debate on ownership until the first decision on an application. At the same time, it offers a developer sufficient security to go ahead, confident that the vesting gives it, through the Crown, a clear title.

The reference to s.16 provides the Mediation and Arbitration Board (established by the *Act*, principally for the purposes of dealing with surface rights compensation matters) with the jurisdiction also to deal with applications under this section. A compensation order made by the Board would need to take account of the following heads of compensation referred to in s. 21(1):

> (a) the compulsory aspect of the entry, occupation or use,
> (b) the value of the land and the owner's loss of a right or profit with respect to the land,
> (c) temporary and permanent damage from the entry, occupation or use,
> (d) compensation for severance,
> (e) compensation for nuisance and disturbance from the entry, occupation or use,
> (f) money previously paid to an owner for entry, occupation or use,
> (g) other factors the board considers applicable, and
> (h) other factors or criteria established by regulation.

[102] There are private mineral owners in the Peace District of British Columbia and in the Lower Mainland and on Vancouver Island.

These factors are clearly designed to deal with the typical surface rights application. There is a considerable body of surface rights jurisprudence and practice both within British Columbia and the prairie provinces on the application of these heads, but little if any experience dealing with how these heads might be applied to the compulsory taking of privately owned storage rights.[103] So far as we are aware, the Board has not been seised with any application under s.16(1)(c) of the *Act*.[104]

It is important to emphasise that there is one further significant difference between an ordinary surface rights compensation award and an award that might be made in the case of storage. In a typical surface rights setting, the surface rights are acquired by the private operator who also pays the compensation. In the case of an application under s.16(1)(c) the application for compensation would be brought by the person claiming the storage rights, but the defendant will be the Crown since it is the operation of s.128 that vests the storage rights in the government.[105]

The Hon. Jack Davis, then Minister of Energy, explained the purpose of these provisions in speaking to the Bill at Second Reading. He observed that the sections were designed to clarify the ownership question. Although Davis framed the issue in terms of a possible claim by a *surface* owner, the language of the Bill and the subsequent *Act* is clearly broad enough to embrace an application from an owner who claims storage rights on the basis of a mineral title rather than on the basis of a surface title. Indeed, as noted above, one of the innovative and attractive features of the legislation is that it is quite agnostic as to ownership.[106] Davis explained as follows:

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[103] The only Canadian experience that we are aware of dealing with compensation orders for storage rights is in Ontario. See discussion of that practice, *infra*, Part 7.

[104] An email inquiry to the Board on July 15, 2009 elicited the following response from the current Chair, Cheryl Vickers: "It certainly hasn't happened since I've been chair of the Board (July 2007) and I am unaware of any applications of this nature before that."

[105] In Ontario, see Part 7, *infra*, the operator is responsible for compensation.

[106] The Anderson Report, *supra* note 86, perhaps surprisingly, does not contain an extensive analysis of the ownership of storage rights. Such discussion as there is occurs in Chapter 14, entitled "Public Participation – Process and Issues". In this chapter the Commission deals with risk analysis and the perception of risk and examines the entrenched opposition of an NGO, Friends of the Fraser Valley, to the proposed drilling. Anderson contrasts this position with the position of landowners in the Valley, up to 60% of whom were likely to own the subsurface rights based on the date of the original Crown grants. The general tenor of the discussion (and see especially at 152) suggests that Anderson was proceeding on the basis that storage

> [The Bill] rolls the existing legislation relating to the storage of oil and natural gas into the *Petroleum and Natural Gas Act*…
>
> There has been a problem with respect to underground storage. The question as to who owns the voids or caverns—if I can put it that way—underground is not clear in the existing legislation. Ownership is clarified in the new legislation: it is vested in the Crown. If there is any claim launched by a surface owner with respect to that ownership matter, there is provision for reparations to the surface owner. It's difficult to imagine what those claims might be, but nevertheless provision is made in the legislation which protects the surface rights owner if a valid claim can be made...[107]

In addition to the storage exploration tenure provided for by s.126 and the vesting and compensation provisions, this Part of the *Act* also provides for Crown leases of storage reservoirs (s.130) as well as licences to operate a storage reservoir. Section 130 deals with the storage lease and contemplates that an application for a storage lease for "a

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rights were held by the owner of the subsurface rights. He suggests that a government decision to refuse to allow exploratory drilling might trigger a claim to compensation. Anderson does refer generally to the role of the Mediation and Arbitration Board, and the report does contain a discussion of Crown petroleum and natural gas tenure (Appendix H), but remarkably enough there is no discussion of what is now Part 14 of the *Act* dealing specifically with storage, even though, as noted above, this part was introduced in 1987.

[107] British Columbia, Legislative Assembly, *Hansard* (March 1, 1988) at 3190 (Hon. Mr. Davis). And further: "This legislation is timely for several reasons. There are several companies poised to undertake exploratory work in the lower mainland. One of them has already started drilling a well near Birch Bay, just south of the international boundary line. Two others have been buying up leases, preparing to undertake extensive exploratory work. The likelihood of these companies finding natural gas is slight: a one-in-ten or one-in-twenty possibility. What they are looking for really is what they refer to as competent reservoirs. They are looking for geological formations which perhaps contain water now but which could be used for the storage of natural gas brought down by Westcoast Transmission from the Peace River area. If storage capacity is found in the lower mainland, it will be a boon primarily to the consumers of natural gas in the lower mainland area. If the storage is adequate, the distributing company - now B.C. Hydro Gas - will be able to negotiate a much lower rate for mainline transportation, will take gas during the summer months from the Peace River area and store it, and will draw steadily on the pipeline rather than intermittently and primarily during the winter months. Because the transportation charge is much reduced, the cost saving can and will be passed on to the consumer, and the cost saving could be in the order of 5, 10 or 15 percent".

storage reservoir that is owned by the government"[108] may be made either by the storage exploration licensee or by the holder of another form of Crown petroleum and natural gas tenure (a natural gas permittee, a drilling licensee, or a lessee). The Minister has considerable discretion in deciding whether or not to grant such an application and as to the terms and conditions of any resulting lease. The *Act* is silent on the question of duration and so this too is left to the Minister. The Regulations fix the rental at $7.50 ha per year.[109]

The regulatory issues associated with the approval of a storage operation are dealt with by the Oil and Gas Commission[110] rather than by the Department. A storage licence issued by the Commission under s.131 provides the regulatory authority to operate the storage; this is a necessary companion to the proprietary rights conferred by the lease. No person may develop or use a storage reservoir without a licence (s.131(1)) and the Commission has considerable discretion to grant or refuse an application, to determine appropriate conditions, and to set the duration of any such licence. The Commission has issued a Guideline for applicants.[111] The Guideline suggests that an application should include information on: the need for the project, project description and title holder, geological and engineering date including information on the nature and size of the trap and operating pressures, market matters including statements from possible users, and the nature of any surface facilities. The Guideline refers to both depleted reservoir projects and aquifer projects.

It is apparent that Part 14 of the *Act* on storage is not a complete code. Other sections of the Act will also be triggered in addition to the surface rights provisions already mentioned in the context of compensation. For example, an exploratory well drilled to

[108] Presumably whether by virtue of the operation of the vesting provision or otherwise.
[109] Storage Reservoir Regulation, *supra* note 84, s.7.
[110] BC Oil and Gas Commission, online: <http://www.ogc.gov.bc.ca/>.
[111] Guideline for Application for a Licence for Underground Storage of Hydrocarbons, online: <http://www.ogc.gov.bc.ca/arb/arb_print.asp_aoid=53.html>. The Guideline suggests that it only applies to northeastern BC.

help identify a storage site would require a well authorization under ss.83 and 85 of the *PNGA*, as would an injection\withdrawal well.[112]

3.4 Provincial policy paper (1995) on natural gas storage

After the introduction of the legislation, the Province did further work to develop a policy framework on natural gas storage during the mid-1990s and issued a discussion paper: "Natural Gas Underground Storage Policy for Northeast British Columbia".[113] The paper provides valuable guidance as to how the government saw the legislation being applied. Here we summarize what the paper had to say about: (1) the value of storage, (2) ownership issues, (3) the form of tenure for a storage project (storage rights vs production rights and duration), and (4) protective corridors for storage projects.

The paper contained the frank acknowledgement that it was focused on upstream storage given that "Efforts to explore for storage opportunities closer to domestic and export markets, and in more densely populated regions of the province have met with sufficient public resistance to forestall further serious consideration …".[114] But the paper still acknowledged the value of upstream storage on the grounds that such storage might:[115]

- allow optimal utilization of production, processing and transportation facilities;
- reduce production variations otherwise occurring in response to seasonal fluctuations in gas demand;

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[112] The *Act* defines a "well" as "a hole in the ground … (b) made or being made by drilling, boring or any other method to explore for, develop or use a storage reservoir for the storage or disposal of petroleum, natural gas, water produced in relation to the production of petroleum or natural gas, waste or any other prescribed substance, (c) used, drilled or being drilled to inject natural gas, water produced in relation to the production of petroleum or natural gas or other substances into an underground formation in connection with the production of petroleum or natural gas, (d) used to dispose of petroleum, natural gas, water produced in relation to the production of petroleum or natural gas, waste or any other prescribed substance into a storage reservoir…."

[113] The paper (16pp) (hereafter "Provincial Policy Paper") is available as part of Unocal's Aitken Creek filings, *supra* note 87; that copy of the paper is undated but the paper requests comments by January 1996 suggesting that it was circulated in late 1995 for comment.

[114] Provincial Policy Paper, Unocal filings, *ibid.*, section 3.0, Underground Storage Prospects in British Columbia..

[115] Provincial Policy Paper, Unocal filings, *ibid.*

- increase security of supply from interruptions to upstream gas movement;
- augment enhanced oil recovery and gas cycling schemes;
- provide opportunities for improved gas recovery from marginal pools; and
- improve overall provincial gas deliverability.

On the matter of ownership, the paper suggested that the province had concluded that ownership of storage space was uncertain but that three possible parties might be able to make a claim: the Crown, the surface land owner, or the petroleum and natural gas rights owner[116] and further acknowledged that the Crown vesting provision (now s.128) implicitly conceded that there could be some privately owned storage rights in the province. Based on this assessment the paper offered the following recommendation:[117]

> As a standard practice, the Ministry will not expropriate subsurface rights for storage projects, but only issue those rights that belong to the Crown. Storage proponents shall be responsible for securing access to any additional subsurface rights held, or thought to be held by, third parties. The Ministry will retain the right to use expropriation as a measure of "last resort" for storage projects where efforts by the proponent to acquire third-party rights have failed and the Ministry determines the project to be in the broader public interest.

One of the substantive issues the paper discussed is the question of whether a proponent would be able to proceed solely on the basis of a Crown storage right or whether a proponent would also require a Crown production right. The paper suggested that the latter would be more likely and that to launch a storage project without also owning the

[116] Provincial Policy Paper, Unocal filings, *ibid*. The paper also offered a statement of the position in Alberta and Saskatchewan noting that each of the three westernmost provinces had adopted "unique approaches" to gas storage. The report, section 5, Subsurface Ownership Rights, suggested that Saskatchewan provided that the Province's "space" legislation vested all pore space in the Province. We think that this is likely an overbroad characterization of the current legislation which is confined to those situations in which there is a Crown mineral title. See discussion, Part 5 *infra*. Alberta's approach was described as follows: "Alberta has elected to presume provincial ownership without enacting legislation and will address the legality of the ownership claim when, and if, challenged." If this ever were a correct statement of Alberta's policy it is certainly incorrect now, see discussion Part 4, *infra*.
[117] Provincial Policy Paper, Unocal filings, *ibid.*, section 5.

relevant production rights would place "severe risks and constraints on the proponent"[118] because of its lack of control if production rights were held by a third party and because of the "inability to effectively manage the project's cushion gas due to restrictions on use of any native hydrocarbons".[119] The concern underlying this latter point is simply that in addition to producing injected gas the storage lessee might also be producing native gas owned by the Crown—potentially problematic in the absence of a tenure to do so.

All of these concerns led the paper to suggest that the exploration licence\lease combination was perhaps best suited to cases where there might be freehold subsurface ownership or where the target was an aquifer or a salt formation and that the Minister should generally "issue storage leases only to applicants who already hold petroleum and natural gas tenure in the proposed storage area."[120] The paper acknowledged that it was sometimes difficult to classify a project as a storage project or as a gas cycling project (i.e. associated gas reinjected to preserve reservoir pressure). This was the historical background to the Aitken Creek project (discussed below) which explains why it was licensed as a scheme under what is now s.100 of the *PNGA*.[121] The classification was important to the government principally because of the different royalty treatment of the injected gas. In the case of an enhanced recovery scheme, injected gas would not be subject to royalty until produced; while in the case of a commercial storage project royalty would be assessed upon injection. The paper suggested that in the case of a hybrid project it might be necessary for the parties (the Crown and operator) to negotiate the pre-defined point at which the project might move from a production\recovery operation to a commercial\storage operation.[122]

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[118] Provincial Policy Paper, Unocal filings, *ibid*.
[119] Provincial Policy Paper, Unocal filings, *ibid*., section 6, Tenure.
[120] Provincial Policy Paper, Unocal filings, *ibid*.
[121] Note that s.100 continues to provide that: "A scheme for any of the following must not be proceeded with unless the commission, by order, approves the scheme on terms the commission specifies: (c) the processing, storage or disposal of natural gas". Natural gas is defined to include both CO2 and H2S but only so long as they are "produced from a well". Thus a storage\disposal project might include an acid gas disposal project but not a pure CO2 disposal project where the CO2 stream originated from an industrial activity. Such a scheme would presumably need to be licensed under Part 14.
[122]Provincial Policy Paper, Unocal filings, *supra* note 87, Section 9, Crown Royalty. The paper also addressed Crown royalty issues and rental issues. On Crown royalty the paper suggested that it was necessary to provide for a royalty on cushion gas on the basis of a deemed rate of extraction. And on rental

As for the duration of a storage lease, the paper suggested that "tenure should be of sufficient length to provide the applicant with long-term project security, yet contain provisions that give the Crown some flexibility to adjust terms to reflect changing circumstances."[123]

The paper also addressed the question of whether the Crown should reserve some sort of protected corridor surrounding the storage scheme within which special caveats on future operations might apply.[124] In general the paper suggested that this would be inappropriate since it served to transfer the risk of drawing proper boundaries from the proponent to the Crown and might also have a detrimental impact on Crown bonus bid revenues in relation to potentially productive contiguous properties.

3.5 Aitken Creek

The Aitken Creek storage facility is a major storage facility in northeast British Columbia. It is jointly owned by Chevron and BP and has a working gas capacity of 59.2Bcf. The storage is connected to both the Spectra system[125] and to the Alliance system.[126]

As noted in the previous section, Aitken Creek was approved as a gas cycling scheme and not as a storage project.[127] The field was discovered in 1959 and began producing oil in 1962. Gas cycling was first approved in 1965 and continued until 1977 when the government authorized concurrent production of oil and the gas cap. The field was first

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the paper acknowledged that a storage operator might end up paying two sets of rents; rent for a production tenure and rent for a storage tenure.

[123] Provincial Policy Paper, Unocal filings, *ibid*.

[124] The Aitken Creek project was protected by a corridor two spacing units in width.

[125] Formerly the Westcoast system. This system can deliver gas to the lower mainland of BC, to the US pacific coast at Huntington\Sumas and to the Alberta system at Gordondale.

[126] The Alliance pipeline system, built in the late-1990s, is a bullet pipeline that takes production from NW Alberta and BC to the Chicago market. The pipeline is now owned by Enbridge Income Fund and Fort Chicago Energy Partners.

[127] The material in this paragraph is based on Unocal's filings in support of its application for exemption from regulation as a utility, *supra* note 87.

proposed as a storage project in conjunction with a planned liquefied natural gas (LNG) project at Port Simpson. Union Oil applied for approval of the storage project as an energy project under the terms of s.19(1)(a) and 20 of the then *Utilities Commission Act* (*UCA*).[128] The Minister of the day issued an exemption order from the terms of the *UCA* on certain conditions including compliance with the terms of a scheme approval under s.116 of the *PNGA*. Those terms included a maximum storage pressure, a protective corridor around the project, and other conditions dealing with deeper drilling and production accounting. Royalty was to be payable on stored gas "when first produced". Both the exemption order (termed a disposition order) and the Ministerial Order approving the scheme have been significantly amended over time to take account, *inter alia*, of the collapse of the Port Simpson LNG project.[129] However, the storage project continued to be principally regulated under the terms of the scheme approval under the *PNGA* (then s.116, now s.100). Furthermore, in response to concerns raised at the time of the 1995 discussion paper, government officials assured Unocal that the project would be grandparented from any new storage rules, although it was also suggested that, if Unocal required modifications, efforts would be made to regulate the project under the storage provisions of the *Act* and *inter alia* would require a storage lease rental and discontinue the protected corridor.

None of this seems to have happened. However, by letter decision of August 2006 the BCUC decided that the Aitken Creek Storage Facility fell within the definition of public utility in the *Utilities Commission Act.*[130] In response, Unocal sought leave to appeal that decision but also sought a broad exemption order under s.88 of the *Act*. The Commission and the Lieutenant Governor in Council ultimately granted that application at least in part

[128] These provisions dealing with "energy projects" have since been repealed. It now seems correct to say that the *Utilities Commission Act* would not apply unless the project were being constructed by a public utility.
[129] The royalty treatment was changed in 1988 and Union was allowed to increase maximum operating pressure from the discovery pressure of 10736 KPa to 19300 KPa in 1998.
[130] BCUC Letter No. L-47-06, *supra* note 87.

but left open the possibility of complaint-based oversight of the operation.[131] The Commission also issued a certificate of public convenience and necessity for the facility.

In deciding to grant the exemption application, at least in part, the Commission took the view that the application should only be granted to the extent that this would serve the public interest and thus the Commission sought assurance that Unocal would not be in "a position where it is able to exert significant monopoly or market power by discriminating on the basis of price or service, withdrawing service, or setting rates which are unreasonable."[132] The Commission continued:[133]

> The Commission Panel notes that a range of services are offered by physical storage facilities, each with its own geographic market, substitutes and barriers to entry. A storage operator may be found to exert differing amounts of market power in each segment. In particular, the services that gas storage provides are: (i) seasonal term supply, (ii) daily balancing, (iii) peaking, (iv) price hedging, and (v) alternative supply (supply reliability).
>
> …. In the case of the services provided by Unocal in its operation of the Storage Facility, the public interest includes the interests of Unocal, storage contract holders, and customers of TGI [Terasen Gas, a distribution utility] who are directly affected by the bilateral agreement entered into by Unocal and TGI and yet have no opportunity to directly influence those negotiations. While these interests may at times conflict, all parties have a stake in the safe and reliable operation of the Storage Facility offering a host of storage related services at a fair and reasonable cost.

[131] Unocal filings, *supra* note 87, BCUC Order No. G-71-08, April 18, 2008. The facility is now operated by Aitken Creek Gas Storage ULC. It appears that Unocal did not proceed with its appeal given the exemption order.
[132] Unocal filings, *ibid.*, BCUC Order G-167-07, Appendix B at 6.
[133] Unocal filings, *ibid*. BCUC Order G-167-07, Appendix B at 7.

The Commission rejected Unocal's request for complete exemption since it was not satisfied that Unocal was unable to exercise market power[134] but concluded that full prospective costs of service regulation was not necessary and that complaints-based regulation would be adequate.[135]

3.6 Other regulatory oversight of storage projects

In addition to the tenure issues that fall within the jurisdiction of the Department of Energy, Mines and Petroleum Resources and the storage licence approval dealt with by the Oil and Gas Commission, an underground storage project may also trigger the application of the province's *Environmental Impact Assessment Act*[136] though not where the project occurs in a depleted oil and gas reservoir in parts of northeast BC. Thus table 8 of the Reviewable Projects Regulation[137] provides that the following constitute (or do not constitute) a reviewable project:

> (1) Subject to subsection (2), a new energy storage facility with the capability to store an energy resource in a quantity that can yield by combustion $\geq$ 3 PJ of energy.
>
> (2) Development or use of naturally occurring underground reservoirs for the storage of petroleum or natural gas is not reviewable under subsection (1) if those reservoirs are located in the Western Canadian Sedimentary Basin of North East British Columbia within the map groups and blocks set out in Appendix 2.

The Regulation contains a similar exception in relation to modifications of existing projects.

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[134] Unocal filings, *ibid*. BCUC Order G-167-07, Appendix B at 14.
[135] Unocal filings, *ibid*. BCUC Order G-167-07, Appendix B at 19.
[136] S.B.C. 2002, c.43.
[137] B.C. Reg. 370\2002.

3.7 Conclusions for British Columbia

In summary, British Columbia has only one geological gas storage facility and that is located in the producing part of the province. The province recognizes that gas storage rights may be owned by private parties as well as by the Crown, apparently on the basis either of private ownership of mineral titles or ownership of the surface. However, the province has adopted a mechanism whereby storage rights in relation to any particular property may be vested in the Crown. Private owners, to the extent that they are disentitled as a result of such a vesting, may be able to claim compensation. Although hardly tested, this should be an effective mechanism to deal with potential holdout problems. The province has developed a separate tenure system for storage although, as a matter of practice, the lone storage project in the province is licensed on the basis of a production tenure and a gas conservation scheme rather than on the basis of a storage tenure.

The province has separated regulatory approval from questions of property rights. Regulatory approval rests with the Oil and Gas Commission not the Department of EMPR. While historically the province's storage facility was not subject to rate regulation, recent developments have brought the Aitken storage facility under the complaint supervision of the BC Utilities Commission.

4.0 ALBERTA

4.1 Introduction

Alberta has a well developed natural gas storage industry.[138] While storage was originally developed by the natural gas distribution utilities operating in Alberta (e.g. ATCO and its predecessors[139]) there is now considerable market-based commercial storage available to producers and others to manage their purchase and sale obligations and to hedge the market. The major storage locations are at Edson, McLeod, Crossfield, Carbon, Hussar, Countess and Suffield.[140]

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[138] In addition, the petrochemicals industry in the province also makes use of salt cavern storage facilities for natural gas liquids. For a useful discussion see the EUB's Post-Incident Report, April 2002, BP Canada Energy Company Ethane Cavern. The Inquiry Report notes (at 4) that there were some 42 salt caverns in the Fort Saskatchewan area, broken down as follows: Dow 7, NGL, 5 ethylene, EnerPro, 10 NGL, BP 10 NGL, Williams, 10 NGL and Atco dry gas. The report is available online: <http://www.ercb.ca/docs/Documents/reports/BP-report.pdf>.

[139] See Alberta Utilities Commission (AUC) Decision 2007005: ATCO Gas South Carbon Facilities - Part 1 Module – Jurisdiction (2005/2006 Carbon Storage Plan) Application No. 1357130 February 5, 2007, online <http://www.auc.ab.ca/applications/decisions/Decisions/2007/2007-005.pdf> at 3 - 10 discussing the evolution of ATCO's Carbon Storage facility. This field was originally purchased and developed by Canadian Western Natural Gas as a producing field to provide peaking capacity for the utility. It was brought into CWNG's rate base in 1958. The field was converted into a storage reservoir in 1967. Over time CWNG and later ATCO gave TCPL and later others (including NUL another utility) the contractual right to use increasing amounts of carbon storage and the facility was expanded by providing increased compression. In the early 1980s Carbon was the only commercial storage facility in Alberta but during the 1990s and early 2000s the competitive market evolved and in this and earlier proceedings ATCO sought to argue that the facility was no longer needed for utility purposes and by the time of this application the storage facility was used 100% for merchant storage capacity with the ATCO utility operation leasing the entire capacity (38.7 bcf) to ATCO Midstream at 45 cents per GJ. In Decision 2006-098 the Commission decided that it was not necessary for Carbon to remain in the rate base for load balancing purposes. ATCO could achieve this goal by other means. However in Decision 2007-005 the Commission took the view that Carbon could remain in the rate base for revenue generation purposes. The Court of Appeal rejected that conclusion in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)* 2008 ABCA 200. As a result of that decision Carbon Storage has been removed from ATCO's rate base effective October 2006 (Decision 2006-098); see AUC Decision 2009-067, June 26, 2009.

[140] ERCB Report, *Alberta's Energy Reserves 2007 and Supply/Demand Outlook 2008-2017*, ST98-2008, <http://www.ercb.ca/docs/products/STs/st98-2008.pdf> and especially Table 5.9, Commercial natural gas storage pools as of December 31, 2007. This table lists the following 8 facilities (name, operator, capacity (m3)): (1) Carbon Glauconitic, ATCO Midstream, 1, 127; (2) Countess Bow Island N & Upper Mannville M5M, Niska Gas Storage, 817; (3) Crossfield East Elkton A & D, CrossAlta Gas Storage, 1,197; (4) Edson Viking D, TransCanada Pipelines Ltd. 1,775; (5) Hussar Glauconitic R, Husky Oil Operations Limited, 423; (6) McLeod Cardium A, PPM Corp Energy Canada Ltd., 986; (7) McLeod Cardium D, PPM Corp Energy Canada Ltd., 282; (8) Suffield Upper Mannville I & K, and Bow Island N & BB & GGG, Niska Gas Storage, 2,395.

In response to the growing interest in natural gas storage and concerns as to the possible uncertainty as to title to storage rights, the province enacted legislation in 1994 to clarify the ownership of natural gas storage rights. The legislation confirms that storage rights are owned by the owners of the natural gas and petroleum titles. Consequently, storage rights in Alberta may be owned by the Crown or by private parties. While the Crown owns about 80% of the mineral rights within the province[141], in some areas, especially in the southern third of the province, gas storage operators can expect to deal with a mixed pattern of Crown and private mineral titles and therefore storage owners. The following sections discuss the storage title clarification legislation, the Crown's natural gas storage disposition legislation, and the regulatory approach to the approval of natural gas storage projects in Alberta.

4.2 Clarification of the ownership of natural gas storage rights

In 1994 the province amended the *Mines and Minerals Act* to clarify the ownership of natural gas storage rights.[142] The provision as it reads in the current s.57 of the *Act* provides (in part) as follows:

> 57(1) Subject to subsection (2),
>
> (a) where a person owns the title to petroleum and natural gas in any land, that person is the owner of the storage rights with respect to every underground formation within that land, and
>
> (b) where one person owns the title to petroleum in any land and another person owns the title to natural gas in the same land, those persons are co-owners of the storage rights with respect to every underground formation within that land.

[141] Alberta Department of Energy, "Alberta Oil Sands Tenure Guidelines" (August 14, 2009), online: <http://www.energy.gov.ab.ca/OilSands/pdfs/GDE_OST_2009_Ch1.pdf>.
[142] S.A. 1994, c.22.

> (2) Where a person owns the title to a mineral in any land and operations for the recovery of the mineral result or have resulted in the creation of a subsurface cavern in that land, that person is the owner of the storage rights with respect to that subsurface cavern to the extent that it lies within that land.
>
> (3) A person who has storage rights in respect of a subsurface cavern within any land has the right to recover any fluid mineral substance stored in that cavern, to the exclusion of any other person having the right to recover a mineral from the same land.

These amendments do several things. First, subsection (2) establishes a special rule for "subsurface caverns". A subsurface cavern is "a subsurface space created as a result of operations for the recovery of a mineral." Acorn and Ekelund suggest that the drafters had in mind here the example of a salt cavern created by dissolving salts by hydraulic methods and did not have in mind the scenario of a depleted oil and gas reservoir.[143] Subsection (2) establishes that the storage rights with respect to that created cavern will be held by the holder of that particular mineral title, i.e. in the case of the salt cavern, the owner of the salt mineral rights. Acorn and Ekelund comment as follows:[144]

> [the subsection] is intended to settle the matter of ownership of storage rights in subsurface caverns in favour of the owner of the mineral that was recovered by operations that resulted in the creation of the cavern.

The general rule of subsection (1) deals with two scenarios. First, in the case where there is a severed petroleum and natural gas estate, the section confirms that the owner of that estate also owns "the storage rights with respect to every underground formation within that land". The *Act* defines storage rights as "the right to inject fluid mineral substances into a subsurface reservoir for the purpose of storage". Second, the legislation provides that where title is split between a gas owner and a petroleum owner, the owners of the separate estates are to be treated as "co-owners of the storage rights with respect to every

[143] Acorn and Ekelund, *supra* note 19, at 361. This distinction must turn on the word "created".
[144] Acorn and Ekelund, *ibid*. at 363.

underground formation within that land." But what does that mean? In their discussion of the section Acorn and Ekelund[145] comment that the section:

> … deliberately does not state the nature of the co-ownership as being joint or otherwise. In practical terms this means that a storage scheme cannot proceed in such a case unless both co-owners are parties to the contractual arrangements. It leaves the matter of compensation of each of them to negotiation.

This has the potential to create both uncertainty and holdout problems.

4.3 The Crown's system for disposing of publicly owned natural gas storage rights

Alberta disposes of Crown owned resource rights, including storage rights, under the terms of the *Mines and Minerals Act*.[146] As noted above, s.57 establishes that ownership of natural gas storage rights follows the title to petroleum and natural gas rights. Thus, where the Crown owns the petroleum or natural gas rights (or the larger mines and minerals estate of which petroleum and natural gas might from a part), the Crown will also own the storage rights.

Subsection 57(5) provides that:

> (5) Where the Crown in right of Alberta owns storage rights in respect of a subsurface reservoir, no person has, as against the Crown, any storage rights in respect of that reservoir except under
>
> (a) a unit agreement to which the Crown is a party,
>
> (b) a contract entered into under section 9(a), or

[145] Acorn and Ekelund, *ibid*. at 362 – 363. For a discussion (and criticism) of this interpretation, see Bankes, Poschwatta and Shier, *supra* note 4 at 607 – 608.
[146] R.S.A. 2000, c. M-15.

(c) an agreement issued with the authorization of the Lieutenant Governor in Council,

that expressly conveys storage rights in respect of that reservoir.

This subsection does two things. First, it confirms that the holder of a petroleum and natural gas licence or lease (or an earlier form of Crown tenure[147]) does not obtain storage rights by virtue of the grant of exploration or production rights. Second, it outlines three different ways in which a party might obtain storage rights from the Crown under the terms of the *Act.* In each case the instrument must "expressly" convey storage rights with respect to that reservoir. We shall examine each of these modes of disposition. Acorn and Ekelund suggest that of these "the most common will be by way of a unit agreement to which the Crown is a party, as this has been the most common case in the past".[148] Perhaps the biggest formal difference between these three modes of disposition is that while options 2 and 3 each contemplate the approval of the Lieutenant Governor in Council, the Minister alone is authorized to exercise a unit agreement.

4.3.1 A unit agreement to which the Crown is a party Unit agreement

The key provision of the *Act* dealing with unit operations for storage purposes is s.102 which provides as follows:

102(1) The Minister may on behalf of the Crown enter into an agreement providing for the combining of interests in a mineral occurring in a subsurface reservoir underlying one or more tracts to facilitate the co-ordinated management of operations for any one or more of the following:

….

[147] The holder of a pre-1994 tenure might, depending upon the terms of the grant and the language of the *Act* at the time of the grant, have an argument that storage rights were included; see Acorn and Ekelund, *supra* note 19 at 362.
[148] Acorn and Ekelund, *supra* note 19, at 363.

(b) the use of the subsurface reservoir for the purposes of storage of fluid mineral substances and the combining of interests in the storage rights in respect of that subsurface reservoir;

(c) the recovery of fluid mineral substances injected into or stored in the subsurface reservoir.

(3) Notwithstanding this Act or an agreement but subject to section 36(6), a unit agreement may provide

(c) for compensation for interests adversely affected,

(d) that any provision or condition of an agreement, whether statutory or otherwise, will be nullified, changed or varied to the extent necessary to give effect to the unit agreement,

(e) that so long as operations are conducted in accordance with the unit agreement the operational requirements with respect to each location insofar as they relate to the location or part of the location within the unit operation will be deemed to have been met,

(f) & (g) [omitted; these paragraphs deal with production scenarios]

Minerals subject to terms of agreement

104 (2) Where a unit agreement provides for the use of the subsurface reservoir for the purpose of storage of fluid mineral substances, storage rights that are the property of the Crown and affected by the unit agreement are subject to the terms and conditions of the unit agreement so long as the Crown is a party to the unit agreement.

To support an application to enter into a gas storage unit agreement, the Department has indicated that it will expect to see:[149]

- geological mapping of the proposed storage reservoir (such as structure, net pay, hydrocarbon pore volume),
- structural or stratigraphic cross-sections to support this mapping,
- seismic mapping and sections (also in support of the geological mapping),
- copies of any [ERCB] applications and approvals for the storage operation,
- pressure surveys, material balance calculations, decline analysis, and any other reservoir information (in support of the reservoirs volume and aerial extent),
- an estimation of the reservoir's remaining recoverable marketable gas,
- historical production/injection information for the reservoir, and
- a written report that discusses the geological and engineering data.

The Department takes the view that it is the responsibility of the applicant to determine the appropriate geography of the application and states that it "does not have any regulated buffer zone protection or specific rules around migration of gas".[150] The Department has developed a standard form gas storage unit agreement (GSUA).[151]

The premise of any unit agreement, whether designed to facilitate storage or production, is that the area subject to the agreement (a particular oil and gas pool) covers two or more "tracts" (separate titled areas within the pool) that are to be combined in order to facilitate coordinated operations. In the case of a producing pool, the main purpose of unitization is to avoid the consequences of the rule of capture. As a result of unitization, production

[149] Alberta Energy, Information Letter, IL 98-23, Commercial Gas Storage in Alberta, July 22, 1998 [Information Letter]. See also FAQs in relation to gas storage, online: <http://www.energy.gov.ab.ca/Tenure/1093.asp> [FAQs].
[150] FAQs, *ibid.;* noting as well that the Crown will only include lands in the GSUA that it believes will be used as part of the storage operation.
[151] Online: <http://www.energy.gov.ab.ca/Tenure/forms/unitgasAgreement.pdf > [Standard form GSUA].

from anywhere in the pool will be shared amongst each of the tracts in accordance with the terms of a negotiated tract participation factor. It is equally the premise of any unit agreement that the various tracts might be under lease to various different parties (the working interest owners). Typically, such leases (whether Crown or freehold) will provide that they will be continued beyond a short primary term by operations or production on the leased lands.

Given these premises, a typical unitization agreement will attempt to provide, at a minimum, for the following: (1) that the various tracts should be operated as single titled unit, (2) that production (and operating costs) should be shared in accordance with an agreed formula, and (3) that any underlying leases will be amended to the extent necessary to give effect to the purposes of the unitization (this will mean, *inter alia*, that the royalty will be payable in accordance with a tract allocation factor and not actual production on the lands, and that the lease term will be extended by activities\production anywhere within the unit area.) In addition to the unitization agreement there will typically be a unit operating agreement which will prescribe how decisions will be made with respect to operations on the unitized lands—which after all are now to be operated as a single tract. Such an agreement will provide for the appointment of an operator and for decisions to be made—if necessary, by a majority of tract owners. The unit agreement will typically be executed by the working interest owners and the royalty\freehold owners and the operating agreement solely by working interest owners.

All of the above will apply to a gas storage unit agreement as well as a production agreement with some modifications. *First*, the working interest owners will need to be assured that each has the right to store as well as produce natural gas. Since such a right will not have been granted to a Crown lessee (s.57(5) *MMA supra* and discussion in part 4.3) and may not have been granted by a private lessor to a private lessee), the working interest owners will want the unitization agreement to be executed by their lessors (including the Crown) and will want that agreement to amend the underlying leases to provide this additional storage right. The Crown standard form agreement gives effect to

this through the definition sections of the agreement and a number of the operative clauses.

First, cl. 303 provides that unit operations will continue each and every lease.[152] "Unit operations"[153] are defined to include injection and storage operations. Second, cl. 303 provides that leases are amended to the extent necessary to conform to the agreement. This must include any Crown agreements\leases. Third, and perhaps most crucially, cl. 401 provides the right to store (and this description of the right must be taken to be read in to existing Crown agreements):

> 401 Operations: The Royalty Owners hereby grant to the Working Interest Owner, insofar as they have the right to grant the same:
>
> (a) the right to conduct Unit Operations [which includes storage, see above] in and in respect of the Unitized Zone without regard to the provisions of the Leases or the boundary lines of the Tracts in such manner and by such means and methods as they consider necessary and proper; and
> (b) without limiting the generality of the foregoing, the right to convert and use as injection or storage wells, any wells now existing or hereafter drilled into the Unitized Zone.
>
> 402 Injection: Notwithstanding clause 401, no Unitized Substances, other than Gas that is deemed under clause 701(b) to comprise Storage Gas, shall be injected into the Unitized Zone for any purpose whatsoever.

[152] Standard form GSUA, *ibid*., Cl. 303: "Any Unit Operations shall, except for the purpose of calculating payments to Royalty Owners, be deemed conclusively to be operations upon the Unitized Zone in each Tract, and any such operations shall continue in full force and effect each Lease and any other agreement or instrument relating to the Unitized Zone or Unitized Substances as if such operations had been conducted on and a well was producing from each Tract or portion thereof, in the Unit Area."
[153]Standard form GSUA, *ibid*.: "unit operations" means "any operations or activities undertaken in connection with the injection into or storage of Storage Gas in the Unitized Zone, the development or exploitation of the Unitized Zone, the production of Unitized Substances ….[including storage gas]"

Second, the working parties to the unitization agreement will want to be sure that they allocate responsibility for any royalty obligations in relation to native gas (i.e. the gas left in place that would otherwise be produced and which would therefore attract a royalty obligation) and yet at the same time provide a different basis for allocating rights in relation to injected (stored) gas. The standard form agreement accomplishes this objective by allocating liability for the native gas in accordance with a tract participation factor until that liability has been amortized in accordance with provincial policy:[154]

> The Gas Storage Unit Agreement provides for the payment of royalties on remaining recoverable marketable gas in the reservoir over a base amortization period. When the volume of gas has been determined, 80% of this amount - described by the heat content - will be amortized over a negotiated period. This amount will be indicated in the Gas Storage Unit Agreement, which provides the methodology for the payment of royalties.

Gas that is not royalty liable is treated as storage gas and storage gas "shall not be allocated among the Tracts, and no royalty shall be payable in respect thereof".[155]

The *third* and final part of the picture in the context of Crown tenure is the continuation of the underlying leases or licences. What is the duration of those leases or licences as amended by the unit agreement? The answer to this question is found in the Petroleum and Natural Gas Tenure Regulations.[156] These regulations provide that when a licence is at the end of its intermediate term, or a lease is at the end of its primary term, such an interest will be continued as to those parts of the location of the agreement that fall within certain prescribed categories. While these categories include producing spacing units and spacing units that, in the opinion of the Minister, are capable of production, the relevant sections also provide that an agreement (i.e. a lease or a licence) shall also be continued

[154] See Information letter, 98-23, *supra* note 149, and also the gas storage FAQs, *supra* note 149, and cl. 7 of the standard form GSUA, *supra* note 151.
[155] Standard form GSUA, *supra* note 151, cl. 702. "Storage Gas" is defined as "Gas with respect to which there is no royalty liability outstanding".
[156] Alta. Reg. 263/97.

for those spacing units within the agreement that are included within a "gas storage agreement".[157]

Once continued under s.15, the leases continue indefinitely until the Minister gives notice under s.18 that the lands are no longer subject to the gas storage unit agreement.[158] This would apparently occur under the terms of the unit agreement itself which provides in cl. 1402 for automatic termination 90 days after all wells used for unit operations have been abandoned, plugged, or disposed of.[159] Since there is no production royalty payable for the use of storage (beyond that provided for and paid in relation to native gas (see above)) the only charge that a lessee pays to the Crown is the rental charge payable under the terms of the Mines and Minerals Administration Regulation.[160] Section 20 is the generic section dealing with rentals for "agreements" and provides as follows:

> (3) Except in the case of an agreement referred to in section 57(5)(c) [this refers to agreements issued with the authorization of the LG in C] of the Act, a rental for a year of the term of an agreement is payable at the rate of $3.50 per year for each hectare in the area of the location of the agreement, subject to a minimum of $50 per year.

4.3.2 A section 9(a) contract

Section 9(a) provides the Minister with an extraordinary power to enter into contracts for certain prescribed purposes with the approval of the LGiC. One of those prescribed purposes is storage:

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[157]The Regulations, *ibid*., define a gas storage agreement by reference to the three categories of storage dispositions listed in s.57 of the *Act*. The main continuation section is s.15 and the relevant clause within that is s.15(1)(d) which provides that the Minister must continue any part of the location of the agreement that includes "a spacing unit all or part of which is within the area of a gas storage agreement to which the lease is subject". Continuation is down to the deepest zone subject to the storage agreement (s.15(2)(d)).

[158] See in particular s.18(1)(d), triggering a one year notice period within which the lessee may re-apply for continuation for some or all of the lands under s.15.

[159] The position is somewhat different in relation to a unit agreement for production purposes, since s.24 of the regulations provides a further notice mechanism by which the Minister may give notice to withdraw from a unit agreement. It would appear that this provision does not apply to gas storage agreements for a couple of reasons: (1) the regulations distinguish between unit agreements and gas storage agreements, and, (2) s.24 uses the language producing, developing or exploiting the petroleum or natural gas which seems inapposite to describe a storage activity.

[160] Alta. Reg. 262/97.

> Notwithstanding anything in this Act or any regulation or agreement, the Minister, on behalf of the Crown in right of Alberta and with the authorization of the Lieutenant Governor in Council, may
>
> (a) enter into a contract with any person or the government of Canada or of a province or territory respecting
>
> (iii) the storage of substances in subsurface reservoirs;

Unlike the situation of a unitization agreement, it is not necessary that the operating parties to the agreement have a pre-existing tenure that is being amended or continued by virtue of the agreement.[161] It is not clear to us how frequently the Crown uses this mode of disposition of storage rights. Winter suggests that this section was the authority for the 1992 Suffield Storage Agreement with AEC, although this particular agreement has since been superseded by a gas storage unit agreement. Acorn and Ekelund suggest that these special Crown agreements are likely to be rare.[162]

4.3.3 A Crown agreement authorized by the Lieutenant Governor in Council

The distinction between the category of Crown agreement authorization and the Crown contract authorization just discussed is perhaps subtle but it turns on an appreciation that while the term "contract" is a general term, the term "agreement" is a defined term in the *Act* and means "an instrument issued pursuant to this Act or the former Act that grants rights in respect of a mineral, but does not include a …. unit agreement or a contract under section 9(a)". Thus, as Acorn and Ekelund point out, this section was added "to legitimize some existing Crown leases which contained express provisions for storage rights and which were commonly referred to as 'storage leases'".[163] Now, s.102 of the *MMA* clarifies that unitization agreements may be used for this purpose, and there is little need to resort to this form of Crown contract.

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[161] Winter, *supra*, note 18 at 122, discussing the Suffield Block Agreement (1992) with AEC and noting that all matters particular to the Agreement and particular to each of the Crown leases were kept separate and independent.
[162] Acorn and Ekelund, *supra* note 19 at 363.
[163] Acorn and Ekelund, *ibid*.

4.4 The regulatory approach to the approval of natural gas storage projects

Approval for the technical aspects of a storage operation in Alberta is the responsibility of the Energy Resources Conservation Board (ERCB)[164] under the terms of the *Oil and Gas Conservation Act (OGCA).*[165] The well licensing provisions of the *OGCA* provide (s.11) that no person shall drill a well without a licence, while s.16 provides that no person shall apply for or hold a licence unless that party is authorized to drill a well for the authorized purpose. The *OGCA* defines the term well as including a well that is completed or being drilled for injection to an underground formation. In addition, s.39, the "scheme approval" provision of the *Act*, stipulates, *inter alia*, that no party may proceed with a scheme for the "processing or underground storage of gas" without scheme approval on such terms and conditions as the Board may prescribe.

The regulations and the relevant ERCB directives provide additional requirements. Thus, s.14.200 requires the continuous measuring of all injected substances while s.15.060 directs an applicant for a scheme approval for a storage operation to comply with the relevant provisions of Directive 65 which is Unit 4.3.[166] The Directive identifies five issues that it will consider as part of its examination of a scheme proposal: (1) conservation; (2) storage capacity and deliverability; (3) equity; (4) environment and safety; and (5) monitoring.

Under the heading of "conservation" the Board emphasises that it is concerned with possible "reserve losses" that may occur through gas storage as a result of "reservoir containment of the gas, gas trapping by water, excessive water production, and the dilution of produced gas by acid gas".[167] Under the heading of "storage capacity and deliverability" the Board indicates that it needs to know the details of original gas in

[164] ERCB, online: <http://www.ercb.ca/>.
[165] R.S.A. 2000, c. O-6.
[166] Board Directive 65, *supra* note 24.
[167] Board Directive 65, *ibid*. at s. 4.3.3.

place as well as estimated storage capacity and maximum deliverability.[168] The Board notes that "equity is an important issue for gas storage pools, since competitive gas production would be detrimental to storage scheme operations."[169] The Board advises that the applicant should "own all of the mineral right leases in the pool and adjoining sections or at least have a production-sharing agreement and written consent from the other owners that could be impacted."[170] An applicant must notify all well licensees in the pool as well as "all lessees and lessors within the area of the storage pool and adjoining offsetting sections. Notification must cover all zones, including those that either underlie or overlie the storage pool."[171] The Board will expect to be advised of any objections and if these cannot be resolved may send the matter to a hearing. Under the heading of "environment and safety" the Board is principally concerned to ensure that the integrity of the wellbore will prevent contamination of other zones and to protect all groundwaters; as such, applicants must comply with Directive 51 on injection and disposal wells.[172] And finally, with respect to monitoring, the Board wishes to be assured that "the scheme will be operated within the conditions of the approval."[173]

Board approvals for storage applications are typically made on the basis of written materials filed by the applicant, and the subsequent approvals are relatively short.[174] The decisions will, *inter alia*: (1) approve the scheme, (2) identify the injection wells, (3) limit the volume of gas injected based upon reservoir pressure, and (4) require annual reports (e.g. monthly, annual, and cumulative reports of gas volumes injected, and a plot of reservoir pressures and composition of injected gas). The licensee is also expected to discuss any anomalous behaviour of the reservoir on an annual basis and "immediately report … any detrimental effects that may be attributable to the operation of the storage scheme".[175]

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[168] Board Directive 65, *ibid*. at 4-19.
[169] Board Directive 65, *ibid*. at 4-20.
[170] Board Directive 65, *ibid*.
[171] Board Directive 65, *ibid*.
[172] Board Directive 65, *ibid*. at 4-21. Directive 51 deals with Injection and Disposal Wells, online: <http://www.ercb.ca/docs/documents/directives/Directive051.pdf>, last revised, March 1994.
[173] Board Directive 65, *ibid*. at 4-22.
[174] See, for example, Gas Storage Approval No. 11371, October 26, 2009, Paramount Energy Operating Corporation, Warwick Upper Manville K Pool.
[175] *Ibid*.

4.5 Treatment of holdout issues in Alberta

As noted above, storage rights in Alberta may be owned by the Crown or by private parties. This may give rise to holdout problems in the event that a private owner refuses to contribute storage rights to a storage operation. In addition, a storage operator may require access to the surface for its injection and production activities. How have these issues been dealt with in Alberta?

In relation to surface access issues we think that the position is clear. The operator of an injection well will be able to use the surface rights provisions of the *Surface Rights Act*[176] in order to drill and operate such a well and to maintain any necessary and associated equipment on the surface.[177] This will suffice to deal with any surface owner holdout provisions.[178]

The position is also clear in relation to the subsurface storage holdout issues, but here the position is quite the reverse, i.e. the provincial legislation does *not* provide any mechanism for dealing with these holdout issues. It seems possible that some consideration was given to addressing this problem when the gas storage amendments were made to the *MMA* in 1994 but Acorn and Ekelund (both intimately involved in the process) comment as follows:[179]

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[176] R.S.A. 2000, c. S-24.

[177] For a more detailed argument on this point, see Bankes, Poschwatta and Shier, *supra* note 4, and Bankes, *Legal Issues Associated with the Adoption of Commercial Scale CCS Projects*, 2008 at 19, online: <http://www.law.ucalgary.ca/system/files/ccs-discuss-legal_1.pdf>.

[178] Furthermore, the 1994 amendments to the *MMA* also dealt with the need for storage operators to drill through mineral rights in order to exploit the storage asset. Thus s.57(2) provides as follows: "Any person who has storage rights in respect of a subsurface reservoir may work through any mineral in the same tract to which the storage rights relate to the extent necessary to exercise those storage rights, without permission from or compensation to any other person for the right to work through that mineral, subject, however, to this Act and the provisions of any other Act affecting the exercise of that right." (emphasis supplied) and discussed in both Acorn and Ekelund, *supra* note 19, and more extensively in McKinnon, *supra* note 22.

[179] Acorn and Ekelund, *supra* note 19 at 362 – 363. In this paragraph the authors are dealing with both the tract owner who will not participate as well as the owner of one substance (petroleum or natural gas) who will not participate.

> [The section] leaves the matter of compensation … to negotiation. [The section] does not go the whole way, that is, to provide for procedures similar to those for compulsory unitization by which recalcitrant title owners can be forced into participation in a storage scheme. If a storage scheme is to be conducted under a unit agreement, all title owners will have to be parties; there can be no "windows" in the unit area where a unit operation is converted to a storage scheme.

It bears emphasizing that apart from the Turner Valley Field,[180] Alberta has yet to proclaim compulsory unitization legislation although the concept is well understood and broadly adopted in most North American oil and gas jurisdictions.

Thus there is nothing in either the *MMA* or in the *Oil and Gas Conservation Act* that would allow an operator to coerce an owner into a storage operation. An operator could not make use of the compulsory pooling provisions of the *OGCA* or the so-called common orders (each of which allows some coercive power to compel access or participation) because they simply do not address the question of access to pore space for storage purposes. The ERCB addresses the issue in the "equity" section of Unit 4.3 of Guide 65 where it comments, or perhaps more pertinently, warns, as follows:[181]

> Equity is an important issue for gas storage pools, since competitive gas production would be detrimental to storage scheme operations. Therefore, it is advisable that you own all of the mineral right leases in the pool and adjoining sections or at least have a production-sharing agreement and written consent from the other owners that could be impacted. It is also strongly advised that if some land is still available for sale, you purchase this land before considering the pool for storage. The lessors must also

[180] *Turner Valley Unit Operations Act*, R.S.A. 2000, c. T-9; this *Act* deals with unitization for production purposes and not unitization for storage purposes.
[181] Board Directive 65, *supra* note 24 at 4.20. The Board also comments that: "It is important to understand the risk involved with a competing company buying mineral rights and drilling a productive well."

provide consent for storage, since a special royalty agreement covering the remaining producible gas reserves may be required.

4.6 Conclusions in relation to Alberta

The legislation provides that gas storage rights in Alberta follow the ownership of petroleum and natural gas rights. They are not vested in the surface owner and they are only vested in the Crown to the extent that the Crown owns petroleum and natural gas rights.

The Crown disposes of storage rights that it owns under the terms of the *Mines and Minerals Act*. While the *Act* provides the Crown with the flexibility to negotiate special gas storage agreements, its standard model is based on a unitization agreement, the premise of which is that the operator of the proposed storage project already has an existing oil and gas production tenure which the operator proposes to extend (both in terms of duration and the rights conveyed) by entering into a gas storage unitization agreement.

The technical aspects of gas storage projects in Alberta are regulated by the ERCB. The *Surface Rights Act* deals with any potential holdouts at the surface rights level but the provincial legislation does not provide any mechanism to deal with the recalcitrant owner of storage rights who refuses to participate either at all, or at least not on the terms offered.

5.0 SASKATCHEWAN

5.1 Introduction

Saskatchewan has a significant number of natural gas storage facilities, mostly comprising facilities operated by TransGas.[182] In addition, Husky operates the East Cantuar facility with a capacity of 5bcf.[183] TAQA also has a facility at East Cantuar (7bcf).[184] In common with the other prairie provinces, mineral rights in Saskatchewan may be owned by the Crown or by private parties. There are no statutory provisions in Saskatchewan vesting storage rights in the Crown or confirming that storage rights are owned by the mineral owners.[185]

5.2 Disposition of Crown Storage Rights

Saskatchewan deals with the disposition of Crown owned storage rights through a 1992 amendment to the *Crown Minerals Act*[186] which provides for "leases of spaces". The *Crown Minerals Act* only applies to Crown minerals and Crown mineral lands; it does not apply to privately owned minerals. The definition section of the *Crown Minerals Act* defines spaces as "the spaces occupied or formerly occupied by a Crown mineral". The section goes on to provide that:

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[182] In *Anderson v. Transgas Ltd.* 2005 SKQB 192, 139 A.C.W.S. (3rd) 560 the court noted that Transgas at that time had 22 operational facilities in Saskatchewan. TransGas is a wholly owned subsidiary of SaskEnergy. It has the exclusive monopoly on intra-provincial natural gas transmission. Online: <http://www.transgas.com/ >. In the *Anderson* case the plaintiff sought an interlocutory injunction to enjoin the development of the proposed Asquith salt cavern project. The plaintiff argued that use of non-potable water pumped from an adjacent aquifer would have a detrimental effect on its own water wells principally by lowering the water table. The court ultimately rejected the application ruling that the plaintiffs had not shown irreparable harm since Transgas was bound to supply them with water by the conditions of its groundwater licence and that the balance of convenience favoured Transgas, principally because it had already contract to supply storage to third parties.

[183] See "Husky Energy: Natural Gas Marketing", online: <http://www.huskyenergy.com/downloads/AboutHusky/Publications/NG_Marketing.pdf>.

[184] See TAQA website, online: <http://www.taqa.ae/en/index.html>; TAQA is the Abu Dhabi National Oil Company.

[185] Concurring with this, see successive editions of Ballem, *supra* note 17, noting that while Saskatchewan has brought underground storage projects under regulatory control it has not "legislated on private rights" 3rd ed at 123, n. 48 and 4th ed at 145.

[186] R.S.S., 1978, c. 50.2 [*CMA*]. The amending *Act* was the *Crown Minerals Amendment Act*, 1992 c.25, at s.272.

> (2) Notwithstanding the terms or conditions of any Crown lease, all spaces are the property of the Crown and remain the property of the Crown whether or not a Crown lease is issued for the Crown mineral within the space and whether or not the Crown mineral is produced, recovered or extracted from the space.

The tenor of this seems to be that an ordinary lessee of Crown minerals will not acquire space rights. Space rights may however be acquired (subs.(3)) under this section by means of an agreement to lease spaces entered into by the Minister on behalf of the Crown, and such agreements (subs(4)) "may be for any period and contain any terms and conditions that the minister considers appropriate". Finally, the section ratified and confirmed any agreements to lease spaces entered into "before, on or after" the section came into force.[187]

In the context of CCS projects it is significant to note that the term "space" is not functionally limited. Thus, a lease of space could be used for disposal or storage subject to any terms and conditions imposed by the Minister.

Neither the *Act* nor the regulations further describe the process by which the Crown will dispose of leases of space rights (other than that the Minister may do so) and it seems likely, given the breadth of discretion accorded to the Minister, that this is quite deliberate and that the other more general provisions of the *Act* dealing with Crown dispositions are not intended to apply.[188] However, the point might be usefully clarified.

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[187] *CMA*, ibid., s.27.2(5). It is not clear why it was necessary to ratify future agreements or if such a prospective confirmation could be of any legal effect whatsoever. The short, three section, Lease of Spaces Regulations, R.R.S. c. C-50.2 Reg. 7 (1995) simply fix the rental rate for storage ($3.50 per hectare based on surface area rather than volume of pore space).

[188] The term Crown disposition means rights granted by the Crown under a lease or other instrument, granting exploration or prospecting rights "or any other right or interest in any Crown mineral or any Crown mineral lands". The latter part of this definition would seem to embrace the lease of a space right. Section 4 *et seq* of the *Act* prescribe general rules for Crown dispositions but in many cases (eg s.4) "subject to the provisions of the Act".

5.3 Regulation of storage projects

On the regulatory side of things, the Ministry of Energy and Resources takes the view that a natural gas storage project should be approved under the terms of the *Oil and Gas Conservation Act*.[189] A guideline[190] issued by the Department makes it clear that applications are to be dealt with under s.17 of the *Act* which provides that:

> 17.1(1) Notwithstanding anything in this Act or the regulations, the minister may make orders approving plans for:
> (a) increasing or improving oil or gas recovery or operations, including, without limiting the generality of the foregoing, plans for:
> (i) drilling, producing from and operating horizontal wells;
> (ii) water flooding;
> (iii) pressure maintenance;
> (iv) steam injection;
> (v) in situ combustion;
> (vi) introducing any substance into the producing formation;
> (b) disposing of oil-and-gas wastes or non-oil-and-gas wastes in subsurface formations.

This practice is hardly completely satisfactory since paragraph (a) deals with enhanced recovery rather than storage, and paragraph (b) deals with disposal of wastes rather than storage of a valuable product. Thus while the disposal clause is certainly enough to accommodate CCS operations it would not cover gas storage. The Oil and Gas Conservation Regulations do not further address the issue of gas storage applications and

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[189] R.S.S. 1978, c.O-2. Note that other regulatory approvals will be required depending on the mnature of the project. See for example the discussion in *Anderson*, *supra* note 182 emphasising that a cavern storage project will require a water licence for the water to be used to dissolve the salt in place in order to create the storage facility.

[190] Ministry of Energy and Resources, PNG Guideline 20, Application for a Gas Storage Project, April 2003, online: <http://www.er.gov.sk.ca/adx/aspx/adxGetMedia.aspx?DocID=3623,3620,3384,5460,2936,Documents&MediaID=24873&Filename=PNG+Guideline+20+-+Application+for+a+Gas+Storage+Project.pdf>.

approvals.[191]

The guidelines deal with some of the technical, safety and economic aspects of an application but they also provide that:

> The application shall be accompanied by the written consent of all owners and all fee simple mineral owners, other than the Crown, (ie. freehold owners) that may be reasonably adversely affected by the proposal.

This clause seems to lump together different categories of owners as if they each had the same type of interest (i.e. "adverse effects"). But there are surely different categories of interests. The categories might include: private mineral owners whose pore space might be used by the project; surface owners (who might be further subdivided into surface owners whose lands might be used for injection facilities and others who might simply be concerned about the project); and then private mineral owners who might be adjacent to the project boundaries who might be concerned about the potential sterilizing effect of the project. In relation to the first category one would expect the consent to take the form of a storage lease agreement or similar.

5.4 Holdout issues in relation to storage projects in Saskatchewan

The consent requirement also begs the question as to what happens in the event that consent is not forthcoming from an owner falling into one or more of the categories listed above. The guideline does not offer any guidance, and neither does the *Oil and Gas Conservation Act*. Section 17 simply provides that orders issued under the *Act* may be subject to any terms and conditions that the minister considers advisable.

As best as we can determine, the Saskatchewan legislation does not provide a mechanism for dealing with any of the categories of potential holdout problems, and any attempt to make other provisions in the legislation do this work (e.g. pooling and unitization

[191] Oil and Gas Conservation Regulations, 1985, c.O-2, Reg. 1.

provisions) will not succeed.

In common with the other prairies provinces, Saskatchewan has surface rights legislation (*Surface Rights Acquisition and Compensation Act*[192]) which provides in general terms that no person can enter on lands for the purpose of drilling a well for mineral exploration purposes without a separate consent of the owner (s.6) (i.e. separate from the grant of any mineral rights), or an order of the Board of Arbitration established by the *Act* (ss.23 – 26). It is clear that the Board has the jurisdiction to make such an order for a well for exploration, production, or recovery purposes (including injection for EOR purposes), but it is less clear that the Board has the jurisdiction to make an order with respect to a well that is to be drilled for gas storage purposes, and certainly not for permanent disposal purposes.

We think that these conclusions follow from a series of definitions contained in the *Act*. First, the applicant for a surface rights entry order will be an "operator". The *Act* defines an operator as follows:

> a person, company, syndicate or partnership or the agent of any of them that has the right to a mineral or the right to drill for or produce or recover a mineral … [emphasis supplied].

It is possible that the rights of production and recovery include production from gas storage, but it is hard to see this extending to a well that is solely used for injection purposes (except for enhanced recovery, see below) or for disposal purposes.

Second, the operator will be applying for surface rights. "Surface rights" are defined as:

> (i) the land or any portion thereof or any interest therein, except mineral commodities within the meaning of *The Land Titles Act, 2000*, or a right of entry thereon, required by an operator for the purpose of drilling for,

[192] R.S.S. 1978, c. S-65.

> producing or recovering a mineral;
> (i.1) the right to establish, install or operate any machinery, equipment or apparatus that is specified in the regulations for use exclusively for or in connection with the drilling, completion or producing operations of a well on a well site;
> (ii) the right to condition, maintain, reclaim or restore the surface of land where the land has been or is being held incidental to or in connection with either or both of:
> (A) the drilling for, producing or recovering a mineral;
> (B) the laying, constructing, operating, maintaining or servicing a flow line, service line or power line … [emphasis supplied].

These rights are similarly framed in terms of production and recovery. And finally, the *Act* defines a "well" as:

> any opening in the ground, except seismic shot holes or structure test holes, made or being made by drilling, boring or in any other manner through which a mineral is obtained or is obtainable, or for the purpose of obtaining a mineral, or for the injection of any fluid in an underground reservoir for the purpose of obtaining a mineral … .

This definition explicitly contemplates a well that is used for injection purposes (for fluids), but only injection (as in an EOR operation) "for the purpose of obtaining a mineral". In sum, it is difficult to read these provisions as extending the benefit of the right of entry order to the situation of natural gas storage; and impossible to read them as dealing with a pure disposal operation such as a CCS operation.

The situation is similar when we consider the situation of the owner of private storage rights who refuses to contribute these rights to the operation. The Crown disposition legislation does not deal with this situation since it applies only to Crown owned minerals. The oil and gas conservation legislation lacks the concept of a designated gas

storage area (and associated expropriation or vesting powers as are found, respectively, in Ontario and British Columbia). Furthermore, the compulsory unitization powers in Part V of the *Oil and Gas Conservation Act* are directed at production operations rather than storage operations.[193]

5.5 Conclusions in relation to Saskatchewan

Saskatchewan hosts both salt cavern and depleted aquifer natural gas storage projects. Natural gas storage rights in the province may be owned privately or publicly. Publicly owned storage rights are disposed of by agreement under the terms of the *Crown Minerals Act*. Regulatory approval of storage projects is dealt with under s.17 of the *Oil and Gas Conservation Act* although that section fails to deal explicitly with the idea of storage. The legislation does not provide a clear framework for dealing with holdout problems, either with respect to surface owners or with respect to private pore space owners.

[193] An application for compulsory unitization under s.34 of the *OGCA* is to be made in respect of an entire field or pool or a portion of a field or pool. A field is "the general area underlaid by one or more pools" while a pool is (principally) a reservoir that "contains or appears to contain an accumulation of oil or gas". Section 39 contemplates that operations in the unit area will be for "drilling for or producing oil and gas" and s.42 deals with the allocation of production. In sum, the unitization scheme seems to be directed at producing operations rather than storage operations.

6.0 MANITOBA

6.1 Introduction

Currently there are no natural gas storage facilities operating in Manitoba. Manitoba Hydro\Centra Gas (the principal gas utility in the province) does access gas storage in the United States and it has in the past explored the feasibility of developing salt cavern storage in the western part of the province.[194]

Development of natural gas storage in the province would be governed by the terms of the *Oil and Gas Act*[195], at least if the project involved a depleted oil and gas reservoir. The position is perhaps less clear with respect to salt cavern storage although it seems likely that the relevant provisions of the *Oil and Gas Act* would not apply to this sort of storage development. The legislation lacks a clear Crown vesting provision or any provisions clarifying the rights of private owners, but it seems likely that the starting position is the same in Manitoba as in the other western provinces—i.e. that storage rights are not prima facie all vested in the Crown but may be owned by the Crown or private parties depending (most likely) on who owns the mineral rights.

Manitoba's *Oil and Gas Act* is both an oil and gas conservation regulatory statute and a Crown disposition statute. Hence it applies to:[196]

> (a) Crown oil and gas rights and the rights to helium or oil shale owned by the Crown;
>
> (b) the exploration for oil, gas, helium or oil shale;

[194] Centra accesses the storage by allowing others to access its downstream stored gas in return for taking additional volumes from the TransCanada system as it passes through the province. Some of the background is discussed in Centra's rate filings before Manitoba's Public Utilities Board. See for example, ICF International, *Assessment of Natural Gas Commodity Options for Centra Gas Manitoba*, February 2009 at 33 – 35.
[195] C.C.S.M. c.O34 [*OGA*].
[196] *OGA*, *ibid*., s.3, entitled "Application of Act".

(c) the drilling of wells, and the operation and abandonment of wells, oil and gas facilities and storage reservoirs; and

(d) oil and gas primary production [emphasis supplied].

Paragraph (a) clearly deals with Crown dispositions but does not refer specifically to storage; the three remaining paragraphs all deal with different aspects of the *regulation* of oil and gas developments, but note that paragraph (c), dealing with wells, specifically refers to storage reservoirs. While the subsequent provisions of the statute clearly provide a *regulatory* regime for storage operations it is less clear that they also deal with the ownership question.

6.2 The disposition of Crown owned storage rights

Part 4 of the Act deals with Crown dispositions. However, consistently with s.3 of the Act on "application" (quoted above), this Part is exclusively concerned with the disposition of oil and gas rights. The Act (s.1(1)) defines "oil and gas rights" as rights to search for and produce oil and gas found in or under the land, and "Crown oil and gas rights" are defined as such rights held by the Crown. No doubt such rights include the right to inject substances as part of an approved enhanced recovery operation, but they do not, on the face of it, include the right to use Crown pore space for storage purposes.

Further inquiry into other defined terms does not help. Thus, the term "disposition" is defined as a lease or exploration reservation in respect of Crown oil and gas rights. Similarly, the definitions of oil and gas refer to the substances themselves and do not deal with storage. All of this suggests that while the *Act* certainly provides for drilling wells for storage purposes and with the regulation of the development of storage reservoirs, the disposition provisions of the *Act* likely do not deal with Crown owned storage rights since such rights fall outside the definition of Crown oil and natural gas rights.[197] This

[197] Section 217 of the *Act* does allow the LGIC to make regulations "enlarging or restricting the meaning of a word or expression used in this Act"; this may not apply to a defined term.

conclusion is confirmed when one looks at the two main forms of tenure, the exploration reservation and the lease.

Thus, consistently with the above definitions, s.41 of the *Act* provides that the holder of an exploration reservation has the exclusive right to drill for oil and gas and to test a well to determine whether the well is capable of producing oil and gas. Section 49 in turn provides that the holder of a lease has the exclusive right to drill for oil and gas within the lease area and to remove and dispose of any oil and gas produced from the lease area. Section 67 provides for special agreements in relation to Crown owned helium and oil shale rights, but there is no similar section dealing with Crown owned storage rights.

6.3 The regulation of storage projects

The *Act* is much clearer when it comes to the *regulation* of natural gas storage projects. Section 2(1) indicates that the objects and purposes of the *Act* include "(e) to provide for the safe and efficient development and operation of storage reservoirs". A storage reservoir is "a reservoir that is developed and operated for the storage of hydrocarbons" and a reservoir is "a subsurface area that contains or might contain oil, gas or helium, or that is or might be suitable for the underground storage of hydrocarbons and excludes underground tanks" (emphasis supplied).

The *Act* regulates the drilling of wells. Thus no person may drill a well without a licence (s.89(1)). A well includes a well that is to be drilled for a number of purposes including:[198]

> i) exploring for oil, gas, oil shale, salt, potash or helium,
>
> (ii) obtaining water for injection into a pool,

[198] Thus a well may be drilled for disposal purposes but only for substances produced in association with oil and gas activities. This would not include an industrial waste stream of CO2 or any other product (at least if injected for disposal purposes rather than enhanced recovery purposes).

(iii) disposing of salt water and other substances produced in association with oil, gas, salt or helium,

(iv) injecting water or any other substance to enhance the recovery of oil and gas, or

(v) the development and operation of a storage reservoir … [emphasis supplied].

The Director shall not issue a licence unless satisfied that the applicant has the necessary surface rights and unless satisfied, in the case of a well to be drilled for other than oil and gas recovery purposes, that that the applicant has, or is the authorized representative of a person who has, the rights required for the purpose for which the proposed well is to be used (s.91(4)). The clear implication is that an applicant for a well to be drilled for storage and related injection purposes must have acquired those rights, whether from the Crown or from a private owner.

Part 13 of the *Act* is devoted to the approval of storage projects. The *Act* provides for the designation of storage areas and for the issuance of storage permits. It is the storage permit that appears to be the most important instrument since a designated storage area refers to an area of land designated under a permit. No person may develop a storage reservoir without a permit (s.160(1)). A permit (s.160(2)) "conveys the exclusive right to develop and operate a storage reservoir within the designated storage area". The *Act* contemplates that a person may make an application for a storage permit in accordance with the regulations, but no such regulations appear to have been passed.[199]

The Minister may only grant an application for a permit (s.162) having taken account of any representations and recommendations made by others, if satisfied that the application

[199] The Crown Disposition Regulation, Man. Reg. 108/94, only deals with leases and exploration reservations for Crown oil and gas rights. It does not deal with storage permits. Similarly, the Drilling and Production Regulation, Man. Reg. 111/94, deals with, for example, EOR applications, but is silent with respect to storage.

is consistent with the principles of sustainable development (defined or referred to in s.2(2) of the *Act*[200]), and subject to the approval of the Lieutenant Governor in Council.

This part of the *Act* also has a group of sections dealing with compensation (ss. 165 and 166). Thus s.165 provides that no person may undertake a subsurface operation within a designated storage area without the approval of the Minister. This section serves as a preface to s.166 which provides that the holder of a storage permit shall make just and equitable compensation to the owner of oil and gas or minerals where such person suffers an adverse effect on access to or recovery of oil or gas or minerals as a result of the development or operation of a storage reservoir. Where the parties cannot agree on the amount of compensation the Minister may, on application, determine the amount of compensation by order.[201]

In our view these provisions deal with the situation of resource sterilization. They are not designed to compensate the owner of the storage rights themselves; the premise of the section must be that such rights have already been acquired by the permittee. Indeed, but for acquiring such rights, the permittee would not have been entitled to a well licence for storage purposes.

In sum, Part 13 of the *Act* is best read as a scheme for the regulatory approval of gas storage projects which also provides a mechanism to compensate other resource owners in the event of resource sterilization. We do not think that the provisions of this Part accomplish a Crown vesting as contemplated in British Columbia's storage legislation. The only section which seems to go beyond this is s.160(2) describing the effect of a storage permit as conveying "the exclusive right to develop and operate a storage reservoir within the designated storage area". The language of "conveyance" and "exclusive right" is the language of property and not the language of regulatory approval. But the section leaves unanswered the question of how the government can grant a property right to somebody else's property without first acquiring that title by a Crown

[200] This subsection includes many references to oil and gas development but no specific reference to storage.
[201] Where the Crown is the owner of the oil gas or minerals.

vesting or expropriation. The permit can certainly confer exclusive rights in relation to Crown owned storage (although this would be an odd way to do it), and it can provide a regulatory approval in relation to privately owned storage interests, but it is extremely unlikely that such a permit would be opposable against a competing property claim by a private owner of storage.

Quite apart from regulation under the *Oil and Gas Act* it appears that the development and operation of storage reservoirs is also subject to regulation under the *Public Utilities Board Act*. Section 161 of the *Oil and Gas Act* signals this and the idea is further developed in part III of the *Public Utilities Board Act*.[202] The purpose of this seems to be to provide that the owner of gas storage in the province shall be subject to full cost of service regulation even if that person is not the owner of a public utility. Thus s.127 of the Act provides that:

> The Board shall determine, from time to time, rates, tolls or other charges to be charged by a public utility or any person for selling, delivering, distributing, storing or transmitting gas within the Province, and in connection therewith shall determine, inter alia, the rate base and the rate of return on shareholder equity [emphasis supplied].

6.4 Treatment of holdout issues

Given our interpretation of Part 14 of the *Oil and Gas Act* which is to the effect that: (1) storage rights may be owned by the Crown or by private parties in Manitoba, and that; (2) Part 14 should be read as a regulatory approval system and not as a set of provisions designed to deal with ownership, it follows that we still need to address the question of how Manitoba would deal with the potential holdout problem, i.e. the situation where a private owner refuses to provide necessary surface rights or where the private owner of pore space refuses to consent to a proposed storage operation and refuses to enter into a storage lease or other similar arrangement.

[202] C.C.S.M. c. P280.

First, with respect to a matter of surface rights, the position in Manitoba seems to be much the same as in Saskatchewan, i.e. there is surface rights legislation[203] which both affirms the ownership interest of the surface owner[204] and provides a mechanism (the right of entry order and duty to compensate) for dealing with the holdout problem. However, the legislation does not deal explicitly with cases of storage and disposal and the definitions of "operator"[205] and "surface rights" seem to be similarly unhelpful insofar as they are concerned with exploration and drilling operations. Thus, while such definitions might extend as far as wells drilled and operated for EOR purposes, it is harder to read them as addressing storage or disposal projects. Somewhat more to the point is the definition of "well". The *Surface Rights Act* simply incorporates the definition from the *Oil and Gas Act* where the term is defined, consistent with the objectives of that *Act* as including a well that is drilled for the "development and operation of a storage reservoir". When read in conjunction with the latter part of the definition of "operator" as "a person who has the right to conduct any operation for the purpose of exploring for a mineral, or for drilling a well for the production of a mineral, and includes any person who has the control and management of a well" this likely suffices to afford a storage operator the opportunity to use the right of entry order provisions of the Act.

With respect to the private owner of pore space who declines to participate, it seems fair to conclude that this matter has not been addressed by the *Oil and Gas Act*. As noted above, we do not think that Part 13 of the *Act* deals with this issue and neither do we think that Parts 10 and 11 dealing with pooling and unitization can be made to address the issue. Part 11 of the *Act* allows the Minister to order unitization with respect to multiple spacing units, but can only do so if the Minister is satisfied that a unit operation:[206]

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[203] *Surface Rights Act*, C.C.S.M. c. S235 [*SRA*].
[204] *SRA*, *ibid*., s.16(1): no entry by an operator without a surface lease or a board authorized right of entry order.
[205] *SRA*, *ibid*., s.1: "operator" means a person who has the right to conduct any operation for the purpose of exploring for a mineral, or for drilling a well for the production of a mineral, and includes any person who has the control and management of a well.
[206] *OGA*, *supra* note 195, s.135.

(a) will result in more efficient production of oil and gas; or

(b) is necessary or advisable to prevent waste or to protect correlative rights.

Neither condition is relevant for a storage or disposal operation. The authority to grant a compulsory pooling order is confined to a single spacing unit and applies to a working interest owner. While the term “working interest” as defined in the *Act* might be read (contrary to industry practice) to include a fee simple owner as well as the lessee of the mineral rights, the definition speaks only to drilling for and producing oil and gas and does not include storage:

> "working interest owner" means, in respect of a parcel of land, a person who has the right to drill for and produce oil and gas from the land … .

6.5 Conclusions in relation to Manitoba

There are no natural gas storage projects in Manitoba. There are no clear provisions vesting natural gas storage rights in the Crown and therefore, much as in Alberta and Saskatchewan, storage rights may be owned by the Crown or by private parties depending on the ownership of mineral rights. Manitoba has a single piece of legislation (the *Oil and Gas Act*) to deal with both the disposition of Crown oil and gas rights and the regulation of oil and gas development. In the case of oil and gas, the legislation offers a clear separation between disposition issues and regulatory issues. The *Act* does not maintain this distinction with respect to storage rights. Thus, Part 13 of the *Act* on storage reservoirs presents some challenging interpretive issues. We think that this Part is best interpreted as providing for the disposition of Crown owned storage rights by way of a permit and as creating a basic regulatory framework, in conjunction with regulation under the *Public Utilities Board Act,* but it should not be seen as effecting a vesting of privately owned storage rights in the Crown or in a private operator licensed (permitted) by the Crown. A permit under Part 13 may be a regulatory necessity to operate a storage project in Manitoba but it will not provide a sufficient approval where the storage rights are privately owned.

The legislation does not provide a resolution for holdout problems where a private owner of storage rights refuses to contribute them to storage undertaking. However, a storage operator would likely be able to use the surface rights provisions of the Act to acquire the necessary surface rights for that operation.

7.0 ONTARIO

7.1 Introduction

Ontario has a well-developed natural gas storage industry going back to 1915.[207] The province's chief energy regulator, the Ontario Energy Board (OEB), has a long history of regulating the development of natural gas storage facilities, including, in most cases, the economic regulation of these facilities.[208]

Regulation of natural gas storage in Ontario is premised, as in the prairie provinces, on the idea that gas storage may be privately owned or publicly owned depending upon the mineral ownership of the lands in question.[209] Given that storage facilities in Ontario are located in the southern part of the province (and in most cases in depleted oil and gas reservoirs) private ownership of natural gas storage rights is dominant. Regulation is further premised on the idea that the operator of a natural gas storage project should expect to acquire natural gas storage rights for its projects by way of negotiation and agreement with owners. The legislation does provide a mechanism for compulsory acquisition of storage rights from private owners in the event of a holdout.

There are at least three bodies of statutory authority that need to be examined in order to acquire a clear picture of the regulation of natural gas storage in Ontario: (1) the rules pertaining to the disposal of Crown owned storage rights to the extent that such rights are owned by the Crown, (2) the rules pertaining to the drilling and operation of storage wells

[207] McGrew, *supra* note 27 at 135, refers to other sources to suggest that the first natural gas storage field commenced operations in Ontario in 1915. Langford Report, *supra* note 9 at 17, notes that "Union Gas has been engaged in gas storage operations since 1942". Some of the history is recounted in *Imperial Oil Ltd v. Minister of National Revenue*, [1977] CTC 455 (FCTD). For a map of storage sites (showing most located in Lambton County close to Sarnia) see the website of the Department of Natural Resources at http://www.mnr.gov.on.ca/en/Business/OGSR/2ColumnSubPage/STEL02_167108.html

[208] Applications for gas storage projects and Board decisions are available on the Board's website at <http://www.oeb.gov.on.ca/OEB/>. For the move towards market storage, see the NGEIR Decision, *supra*, note 3, and section 7.5, *infra*.

[209] For a nice example, see OEB Decision with Reasons, EB-2008-0405, Application by Union Gas Limited for Natural Gas Storage – Heritage Pool Development, May 29, 2009. In s.2.3 of the Board report it is noted that the bulk of the proposed storage rights were privately owned but that one tract was owned by the province (Ministry of Transport) and another tract was owned by Canada [Heritage Pool Decision]. Online: <dec_reasons_Union_HeritagePool_20090529>.

and facilities, and (3) the rules pertaining to the responsibilities of the Ontario Energy Board (OEB) dealing with the designation of gas storage areas, the operation of gas storage facilities, the use of lands for those purposes, the determination of compensation and other ancillary matters and in some cases the economic regulation of those facilities.

7.2 Crown owned storage rights

Ontario deals with the disposition of Crown owned storage rights under the terms of (the very short) Part IV of the *Mining Act*[210] (which deals generically with oil, gas and underground storage) and the companion regulations entitled *Exploration Licences, Production and Storage Leases for Oil and Gas in Ontario*.[211] The legislation is principally designed to create the authority for the different forms of tenure and an appropriate regulation-making power. Thus s.101.1(1) provides that "The Minister may issue storage leases for the temporary storage of hydrocarbons and other prescribed substances in underground formations on Crown land" while subsection (2) stipulates that "A storage lease does not authorize the permanent disposal of any substance." A storage lease is the only storage tenure that the legislation contemplates, i.e. there is no formal storage exploration tenure and the exploration licence referred to in s.100 of the *Act* and s.2 of the Regulations is a licence to explore for oil or gas.

Storage leases are offered for sale by tender, and the Regulations require (s.16(2)) that the tender bid shall consist of:

> (3) Where the right to obtain a storage lease for the purposes of storing natural gas is offered for sale by tender under subsection (2), the tender bid shall consist of,

[210] R.S.O. 1990, c. M-14. There is arguably an outstanding difficulty with the manner in which storage rights have been grafted onto this legislation. The *Act* makes a fundamental distinction between mining rights and surface rights but yet does not define mining rights as including storage rights while surface rights in turn are described as all other interest in land except mining rights, thus perhaps suggesting that storage rights are indeed part of surface rights; but if that were the case why is it necessary to create a form of tenure for storage rights?
[211] O. Reg. 263/02.

(a) a cash bonus for the right to obtain the storage lease;

(b) the storage rental, in dollars per 1000 cubic metres of the working storage volume per month, that the applicant proposes to pay the Crown during the first and subsequent terms of the lease;

(c) the proposed operating parameters and method used in calculating the working storage volume; and

(d) the method of calculation of and the compensation in dollars for the remaining gas in place.

The lease may be granted for a term of not more than 10 years renewable for successive periods of ten years for those areas of the lease still being used for storage purposes (s.19). The annual rental for storage is based on the bid amount per 1,000 cubic metres of storage or, if there was no bid amount, $0.30 per 1,000 cubic metres (see s.4 of the Schedule to the Regulations).

7.3 Rules pertaining to the drilling and operation of storage wells and facilities

Ontario regulates the drilling of wells for oil and gas and related purposes under the terms of the *Oil, Gas and Salt Resources Act*[212] (*OGSRA*) and the *Exploration, Drilling and Production* Regulations.[213] The *Act* applies to operations on private lands and Crown owned mineral lands.

The *OGSRA* defines a well as including a well drilled for geological evaluation or for production purposes but also includes a well drilled for the "injection, storage and withdrawal of oil, gas, other hydrocarbons or other approved substances in an underground geological formation" and a well drilled for solution mining (as in the case of a salt deposit) or for disposal of oil field fluids.

[212] R.S.O. 1990, c. P.12.
[213] O. Reg. 245/97.

Section 10 of the *OGSRA* creates the basic regulatory framework when it provides that no person shall "drill, operate, deepen, alter or enter a well, or engage in any other activity on or in a well, except in accordance with a licence." Injection for enhanced recovery purposes (but not storage purposes) requires an additional permit (s.11), while injection within 1.4 km of a gas storage project requires a report from the Ontario Energy Board (s.11(2)) (see next section on the role of the OEB).

7.4 The role of the Ontario Energy Board

Part III of the *Ontario Energy Board Act* (*OEBA*)[214] covers natural gas storage and gives the Board five related responsibilities: (1) to designate storage areas, (2) to authorize injection\recovery operations, and the use of land for those purposes, (3) to report to the Minister on applications to drill wells within or adjacent to a storage area, (4) to determine compensation for the use of lands for storage purposes, and (5) to regulate different facets of gas storage operations including rates and the possible application of market-based rates.

7.4.1 The authority to designate a gas storage area

Section 36.1 provides that the Board, may, by order, designate an area as a gas storage area. This authority is crucial since the accompanying s.37 creates two prohibitions, one of which is that no person shall inject gas for storage purposes "unless the geological formation is within a designated gas storage area". The *Act* does not provide further guidance as to how the Board should exercise this discretion except that the objectives of the *Act* include the statement that the *Act* and the Board should "facilitate rational development and safe operation of gas storage".[215]

[214] S.O. 1998, c.15 [*OEBA*].
[215] *OEBA*, *ibid*., s.2(4).

Recent Board decisions however do provide more guidance. For example, in a 2008 decision dealing with the proposed the Sarnia Airport Gas Storage Pool[216] the Board indicated that it takes account of three matters in recognizing a designated storage area (DSA): (1) whether the underlying geological formation is appropriate for storage, (2) whether the tract of land is appropriately sized to provide for safe operation, and (3) possible effects of designation on directly affected landowners and whether the storage developer has the necessary leases and agreements in place. In a 2009 decision on an application from Union Gas Limited with respect to the Heritage Pool Development, the Board panel added two additional issues, aboriginal consultation, and the need for incremental storage capacity in Ontario.[217]

With respect to the first matter, the Board considers such things as the existence of appropriate seals (lateral as well as capping), porosity of formation rock, proposed operating pressure and pressure and fracture testing. As to the question of sizing, the Board observed in its Sarnia airport storage decision that:[218]

> A DSA is established to protect a storage reservoir from future third party drilling and other subsurface activities. A DSA represents a reasonable balance between the protection of the reservoir storage from other subsurface activities and the retention of as much land as possible for future oil and gas exploration and drilling.

Board decisions establish the boundary based on pool boundaries with an allowance for a buffer zone, an area between the boundary of the pool and the edge of the designated area.[219] The Board typically relies heavily on reports filed by the provincial Department

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[216] EB-2008-0002, In the Matter an application by Market Hub Partners Management Inc. and AltaGas Ltd. for an Order designating the area known as the Sarnia Airport Gas Storage Pool, in the Geographic City of Sarnia in the County of Lambton, as a gas storage, July 28, 2008 [Sarnia Airport Gas Storage Pool Decision], online: <http://www.oeb.gov.on.ca/OEB/_Documents/Documents/dec_reasons_MarketHub_Altagas_20080728.pdf>.

[217] Heritage Pool Decision, *supra* note 209.

[218] Sarnia Airport Gas Storage Pool Decision, *supra* note 216 at 7.

[219] RP-2003-0253, Tribute Resources Inc and Tipperary Gas Corp, Partial Decision with Reasons, October 25, 2004 at 11 [Tipperary Pool Partial Decision].

of Natural Resources as well as by the applicant. However, in its Storage Designation decision for the Tipperary Pool Project the Board declined to extend the Designation Boundary to meet the Department's request to have the boundary coincide with spacing boundaries on the grounds that the designation should remain "a purely technical determination".[220]

The Board examines the extent to which the applicants have the necessary property interests to operate the storage and identifies any gaps that the applicant needs to fill. In the case of the Sarnia Airport Pool, the Board noted that the applicants held petroleum and natural gas rights and storage leases for the entire area with two exceptions. It further noted that the applicants would be offering to pay a royalty on residual gas (down to a reservoir pressure of 50 psia) and would also be offering annual storage payments (as well as payments for outside acreage). Such payments would be "competitive with other compensation programs currently offered by other established storage operators in Ontario".[221] Compensation issues are discussed in more detail, *infra*.

The form of the Board's Designation Order is relatively simple since it does little more than provide a metes and bounds description of the surface area subject to the designation. The Order does not deal with technical issues. These matters are dealt with in the authorization to operate.

7.4.2 Authorization of injection and recovery operations

Section 38(1) of the *OEBA* provides that:

[220] Tipperary Pool Partial Decision, *ibid*. at 12; and boundaries should protect against "inadvertent penetration into the storage area". See also Century Pools II, Designation Order Decision, RP-1999-0047, March 30, 2000, at para. 3.2.5, where the Board rejected an argument form an owner that the boundary should include an entire unitized area. The Board agreed with the applicant and the Department that it was not necessary to include the lands to ensure the integrity of the storage reservoir.
[221] Sarnia Airport Gas Storage Pool Decision, *supra* note 216.

> The Board by order may authorize a person to inject gas into, store gas in and remove gas from a designated gas storage area, and to enter into and upon the land in the area and use the land for that purpose.

This, as the Board notes, is the authorization to operate the storage once the pool has been designated. It is also, effectively, an expropriation[222] subject to a right to compensation provided for in the following subsections.

In its Sarnia Airport decision the Board indicated that it typically takes into account the following factors:[223]

> • Are appropriate safety requirements for proposed injection/withdrawal activities going to be ensured?
> • Will all relevant codes and standards be followed?
> • Have the proposed storage wells been appropriately designed and are construction and maintenance plans in order?
> • Is the proposed maximum operating pressure safe and prudent?
> • What are the potential impacts of injection/withdrawal activities?
> • Are the proposed mitigation programs appropriate?
> • Is the applicant a capable prospective storage operator in terms of technical and financial capabilities to develop and operate the proposed storage facilities?
> • Is the applicant appropriately accountable for losses or damages occasioned by its activities?

The Board notes that operators are required to comply with the relevant CSA standard: CSA Standard Z341.1-06. In addition, conditions of approval specify a maximum

[222] This was the characterization of Joliffe, counsel for the applicants in *Wellington v. Imperial Oil Ltd* [1970] 1 OR 177 (Ont. HC).
[223] Sarnia Airport Gas Storage Pool Decision, *supra* note 216 at 9 – 10.

operating pressure,[224] require the applicant "prior to the commencement of any injection, storage or withdrawal operations" to "obtain all the necessary storage rights" within the designated area,[225] require the applicant to conduct water tests and if necessary provide water to affected parties, and[226]

> Obtain and maintain in full force and effect insurance coverage, including but not limited to, liability and pollution coverage, in the amount that is determined to be adequate by an independent party with expertise in adequacy of insurance coverage for environmental and other risks and potential impacts of gas storage operations in southwestern Ontario.

The Board's decision on Union Gas' 2009 application with respect to the Heritage Pool Development provided the occasion for discussion of the preferred wording of the condition relating to the acquisition of storage rights. Board staff had proposed a condition that was identical to the condition proposed and accepted for the Sarnia Airport Project (quoted above). Union objected arguing that previous practice had not required such a condition and that a landowner would be fully protected since it would have a statutory right to compensation.[227] The Board accepted this argument and accordingly reverted to the more generic language used in previous decisions to the effect that:[228]

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[224] In recent years Union, which operates the bulk of the storage facilities in Ontario, has applied to the Board to allow it to increase maximum operating pressures in order to enhance the working capacity of the pools. See, for example, EB-2008-0038, application by Union Gas re operating pressures for Oil Springs East, Payne and Enniskillen, July 10, 2008.

[225] Sarnia Airport Gas Storage Pool Decision, *supra* note 216, Schedule 1, Conditions of Approval, cl. 1.2; or alternatively the Board Order (see, for example, Board Order re Union Gas, Dow Sarnia Block "A" Pool, EBO 172, EBLO 239, October 29, 1991) will provide that the applicant "shall make to the owners of any relevant gas or oil rights or of any right to store gas in the …. Pool area, fair just and equitable compensation in respect of such gas or oil rights or such right to store gas."

[226] Sarnia Airport Gas Storage Pool Decision, *supra* note 216, Schedule 1, Conditions of Approval, cl. 1.9; and see also the similar insurance clause included in the approval conditions issued for the Tipperary Pool Project, Reasons for the June 17, 2005 Decision, issued August 25, 2005 at 4 of Conditions of Approval [Tipperary Reasons for June 17, 2007 Decision]. The Board was more deferential in the case of the Union Gas Heritage Pool Decision. There, *supra* note 209 at 15 – 17, the Board acknowledged that perhaps Union with its forty years or so experience was perhaps in a better position to assess the adequacy of its insurance coverage than any independent expert—and the Board amended the proposed condition accordingly.

[227] Heritage Pool Decision, *supra* note 209 at 15.

[228] Heritage Pool Decision, *ibid*. at 16.

> Union shall make the owners an offer of fair, just and equitable compensation in respect of gas storage rights and petroleum and natural gas leases, prior to the injection of gas into the Pool.
>
> Union shall make to the landowners and/or tenants an offer of fair, just and equitable compensation for any damage resulting from the authority hereby being granted by the Board.

This language recognizes that there are two broad categories of compensation. One category relates to the storage rights that are effectively being acquired; a second category relates to damage (and presumably principally surface damage) that an owner may suffer. As we shall see below, the Board further breaks down these broad categories of compensation.

The Board did not address one potential difficulty associated with the s.38 order in this case, caused by the status of some of the storage rights. It appears from the record[229] that some of the storage rights here were actually owned by Canada. This raises the question of the extent to which provincial legislation that is effectively compulsory acquisition legislation can be made to apply to federal public property.[230] We do not believe that it can be made to apply although of course there is nothing to prevent Canada from agreeing to contribute its storage rights to the project, or indeed making provision for the application of provincial laws to federal subject matter[231] or property.[232]

The Board rejected (at least initially) an application to inject and withdraw gas in the Tipperary Pool Project in 2004. The Board was of the view that while the applicant had the necessary competence on the well drilling side, it had failed to provide the necessary

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[229] Heritage Pool Decision, *ibid*. at 3, s.2.3.
[230] The issue is not the *vires* of the legislation; Ontario clearly has the jurisdiction to make such a law, the issue is the applicability of the legislation. For discussion see Elizabeth Edinger, Case Comment, *Bell Canada (1988)*, (1989), 68 Can Bar Rev 631; one of us has discussed analogous issues in the context of Indian lands in Bankes, "*Delgamuukw*, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights" (1998) 32 U.B.C. L. Rev. 317 – 351.
[231] See, for example, *Indian Act*, R.C.S. 1985, c I-5, s.88.
[232] See, for example, *Indian Oil and Gas Ac*t, RSC 1985, c. I-5.

evidence as to the financial resources that it would need access to in order to run a successful market-based storage operation. The Board offered these general remarks:[233]

> The Board's designation of a storage area creates a significant provincial asset. The role of storage areas in augmenting the overall integrity and buoyancy of gas supply and distribution in the province has been noted as early as 1962 in the Langford Report. Stewardship of this asset is important to realizing these benefits. The Board is not prepared to grant exclusive rights to exploit a valuable provincial asset unless the Applicant can demonstrate that it has a reasonable probability to successfully manage those assets in a commercially responsible manner. While the Board does not expect any applicant to be able to demonstrate that its technical and financial viability and preparedness guarantees the success of the proposed operation, it is important that applicants are able to present thoughtful, detailed and adequately supported operational and business plans, which address the key elements of the operation.

The Board ultimately approved the application after the applicant supplied additional supporting data.[234]

7.4.3 Applications to drill wells in the storage area

Section 40 of *OEBA* provides that:[235]

> (1) The Minister of Natural Resources shall refer to the Board every application for the granting of a licence relating to a well in a designated gas storage area, and the Board shall report to the Minister of Natural Resources on it.

[233] Tipperary Pool Partial Decision, *supra* note 219 at 21.
[234] Tipperary Reasons for the June 17, 2005 Decision, *supra* note 226.
[235] The companion provision in s.11(2) of the *OGSRA* extends this to wells drilled within 1.6 kms of an designated gas storage area.

(4) The Minister of Natural Resources shall grant or refuse to grant the licence in accordance with the report.

The Board indicates that in considering a referral under this section the Board will typically review the geological evidence related to the well location and proposed drilling program, the technical capability of an applicant to conduct the drilling in accordance with applicable standards and codes, and environmental and landowner related matters.[236] The Board's report (see subs.(4)) binds the Minister. Most such applications are routine and deal, for example, with the storage operator's need to drill the original injection\withdrawal wells (and in some cases observation wells) and, over time, additional wells to enhance injection and deliverability.[237]

7.4.4 Compensation

Section 38(1) (quoted above) deals with the Board's power to authorize a gas storage operation but also allows the Board to authorize an applicant gas storage operator to enter and use land for those purposes. Subsection (2) deals with the duty to compensate owners for the use of their land.

Subject to any agreement with respect thereto, the person authorized by an order under subsection (1),

(a) shall make to the owners of any gas or oil rights or of any right to store gas in the area just and equitable compensation in respect of the gas or oil rights or the right to store gas; and

[236] *OGSRA*, *ibid*. at 18.
[237] See, for example, EB-2009-0060, Application by Union Gas Limited to drill 5 [additional] wells in the Tipperary Storage Area; wells required to increase deliverability and the ability to cycle the full working capacity of the pools. The performance of the initial two wells was "significantly less than expected".

> (b) shall make to the owner of any land in the area just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the order.

The section affords primacy to the existence of an agreement. Thus, a Board order in respect of compensation will only be made if the parties cannot reach an agreement. In the Tipperary Pool Project the Board emphasized that it would only get involved if the parties could not negotiate agreements. Hence it would defer the issue of compensation since it was not convinced that the parties had exhausted their negotiations.[238]

The Board has said that where there is an agreement it has no jurisdiction to entertain an application under this section.[239] However, where there is no agreement, or where such an agreement does not deal with all relevant matters, the Board will make an order. As the Board stated in its recent decision involving Century Pools:[240]

> The Board finds that in the absence of an agreement under section 38 an applicant is entitled to active and responsible participation and is eligible for an order of the Board determining the compensation. This finding applies where there is no agreement or compensation at all and also where there is no agreement on certain components of compensation.

The Board has identified and uses a number of distinct categories or heads of compensation.[241] The first is residual gas. Residual gas refers to the gas remaining in a

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[238] Tipperary Pool Partial Decision, *supra* note 219 at 24 and 27.

[239] See, for example RP-2000-0005, Application in Respect of Just and Equitable Compensation for the Century Pools Phase II development, September 10, 2003, section 2, "The Board's General Principles for Standing" [Century Pools Application].

[240] Century Pools Application, *ibid*.

[241] Century Pools Application, *supra* note 239 at section 2. And see in particular the discussion in Tipperary Pool Partial Decision, *supra* note 219 at 26, where the Board recites the terms of settlement proposed by Tipperary:

> • Compensation for residual gas in the Tipperary Unit Area is for gas in place down to reservoir pressure of 50 psi to be calculated as follows: 12.5% by Unit Participation Percentage by GIP (Gas in Place) mcf by wellhead price. The purchase price includes any applicable GST and is payable within 30 days of the date of initial injection in the pool;

producing pool down to the point at which it is no longer economical to produce which the Board takes to occur at 50 lbs psi. Compensation under this head may be calculated on the basis of a royalty that would otherwise be payable on this gas (ie gas in place less gas that could not be economically produced) were it to be produced.[242] Second, there is compensation for the storage rights themselves, typically expressed as an annual dollar figure per acre of storage rights.[243] This may be divided into a payment for inside acres (lands within the designated storage area) and a (smaller) payment for outside acres (lands where the storage area boundary severed a tract).[244] Third, there may be an annual per acre payment for roadways representing compensation for the lease of land and damages, including disturbance, loss of opportunity and crop loss. Fourth, there might be a similar payment for each wellhead.

The Board does not provide extensive reasons to support its decisions as to "just and equitable compensation" (s. 38) under these various headings. Instead, the Board takes a fairly formulaic approach based on compensation patterns in relation to previous storage projects.[245] Thus the Board is very much of the view that the compensation rates will be fair and equitable if they are based on and similar to compensation rates payable in the area for similar projects.[246]

• Gas Storage Rights and PNG Rights Compensation at $ 92.50 per acre;
• Outside Acreage Compensation for Gas Storage Rights and PNG Rights outside of the DSA at $27.79 per acre;
• Gas Storage Wells Compensation in the amount of $1,050.00 per well, covering the lease of land for facilities, and damages including disturbance, loss of opportunity and crop loss; and
• Surface Rights Compensation - permanent all weather roads $ 825.00 per acre.

[242] See, for example, RP-2000-0005, Century Pools Phase II, compensation order, March 23, 2004 [Century Pools Compensation Order]. It should be noted however that this Order represented Board approval of a settlement. This is clearly a long-standing practice. See *Wellington v. Imperial Oil* [1970] 1 OR 177 (Ont. HC) where the judgment records that Imperial offered to purchase Wellington's interest in remaining gas on the basis of 2 cents per mcf down to a pressure of 50 lbs psi [*Wellington v. Imperial Oil Ltd.*].

[243] The practice suggests that this is flat amount per acre; this seems quite inexact when compared with the negotiation for tract participation factors in the context of unitization of a producing field and contrasts with the position in relation to Crown storage interests discussed in section 7.2 *supra*.

[244] See Century Pools Application, supra note 239 at s. 3.22.4.

[245] See, for example, the discussion in Tipperary Pool Partial Decision, *supra* note 219 at 24 – 26.

[246] See for example the Board's Heritage Storage Pool Decision, *supra* note 209 at 15 – 16, where the Board seemingly endorses Union's approach which was to offer compensation at "the standard Lambton County storage rates" for storage rights, outside acreage, well sites and roads and to adjust these annually based on the CPI.

Section 38(3) aims to ensure that the OEB will be the sole forum for determining compensation (and not the courts in a civil action).[247] Thus the section provides that:

> No action or other proceeding lies in respect of compensation payable under this section and, failing agreement, the amount shall be determined by the Board.

Subsection (4) does however allow for an appeal to the Divisional Court, in accordance with the *Expropriations Act*, R.S.O. 1990, c. E.26, s.31.

The "just and equitable" formulation of the current legislation is of course very different from the traditional expropriation standard which would be based on ideas of fair market value.[248] There is no discussion of the implications of this distinction in the recent decisions of the Board.

Given the primacy that the *Act* affords to agreements, and given that such agreements might take several forms (oil and gas leases, gas storage agreements, gas storage lease agreements, unitization agreements)[249] and might have been negotiated over a period of decades (from when exploration first started to the time when the project moved over from production to storage),[250] there is a high chance that private storage owners in the same pool might receive widely different amounts of compensation. The Board has consistently expressed some concern about this while recognizing that it lacks the

[247] In *Wellington v. Imperial Oil Ltd*, *supra* note 242, Justice Pennell concluded that the predecessor legislation had in fact achieved that result; the section has not changed materially since that time. The Board takes the view that where an agreement between the parties provides for arbitration to determine the appropriate compensation then compensation should be determined by that mechanism rather than by a s.38 Order. Century Pools Compensation Order, *supra* note 242, at s. 3.4.4, at paras 94 – 96.

[248] See generally, Eric Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed. (Scarborough, Ontario: Carswell, 1992).

[249] Century Pools Compensation Order, *supra* note 242 at para 40, where the Board noted "the broad range of contractual arrangements that have been made with respect to the Lambton County storage pools. With the exception of the Mandaumin Pool, there are scarcely two identical contracts …. This diversity presents a challenge in arriving at a uniform and consistent approach to storage compensation."

[250] In addition to the difference in form, note that some such agreements might provide for renewal and periodic reassessment of the level of compensation, whereas others might be perpetual.

jurisdiction to take on the issue directly.[251] Consequently, the Board resorts to exhorting operators to adopt a policy of uniform treatment throughout a storage pool even if not legally required to do so. However, the Board (see above) does allow parties with agreements to participate as intervenors in s.38 applications on the basis that new compensation orders might have knock-on effects for other parties within the storage area.

7.5 Economic regulation and deregulation of storage in Ontario

In 2003, evidence of decreased production by conventional gas supply sources and of impending growth in natural gas demand (the latter driven by the province's increasing reliance on gas-fired power generators)[252] prompted the Ontario Energy Board (the OEB, or the Board) to embark on a broad review of Ontario's natural gas infrastructure and regulatory structure, in order to strategize how best to meet these trends.

A main issue in the review process was whether (and to what extent) the OEB should refrain from regulation of natural gas storage and move from cost-based pricing to market-based pricing, given the Board's mandate of both consumer protection and "rational" development of storage, in the public interest.[253] Depending on market conditions, public interest would be best served either by (a) regulation, in order to maintain fair pricing and reliable service in the face of market power, or monopoly, on the part of utilities, or (b) whole or partial deregulation, where market competition is sufficient to be more efficient than cots-based services. "More efficient" in this context means that a competitive approach will deliver lower prices for consumers, save administrative costs, and encourage investment in new market-priced storage and services (particularly high deliverability storage required especially by gas-fired electricity generators) (because of the potentially higher profits) than might obtain under

[251] The Board can only set compensation where there is no agreement.
[252] Natural gas consumption for power generation in Canada increased 257.2% from 1971 to 2001; see David Brown, Roger Ware, and Howard Weston, "Forbearance, Regulation, and Market Power in Natural Gas Storage: The Case of Ontario" (World Energy Congress 2007) online: <http://www.worldenergy.org/documents/p000964.pdf> at 4.
[253] Brown, Ware, and Weston, *supra* note 252 at 17.

cost-based regulation.[254]

The OEB's review process consisted of the Natural Gas Forum, which started in 2003, and the subsequent Natural Gas Electricity Interface Review, which culminated in the Board Decision of November 7, 2006 in which the OEB announced its partial deregulation of storage pricing—the first decision on "general forbearance" from regulation in the natural gas industry in Ontario.[255]

The following sections briefly outline the NGF and NGEIR review processes and the NGEIR Decision, then touch on the Board activities which flowed from each part of this four-fold Decision, which focused on 1) new storage providers, 2) ex-franchise and 3) in-franchise customers of Union and Enbridge, and 4) new storage services provided by Union and Enbridge to in-franchise customers.

7.5.1 Natural Gas Forum

The first stage of the Board's review, the Natural Gas Forum (the Forum), culminated on March 30, 2005 with a report outlining the resulting OEB policy decisions on the regulatory framework for the natural gas sector.[256] The report and the hearings that preceded it were prompted by the Board's perceived need to evaluate and strategically integrate regulation of natural gas infrastructure. The availability and future development of underground natural gas storage—especially that of the high-deliverability "operationally flexible" storage required by natural gas plants and increasingly employed as a hedge against higher and more volatile gas prices—was one of the challenges considered by the Board.[257]

In this context, the Forum's task was to consider how best to achieve development and, specifically, to consider whether the Board should refrain from regulating storage pricing

[254] Brown, Ware, and Weston, *supra* note 252 at 6.
[255] Brown, Ware, and Weston, *supra* note 252 at 18.
[256] Ontario Energy Board, "Natural Gas Regulation in Ontario: A Renewed Policy Framework—Report on the Ontario Energy Board Natural Gas Forum," March 30, 2005 [NGF Report].
[257] NGF Report, *ibid*. at 39.

and allow market-based pricing for storage, as the Board potentially could be required to do, under s.29 of *Ontario Energy Board Act* (*OEBA*): [258]

> 29. (1) On an application or in a proceeding, the Board shall make a determination to refrain, in whole or part, from exercising any power or performing any duty under this Act if it finds as a question of fact that a licensee, person, product, class of products, service or class of services is or will be subject to competition sufficient to protect the public interest.

The consideration of this issue focused on whether refraining from regulation would in fact encourage development of storage services, whether there was sufficient competition in the natural gas storage market to satisfy the requirement of s.29 *OEBA*, and whether the public interest would indeed be served by allowing market-based pricing for storage.[259]

The Board was also cognizant of the possibility that its practice of having already allowed some market-based pricing for storage—outside of an explicit, integrated, policy-driven approach to the issue—was effectively discriminatory. In practice, the Forum report observed, the OEB had begun to allow some market-based pricing specifically in its approvals of storage contracts between utilities and their ex-franchise customers.[260] In 1997, for example, the OEB approved the application of market-based rates to certain ex-franchise storage contracts because it found that parties had purchased storage and then rented it to third parties at higher prices. The Board decided that this rent should properly flow to Union (a regulated utility) and its ratepayers, and so allowed Union to charge a market-based rate for that storage.[261] In a 1999 Decision,[262] the Board approved a proposal by Union Gas to renew existing ex-franchise cost-based storage

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[258] *OEBA*, *supra* note 214.
[259] NGF Report, *supra* note 256 at 57.
[260] NGF Report, *ibid.* at 46, 48.
[261] See reference to the approval in EBRO 494-03 (1997) at 8, online: <http://www.oeb.gov.on.ca/documents/consultation_ontariosgasmarket_ceedappc1_finalsub_161104.pdf>.
[262] OEB Decision with Reasons, Application by Union Gas for Approval of Rates, RP-1999-0017, July 21, 2001, [Approval of Union Rates] online: <http://www.oeb.gov.on.ca/documents/cases/RP-1999-0017/decision_1999.pdf>.

contracts at market prices. In that Decision, the Board focused less on the evolving boundary between in-franchise and ex-franchise customers, which had become the basis of its distinction in terms of pricing, but rather on how the resulting revenue—that is, "any premium that exists due to the differential between market price and the embedded cost of storage"—would be allocated (i.e. as between shareholders and rate payers). The OEB observed that, although the Board had not previously allocated a share of storage premiums to utilities, as it had done with premiums on transactional services, such sharing could work as an effective incentive for the efficient management of existing storage services.[263]

The Forum resolved that the OEB would proceed by studying further the impact of increased gas-fired power generation on natural gas storage and transportation infrastructure (or, the convergence of those markets)—first, in a Gas-Electricity Interface Review, to be followed by a Storage Proceeding.[264] The OEB did decide, however, that henceforth it would refrain from price regulation for new storage developed by independent (not affiliated with gas distributors or transmitters) storage operators.[265] For example, on June 17, 2005, the OEB approved an application by Tribute Gas Corp. to inject, store and withdraw gas in a designated storage pool in Huron County, and allowed it to sell that storage at market-based rates.[266]

7.5.2 Natural Gas Electricity Interface Review

The Natural Gas Electricity Interface Review (NGEIR), which focused on storage development and pricing, with particular attention to high deliverability services, culminated in the OEB Decision with Reasons released November 7, 2006.[267] The NGEIR was charged with considering whether the Board—notwithstanding its authority under the *OEBA* to regulate storage rates under s.36 (on gas regulation, as the section

[263] Approval of Union Rates, *ibid*. at 140-142.
[264] NGF Report, *supra* note 256 at 54.
[265] NGF Report, *ibid*. at 57.
[266] See OEB Decision RP-2003-0253,EB -2003-0314,EB -2003-0315,EB -2003-0316,EB -2003-0317, issued June 20, 2005, supporting the conversion of the existing Tipperary north pool from gas production to gas storage, online: <http://www.oeb.gov.on.ca/documents/decision_tipperary_200605.pdf>.
[267] NGEIR Decision, *supra* note 3.

relates to storage) and to approve storage contracts under s. 39(2)—should refrain from regulating storage prices (and contracts) as potentially required by s.29 of the *Act*.[268]

The test for regulatory forbearance under s.29 *OEBA* is whether the market under consideration is subject to competition sufficient to protect the public interest, in which case, the OEB shall refrain from regulation. The NGEIR analysis of whether "workable" competition existed in the natural gas storage market focused on several issues: the product market (whether substitute products or services could be considered of a species with the service under scrutiny—storage); the geographic market (the area which would properly figure in the assessment of competition); market share (in this case, whether either of the gas utilities had market power); and conditions for entry of new suppliers and new investment.[269]

As for product market, the OEB decided that, although there were products and services that could substitute for storage (such as commodity sales, swaps, exchanges, displacement, and delivery/redelivery service), because these substitutes were difficult to quantify, the analysis would be confined to storage. Geographically, the OEB concluded that Ontario storage operators compete in a market that includes Michigan and parts of Illinois, Indiana, New York and Pennsylvania.[270] As for market power, the OEB found that neither Union nor Enbridge had a storage market share that precluded workable competition, on the basis that their share of the market's working gas capacity (13.1% and 7.9% respectively) and maximum daily deliverability (9.1% and 7.1% respectively) did not indicate market power.[271] Finally, the OEB found that, because neither Union nor Enbridge exercised market power, an analysis of the conditions for entry of new suppliers and new investment was not necessary.[272]

The OEB concluded that the storage market in Ontario was indeed subject to workable

[268] NGEIR Decision, *ibid*. at 74.
[269] NGEIR Decision, *ibid*. at 30, 31.
[270] NGEIR Decision, *ibid*. at 37.
[271] NGEIR Decision, *ibid*. at 39.
[272] NGEIR Decision, *ibid*. at 41.

competition. The Decision observed:[273]

> It is not necessary to find that there is perfect competition in a market to meet the statutory test of "competition sufficient to protect the public interest"; what economists refer to as a "workably competitive" market may well be sufficient.

The OEB also noted that the s.29 test for market competition suggests reliance on qualitative evidence since it speaks ("or will be subject to competition") to the direction in which the market is moving.[274]

The second step in the s.29 *OEBA* analysis was to consider whether the workable competition in the storage market was sufficient to protect the public interest. The OEB's analysis on this point followed the structure of its own public interest mandate: the pursuit of competition in the sale of gas to users, consumer protection (in terms of price and reliability of service), and the rational development and safe operation of storage.[275]

In this stage of its analysis, the OEB reiterated its mandate to foster competition. It concluded that refraining from rate regulation and contract approval in the ex-franchise market was the best means of achieving competition capable of protecting the consumers' interests.[276] In order to best facilitate development, the OEB reiterated its commitment (first signaled in the NGF report) to refrain from setting storage rates and approving storage contracts for third-party development, whether independent or affiliated (with the utilities), and decided also to forbear in the same manner where utilities chose to invest in new storage services.[277] As noted above, this was the first invocation of s.29 *OEBA* by the OEB, and indeed the first "general forbearance" from regulation in the natural gas industry.[278]

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[273] NGEIR Decision, *ibid*. at 26.
[274] NGEIR Decision, *ibid*. at 26.
[275] NGEIR Decision, *ibid*. at 42-51.
[276] NGEIR Decision, *ibid*. at 48.
[277] NGEIR Decision, *ibid*. at 50.
[278] Brown, Ware, and Weston, *supra* note 252 at 13.

In summary, in its Decision following the NGEIR, the OEB concluded that it would (emphasis supplied):

> 1) refrain from regulating the storage rates or approving the contracts of new storage providers;
>
> 2) refrain from regulating the storage rates or approving the contracts of ex-franchise storage customers of Union and Enbridge; and
>
> 3) continue to regulate storage rates for bundled, unbundled and semi-unbundled in-franchise customers of Union and Enbridge;
>
> 4) refrain from regulating the rates or approving the contracts for new storage services offered by Union and Enbridge to their in-franchise customers.

The following sections elaborate on these four aspects of the Decision, and outline OEB activities which have flowed from each of them.

7.5.3 New storage providers

As declared in the earlier Natural Gas Forum report, the NGEIR Decision confirmed that the OEB would refrain from regulating storage rates and approving the contracts of new storage providers—that is, storage services offered by operators other than Union or Enbridge, but including storage operators affiliated with Union and Enbridge.[279] New or third-party storage would be unregulated in these contexts in order to encourage development of new storage services—particularly, those "more specialized services to meet the load characteristics of power generators", or high-deliverability storage.[280]

The inclusion of affiliated operators in this category of operators included Market Hub

[279] NGEIR Decision, *supra* note 3 at 74, 3.
[280] NGEIR Decision, *ibid*. at 50.

Partners Canada (MHP), a Union affiliate which had earlier proposed to develop storage in Ontario. During the NGEIR hearings, MHP had applied for an expedited decision on its proposal to charge market-based rates for storage on the basis that MHP was similar to an independent operator. On September 7, 2006 (two months before the NGEIR Decision) the OEB granted this authorization and relieved MHP of the obligation to seek OEB approval of its storage contracts.[281]

Following the NGEIR Decision, the OEB formally rescinded the storage rate orders for both MHP and Tribute Resources Inc.[282] The OEB also extended development deadlines for Tipperary Gas Corp. (authorized earlier to develop a storage facility in Huron County) on the basis that Tipperary's operation was one of very few independent storage operations in Ontario at that time, and that the "emerging" independent storage market was in the public interest.[283] In a Decision approving applications by MHP to develop the St.Clair gas storage pool, the Board observed that although MHP would not require OEB approval of its contract terms (specifically, the contracting parties and the period terms) as per the NGEIR Decision, agreements would nevertheless still need to comply with "general terms and conditions" of operation.[284]

7.5.4 Ex-franchise customers

In the NGEIR Decision, the OEB also declared that it would refrain from regulating the storage rates and approving the contracts of cross- or ex-franchise storage customers of Union and Enbridge.[285] As noted above, in practice, the OEB had already begun to allow market-based storage rates to apply to ex-franchise contracts. The NGEIR Decision clarified the OEB's policy in this respect, and distinguished the preceding practice of

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[281] NGEIR Decision, *ibid*. at 53, 5.
[282] OEB Order EB-2005-0551, February 5, 2007, online: <http://www.oeb.gov.on.ca/documents/cases/EB-2005-0551/Decision_Orders/order_mhp_tribute_20070205.pdf>.
[283] OEB Decision with Reasons, EB-2006-0018,EB -2006-0159, andEB -2006-0279, February 6, 2007 at 11-12, online: <http://www.oeb.gov.on.ca/documents/cases/EB-2006 0018/dec_Tipperary_20070206.pdf>.
[284] OEB Reasons for December 26, 2006 Decision, EB-2006-0162,EB -2006-0163,EB -2006-0164,EB -2006-0165,EB -2006-0166,EB -2006-0167, February 13, 2007, at 20, online: <http://www.oeb.gov.on.ca/documents/cases/EB-2006-0162-0167/decision_reasons_mhp_20070213.pdf>.
[285] NGEIR Decision, *supra* note 3 at 71-74.

allowing market-based pricing from the deregulation that would follow: ex-franchise contracts had in fact been regulated, the Decision noted, but had been subject to OEB approved maximum rates high enough not to have actually constrained pricing. [286]

Following the NGEIR Decision, on May 29, 2009 the OEB released a Decision approving the designation and operation by Union of the Heritage Gas Storage Pool in the Township of St. Clair, County of Lambton, Ontario. The Board approved Union's request that this operation be subject to market-based rates precisely on the basis that the operation would not be part of Union's regulated business but rather a strictly ex-franchise service to customers in Eastern Canada and northeastern U.S.[287]

The NGEIR Decision also indicated that sharing premiums from ex-franchise storage contracts with ratepayers (by reducing distribution rates), with small incentive payments going to the utilities, would continue for short-term storage contracts, but not for long-term contracts using storage space not needed to meet in-franchise demands, on the basis that the latter capacity would constitute a "non-utility" asset.[288] However, the OEB specified that this shift in profit streaming would take place over a transitional period from 2008 until 2011. On October 23, 2008, the Board issued a Decision rejecting Union's interpretation (reflected in their accounting) that this shift would apply starting immediately on the release of the NGEIR Decision.[289]

7.5.5 In-franchise customers

The NGEIR Decision also specified that the OEB would continue to regulate storage rates for bundled, unbundled and semi-unbundled in-franchise customers of Union and Enbridge.[290] The OEB also decided that Union would reserve approximately two-thirds of its existing storage capacity for in-franchise needs, projecting that this amount would

[286] NGEIR Decision, *ibid*. at 13.
[287] Heritage Pool Decision, *supra* note 209 at 9-10.
[288] NGEIR Decision, *supra* note 3 at 4.
[289] OEB Decision on Motion, EB-2008-0154, October 23, 2008, online: <http://www.oeb.gov.on.ca/OEB/_Documents/EB-2008-0154/Dec_Motion_Union_Gas_20081023.pdf>.
[290] NGEIR Decision, *supra* note 3 at 74.

be adequate for those needs over the following several decades.[291]

The Decision elaborated on the distinction between in- and ex-franchise customers.[292] The OEB largely accepted Union's description of the distinction: in-franchise customers are inside the franchise area; ex-franchise customers are outside.[293] However, the OEB noted several exceptions to these categories—for example, three distributors (the City of Kitchener's gas distribution utility, Natural Resource Gas Ltd., and Six Nations Natural Gas Company Limited) were purchasing storage at cost-based rates (being physically connected to Union's distribution system) while serving customers ("cross-franchise") outside of Union's franchise area. Thus, the OEB defined the term "in-franchise customers" within its Decision so as to include distribution customers of the utilities.[294]

The OEB also noted two exceptions within this group of distribution customers: Enbridge and Kingston, distinguished because the storage services they (unlike the others in the group, which had no access to storage alternatives) received were subject to competition sufficient to protect the public interest, and therefore should not be rate regulated.[295] In other words, the basis for applying cost- or market-based rates would turn on the "competitive position" of the distribution customer.[296] Kingston already was purchasing storage at market-based rates; Enbridge, however, was purchasing storage at cost-based rates. The Board decided that Enbridge would also be subject to market-based rates for storage, but that the transition to market-based rates would be phased in over several years (to be completed in 2010) in order to protect Enbridge's customers from the shift to potentially higher market-based rates.[297]

Following the NGEIR Decision, the OEB approved Union's 2007 rate schedule, noting that the schedule complied with the Decision in still retaining the cost-based storage

[291] NGEIR Decision, *ibid*. at 4.
[292] NGEIR Decision, *ibid*. at 60.
[293] NGEIR Decision, *ibid*. at 14.
[294] NGEIR Decision, *ibid*. at 15, 56.
[295] NGEIR Decision, *ibid*. at 66.
[296] NGEIR Decision, *ibid*.
[297] NGEIR Decision, *ibid*. at 65.

pricing for Enbridge.[298] On June 11, 2009, the Board approved an in-franchise, cost-based contract for storage between Union and Ferrous Processing and Trading Company.[299]

7.5.6 New storage services offered by Union and Enbridge to in-franchise customers

The NGEIR Decision also announced that the OEB would refrain from regulating the rates or approving the contracts for new storage services offered by Union and Enbridge to their in-franchise customers.[300]

The category "new storage services" includes (indeed, arose from) high-deliverability storage.[301] The working definition of high deliverability is when 10% of the volume can be delivered in one day, in comparison with 1.2% for conventional seasonal storage.[302]

The impetus for refraining from price regulation of this particular service is the need for its development, following from the issues identified by the NGF, which foresaw increasing growth of gas-fired power generation and the need for high-deliverability storage to meet those demands. In the NGEIR Decision, the OEB decided that development would be best regulated where utilities would both receive incentive for and bear the risk of new development.[303] The decision to refrain from price regulation (and contract approval) of high-deliverability storage was broadened by the OEB to encourage development of all "new" storage services more generally.[304]

Subsequent to the NGEIR Decision, the Association of Power Producers of Ontario

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[298] OEB Decision EB-2005-0520,EB -2006-0502, December 19, 2006, at 3-4, online: <http://www.oeb.gov.on.ca/documents/cases/EB-2005-0520/finalrateorder_union_191206.pdf>.
[299] OEB Decision and Order EB-2009-0082, June 11, 2009, online: <Dec_Order_Union T1 Ferrous_20090611>.
[300] NGEIR Decision, *supra* note 3 at 74.
[301] NGEIR Decision, *ibid*. at 66.
[302] NGEIR Decision, *ibid*. at 14; Brown, Ware, and Weston, *supra* note 252 at 3. Also see OEB Decision EB-2006-0322,EB -2006-0340, July 20, 2007, at 14: "The Board has refrained from regulating rates for deliverability higher than 1.2%", online: <http://www.oeb.gov.on.ca/documents/cases/EB-2006-0322-0338-0340/dec_reasons_NGEIR_20070730.pdf>.
[303] NGEIR Decision, *supra* note 3 at 50, 51.
[304] NGEIR Decision, *ibid*. at 69-71.

challenged the lack of price regulation for high-deliverability storage, arguing that there was insufficient competition for such services (a lack of competitive alternatives), and in a Decision issued May 22, 2007, the OEB found grounds for review.[305] On review, however, the OEB decided that it would not vary any aspect of the NGEIR Decision. The OEB noted, with respect to this particular motion, that the NGEIR decision had acknowledged that these services were not being offered currently, and that investments would be required in order to develop them—but also that the development of the services was necessary, and that a non-regulated market was the rational and most effective model in which to achieve this development. The NGEIR Decision had explicitly found that "competition in these services *will be* sufficient to protect the public interest" and that the OEB was therefore required to refrain from regulation in this area.[306]

On July 31, 2009, the OEB issued a Decision approving Union's proposal to increase the operating pressures in three natural gas storage pools above the pressures set in the OEB's original conditions of approval.[307] The proposed increase in operating pressures would increase the working capacity of the pools, which Union intends to use to provide storage services to customers at market-based rates.[308] Referring specifically to the discussions of demand for high deliverability storage in the NGEIR Decision, Union's application stated that the additional capacity created by the proposed increased operating pressures will be used to meet the requirements of power generators and marketers.[309]

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[305] OEB Decision and Reasons EB-2006-0322, EB-2006-0338, EB-2006-0340, May 22, 2007, online: <http://www.oeb.gov.on.ca/documents/cases/EB-2005-0551/Decision_Orders/dec_reasons_NGEIR_motion_20070522.pdf>.
[306] OEB Decision EB-2006-0322,EB -2006-0340, July 20, 2007, at 12, online: <http://www.oeb.gov.on.ca/documents/cases/EB-2006-0322-0338-0340/dec_reasons_NGEIR_20070730.pdf>.
[307] OEB Decision and Order EB-2009-0144, July 31, 2009, online: <Decision_Order_Union_Bentpath Storage_20090731>.
[308] It appears that the original proposals and authorizations had been predicated on sales at market-based rates; with regard to Oil City Pool and Bluewater Pool, at least, in a hearing (RP-1999-0047) on the original applications for storage designation and injection/withdrawal authorization, Glenn Leslie noted for Union Gas Ltd. that: "… the storage is underpinned by contracts which will return market value prices and that will result in premiums over cost-of-service rates." Online: <http://www.oeb.gov.on.ca/documents/cases/RP-1999-0047/VOLH3.TXT>.
[309] OEB Decision and Order, *supra* note 307 at 2,4,6.

In sum, Ontario has made huge moves to deregulate gas storage in the province partly in order to provide greater security of supply.

7.6 Treatment of resource use conflicts

Ontario deals with the issue of resource use conflicts (between gas storage and other uses of the surface and subsurface estate) at a number of different levels. First, in the case of Crown owned storage rights, the *Mining Act* provides (s.101.2) that "the Minister may issue an exploration licence, production lease or storage lease under this Part in respect of land that is already subject to a licence or lease under this Part" (i.e. Part IV of the *Mining Act*).[310] This suggests that existing uses of the subsurface estate will not automatically have priority over proposed storage uses. This signal may be important should the Minister act on this authority since it may make it more difficult for a mining operator, whose exploration activities might be sterilized by a storage project, to claim that the government has "expropriated" its interest.[311]

Second, s. 40 of the *OEBA* (quoted above) provides a mechanism for managing some potential resource conflicts, at least within the designated storage area. Section 40, it will be recalled, requires the Minister to refer well licence applications within a DGSA to the Board for its report. A recent example involved an application by Enbridge with respect to designated storage in Lambton.[312] The storage project was based on a pinnacle reef structure with a gas cap and underlying oil zone. Oil production from the lower zone proceeded concurrently with the gas storage operations. Enbridge proposed to re-enter a number of vertical oil wells in the pool and kick off a horizontal well to enhance oil production. In its report recommending approval, the Board canvassed a number of issues including land matters, effect on rates, and environmental matters, before concluding that the proposal should not affect the storage operation and might provide some

[310] This is expressed to be "despite the definition of Crown land" which expressly excludes from the definition "land, the surface rights, mining rights or the mining and surface rights of which are under lease or licence of occupation from the Crown".
[311] See *British Columbia v. Tener* [1985] 1 S.C.R. 533: the Supreme Court found that the registered owner's mineral interest (in land now within Wells Gray Provincial Park) was expropriated through the operation of the Park Act.
[312] OEB EB-2006-0002(3), January 30, 2006.

enhancement. Clearly, and especially given successful experience with earlier horizontal wells, this was an easy case; in fact, there was no real conflict between the two activities.[313]

7.7 Conclusions for Ontario

There are numerous natural gas storage projects in southern Ontario. Union Gas is the most important operator. Ontario has more than fifty years experience with natural gas storage. This experience is reflected in both the number of storage projects in the province but also in the sophisticated and transparent regulatory approach of the Ontario Energy Board to the approval of such projects.

Ontario recognizes that storage rights may be owned by the Crown or by private owners based upon ownership of the mineral rights in relation to the land. Private ownership is dominant in that part of the province where storage operations are active but the Crown does have in place a tenure regime for disposing of Crown owned natural gas storage rights. The Ontario Energy Board regulates the development of storage sites and in the course of that also provides a mechanism to deal with and provide compensation in the event of holdouts (either surface or subsurface). In recent years Ontario has moved away from the economic regulation of gas storage and has signaled that new storage, and the expansion of existing storage facilities, should be able to take advantage of market-based rates.

[313] The vertical wells predated designation as a storage area; and the wells would only be produced when reservoir pressure (and storage) was low.

8.0 QUEBEC

8.1 Introduction

Historically there has been very little natural gas production in Quebec. However, there are currently two natural gas underground storage properties in Quebec; one in Saint-Flavien and the other in Pointe-du-Lac. Both are depleted natural gas fields. Gaz Métropolitain, the dominant distribution utility in Quebec, has an interest in these two properties through its 50% interest in Intragaz. Storage is subject to economic regulation by the Régie de l'énergie du Québec.[314]

The principal legislation dealing with underground natural gas storage in Quebec is the *Mining Act*.[315] The *Act* deals with issues of ownership in Chapter II, especially ss. 3 – 5. Well licences area dealt with in Division X of Part III, while Division XI deals with exploration tenures for petroleum and natural gas, brine and natural gas storage, and Division XIII deals with production leases for the same substances and for a lease to operate an underground storage reservoir.

Surface rights are dealt with in Chapter IV, Division III but these provisions seem to be confined to those engaged in mining operations rather than underground storage operations.

8.2 The ownership position

Our interpretation of the ownership provisions of the *Mining Act* is that the ownership position with respect to natural gas storage rights follows the position with respect to minerals. This conclusion turns on a 1986 amendment to the *Mining Act* which provided that the same rules (and exceptions) apply to underground storage reservoirs as apply to minerals, at least in terms of "the domain of the state". Hence, this section begins with a

[314] See Gaz Metro website online: <http://www.corporatif.gazmetro.com/default.aspx?culture=en-CA>.
[315] R.S.Q., c. M-13.1.

discussion of the position in relation to minerals and then turns to look at the position in relation to storage rights.

Historically, the position in relation to minerals was that while most minerals were vested in the state, older forms of grant either under the seignorial system or under pre-1880 grants carried mineral title. In 1982, the province introduced *An Act Respecting the Revocation of Mining Rights and Amending the Mining Act*,[316] to amend the *Mining Act* so as to vest nearly all mineral rights in the Crown. Exempted from this re-vesting were *existing* mining operations and petroleum and natural gas operations. At this time the *Mining Act* (Division XVII) dealt with the regulation of underground reservoirs for storage operations—specifically, licensing for exploration and or development of underground reservoirs belonging to the Crown—but did not provide for a more general Crown vesting. However, the *Act* was further amended in 1987 to declare that ownership of underground reservoirs was to be subject to the same rules as mineral rights.[317]

The current version of the *Mining Act*, provides as follows:

> Chapter II, Ownership of rights in or over mineral substances and underground reservoirs, Domain of the State.
>
> 3. Subject to sections 4 and 5 [the latter of which exempts certain mineral substances and does not pertain to underground reservoirs], rights in or over mineral substances, other than those of the tilth, form part of the domain of the State. The same rule applies to rights in or over underground reservoirs situated in lands of the domain of the State granted

[316] S.Q. 1982, c.17 (in force 15 September 1982).
[317] S.Q. 1987, c. 64. The Bill's explanatory notes included the following: "This bill revises and consolidates mining law and replaces the Mining Act. Its main object is to regulate the terms and conditions for allocating mining rights pertaining to mineral substances and underground reservoirs in the public domain. The bill enacts that mineral substances and underground reservoirs are Crown property. At the same time, it preserves acquired rights in such property under former legislation. The bill revokes, in favour of the Crown, rights in underground reservoirs not in the public domain." The government's introduction of the Bill in the legislature reiterated precisely these parts of the explanatory notes. The Bill did not attract debate (Québec, *Débats de l'Assemblèe nationale* (9 Décembre 1986) at 4994 (M. Raymond Savoie)).

or alienated by the State for purposes other than mining purposes.

The *Act* does not define the term "underground reservoir".[318]

8.3 The disposition rules for state owned storage rights

The *Mining Act* deals with dispositions for storage in the same manner as it deals with dispositions for other purposes. Thus, there is an exploration tenure (an exploration licence) and an operational tenure (in the form of an operating lease). This section examines the rules dealing with each.

Section 165 of the *Act* provides that:

> No person may explore for petroleum or natural gas, brine or underground reservoirs unless he holds, as the case may be, an exploration licence for petroleum and natural gas, an exploration licence for brine or an exploration licence for underground reservoirs issued by the Minister. [emphasis supplied]

Licences are issued for a five year term (s.169) (renewable for five successive one year periods) on the basis of an application[319] rather than on the basis of a bidding process—unless the Minister has issued a special call for tenders (s.166(1)). The Minister has not made use of this special call process in the past. The *Act* also provides what is effectively a right of first refusal for the holder of a tenure for one set of rights (e.g. petroleum exploration rights), where another party (without an existing tenure) applies for another set of rights (e.g. storage rights). Thus s.167 provides that:

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[318] Neither do the regulations, but the Regulation respecting petroleum, natural gas, brine and underground reservoirs, R.R.Q. c. M-13, r.1 does define an "artificial underground reservoir" as "any cavity resulting from the extraction or the dissolution of the surrounding rock." This serves to distinguish salt caverns from a depleted reservoir.

[319] The Minister must exclude from the area of an application any land lands subject to lease to operate storage or an application therefore. The Regulations *ibid.* (s.63) prescribe the information that an applicant must provide in support of its application.

> Where a person applies for an exploration licence for petroleum and natural gas, an exploration licence for brine or an exploration licence for underground reservoirs with respect to a territory already subject to such a licence held by a third person, the Minister shall first offer the exploration licence applied for to that third person.

In a somewhat unusual provision (in terms of Canadian oil and gas statutes), s.173 contemplates that the holder of an exploration licence (including a storage licence) may, with the approval of the Minister, carry out exploration on territory bordering the licensed territory, "provided the proposed exploration work is necessary to gain better knowledge of the territory subject to his licence." The *Act* recognizes that the holder of an exploration tenure may wish to produce (or in the case of a storage reservoir, store) on a pilot basis. Thus s.175 provides that the exploration licensee can only use an underground reservoir for storage purposes for a test period (which may be extended).[320] The licensee may group a number of exploration licenses in order to meet work commitment obligations (s.180).

Leases for the operation of underground storage are dealt with in Division XIII, ss.193 – 206. The general scheme is that the Minister must (subject to exceptions dealing with existing and pending competing rights claims) issue a lease to operate an underground reservoir to a person (note that the *Act* uses the term "person" rather than licensee) "who establishes the presence of … an operable underground reservoir".[321] The lease area must not be less than 200 ha or more than 2,000 ha including a protected area zone.[322] Leases are granted for 20 years subject to three ten year renewals with the possibility of further extensions if it can be shown that an underground reservoir is still "operable" (s.199).

The regulations (s.112) require an applicant for a storage lease operation to provide a

[320] The regulations (s.72) provide that the test period for a storage reservoir shall not exceed one year.
[321] The test for lease issuance for production has an economic component; not so the test for storage.
[322] These figures appear to be based on the similar size of lease tenures for production purposes. The size may be quite arbitrary in the context of storage operations where an operator will want to know that its rights extend throughout the reservoir. See Winter, *supra* note 18, at 108, n 2, indicating that the Suffield Storage site is recognized to cover 7,232 ha of Crown lease lands and 400 ha of freehold lands.

suite of information in support of its application. This seems to include the information that the province would like to have as owner, and information that the province needs as the regulator of a storage operation. In this context it is notable that s.113 of the regulations contemplates that the Minister will fix the rent for a storage lease taking "into account the depth, thickness, extent and economic prospects of the underground reservoir".[323] The application must allow for a protective perimeter (s.114) which shall "be at least 10% of the width of the underground reservoir measured at its widest place." The regulations deal with the native gas issue by stipulating (s.117) that the storage lessee may not produce any more mineral substances from the underground reservoir than the quantity injected unless it holds mining rights for the extracted substances.

8.4 The regulation of storage

The regulation of storage operations is comprised of regulations pertaining to drilling of wells, and regulations pertaining to the operation of storage. Section 160 provides that no person may drill a well for oil, gas or brine "or to explore for or operate an underground reservoir" without a well drilling licence. The regulations to the *Act*[324] are generic for different types of wells and require the applicant to describe a drilling program as part of its application (s.15), including a geological projection of the operations. Section 22(7) provides that a licensee may not drill a well within 1,600m of an existing underground reservoir. The regulations contemplate three forms of well licence, a well drilling licence (ss. 15 – 48), a well completion licence (the application for which must describe the completion program and an evaluation) (ss.49 – 55) and a well conversion licence (ss. 56 – 57). Converting a well from production to injection would trigger an application under these provisions.

[323] Information that the applicant must submit under s.112 includes information about the thickness of the reservoir and its porosity and permeability. Note that while the western jurisdictions (e.g. British Columbia, Alberta, Saskatchewan) apply a flat per hectare fee, both Ontario (which fixes rent on the basis of storage capacity) and Quebec have adopted a more sensitive approach to setting rental levels.
[324] Regulations, *supra* note 318, chapter 3, ss. 15 et seq.

As noted in the tenure section, a storage reservoir may be operated for a test period for up to a year. Section 72 of the regulations prescribes the information and test program that a licensee must provide in support of its application.

8.5 Holdout issues

Since for all practical purposes it would appear as if all storage rights are vested in the province, there are unlikely to be holdout issues where a private owner of storage refuses to participate. But that still leaves open the question of surface rights. Both the exploration licence provisions and the lease provisions of the *Act* deal with the question of access. Thus, ss.170 and 200 provide that the licensee\lessee respectively shall have access to the relevant lands where the lands are unalienated (by lease or sale), but where there is a private interest, access rights can only be exercised in accordance with s.235 which provides:

> The holder of mining rights or the owner of mineral substances may acquire, by agreement or by expropriation, any property permitting access to or necessary for the performance of exploration work or mining operations on the land granted or alienated by the State for purposes other than mining purposes ….
>
> No holder of mining rights or owner of mineral substances may exercise his right of access to the parcel of land or his right to perform exploration work or mining operations on land leased by the State for purposes other than mining purposes or on lands under an exclusive lease to mine surface mineral substances unless he obtains the lessee's consent or pays compensation to him. If there is no agreement on the amount of compensation, it will be fixed by the competent court…..

Two comments are in order. First, there might be a threshold question as to whether a storage licensee\lessee can take advantage of this section. Elsewhere the *Act* seems to

distinguish between exploration and mining operations and storage operations. On the other hand, the access provisions referred to above are generic and seem to contemplate all operations, including brine and storage operations as well hydrocarbon production operations. This looks like a situation in which the approach of adding on a new form of tenure to the existing suite of tenures dealt with in the *Act* was not fully tracked through into the expropriation and compensation provision.

Second, the section does provide a procedure to obtain access from the holdout surface owner but, as a court-based system, it seems more cumbersome that the surface rights procedures of the western provinces.

The *Act* contains one extraordinary provision dealing with a potential resource use conflict that might exist between a form of tenure known as a lease to use gas and other forms of tenure under the *Act*. In addition to a conventional hydrocarbon production lease, the *Act* also contemplates a "lease to use natural gas".[325] This seems to be a very limited form of household\farm domestic use tenure and not a commercial tenure.[326] However, s.190 provides that:

> The Minister may cancel a lease to use natural gas where he grants a lease to produce petroleum and natural gas, a lease to produce brine or a lease to operate an underground reservoir in respect of the parcel of land containing the well.
>
> The lessee under the latter lease shall pay to the person whose lease to use natural gas has been cancelled compensation based on the investments made to produce natural gas and a lump sum computed as prescribed by regulation [emphasis supplied].

[325] Division XII, ss. 185 et seq.
[326] A gas use lessee (s.189) "may use the natural gas only to meet the energy requirements of his residence".

We can hardly expect this provision to be widely used but it does show generally that narrow private rights may be made subordinate not only to broader public interests but also to private interests that are presumptively wealth enhancing.

8.6 Conclusions

Quebec has elected to take the same approach to storage rights as it has taken with respect to minerals, including oil and gas, and to vest all such rights in the state (subject to some very limited grandparented exceptions). The legislation (the *Mining Act*) provides for a two step exploration and lease tenure scheme for storage which seems to track (perhaps somewhat slavishly) the two stage tenure scheme for hydrocarbons. As in some other jurisdictions (e.g. Manitoba), the *Mining Act* serves as both a disposition statute and as a conservation\regulatory statute. Since storage rights are vested in the government there are no storage holdout problems that need resolution; however, there is some possibility that the legislation needs to be amended to ensure that storage operators can access the surface rights provisions of the *Mining Act*.

9.0 NEW BRUNSWICK

9.1 Introduction

New Brunswick currently has one salt cavern storage project under development with a projected in-service date of 2011 – 2012 and with 4.0 bcf working gas capacity.[327] The province's position on the ownership of storage rights is crystal clear; all storage is vested in the Crown. As a corollary to this, the province has a disposition system in place, and, as the sole owner of storage sites, the province does not need legislation to deal with holdout problems.

9.2 Crown ownership and disposition of storage rights

New Brunswick moved to vest storage sites in the Crown as recently as 1999 by way of an amendment to the *Underground Storage Act* (the *Act* was originally introduced in 1978[328]) which now provides as follows:

> 2.1(1) Every site in the Province suitable for constructing or operating an underground storage facility is hereby declared to be, and to have been at all times prior hereto, property separate from the soil and vested in the Crown in the right of the Province.

At the same time, the province also made it clear that this vesting did not give rise to any claim to compensation:

> 2.1(2) No compensation is payable to any person, municipality or rural community as a result of the declaration in subsection 2.1(1).

[327] The project is being developed by Corridor Resources, online: <http://www.corridor.ca/oil-gas-exploration/natural-gas-storage-underground-storage-project.html#project-description>.
[328] *Underground Storage Act*, S.N.B. 1978, c. U-1.1. Previous to the amendment, the Act did not address the issue of storage reservoir ownership.

The *Act* does not define the term "site" or the term "suitable"[329] but it does define the term "underground storage facility" as follows:

> a naturally occurring underground cavity or system of cavities or pores, or an underground space created by some external means, that may be used for the storage of fluids but does not include fabricated containers that may be used for storage purposes.

The definition embraces both depleted reservoirs and salt caverns. The main vesting provision is declaratory. It speaks both prospectively and retroactively and it effectively severs the property in the storage "site" from the "soil". The effect of the provision must be that there can be no privately owned storage rights in the province and that all rights to use Crown-owned storage must therefore be obtained from the Crown as authorized under the terms of the *Underground Storage Act* (the *USA*) The *USA* contemplates a two-stage tenure scheme, an exploration licence (a three year non-renewable term to evaluate "underground storage potential for fluids")[330] and a storage lease (an initial term of ten years renewable for like terms of ten years on application). The regulations provide for a rental of $0.50 cents per hectare while the property is held on an exploration licence. Section 12(4) of the *USA* provides that a lessee shall pay "such rentals as are prescribed by legislation" but the regulations do not currently deal with leases. Consequently it is not possible to ascertain whether the province will adopt a flat acreage based fee (as is the case in the western provinces) or a fee based on storage capacity (as seems to be the approach of Quebec and Ontario).

This broad Crown vesting provision should serve to eliminate most holdout problems

[329] Neither does the *Act* define the term "storage" which leaves open the question of whether the term could be read to include disposal as in the context of CCS.

[330] *USA*, *ibid*., s. 7(3); "fluids" is defined as meaning "compressed air, any gas or liquid or such other matter, as is designated by regulation, including, without limiting the foregoing, oil and natural gas as defined by the *Oil and Natural Gas Act*, but does not include nuclear wastes in any form". This provision seems wide enough to allow the Lieutenant Governor in Council to designate CO_2 as a fluid for the purposes of the Act. No such regulations have been passed; the only regulations (Fees Regulation – Underground Storage Act, N.B. Reg. 2005-5) deals with fees and work requirements for the exploration licence phase.

associated with developing a natural gas storage site (since there can be no competing claims from another fee simple owner of storage rights) but it still leaves outstanding the question of surface rights and the possibility of competing interests held by an oil and gas rights lessee.

9.3 Surface Rights

Surface rights are readily dealt with. Section 9 of the *Act* distinguishes between Crown lands and "lands other than Crown lands". For Crown lands, ss.9(1) and (3) afford the licensee the power to "enter on and explore Crown lands for the purposes of evaluating underground storage potential for fluids" subject to the payment of compensation for "any loss or damage". For non-Crown lands however, the *Act* provides that there can be no entry without consent of the owner, tenant, or occupant or by obtaining a "special order" from the Minister and again subject to payment for any "loss or damage".

9.4 Resource use conflicts

In New Brunswick, oil and gas rights are similarly declared to be vested in the province in terms that parallel the vesting provisions for storage rights:[331]

> 3 All oil and natural gas is hereby declared to be, and to have been at all times prior hereto, property separate from the soil and vested in the Crown in the right of the Province.

This section seems to preclude the possibility of private ownership of oil and gas rights in New Brunswick but it does leave open the possibility of a conflict between the holder of Crown storage rights and the holder of rights under the *Oil and Natural Gas Act*. The *Underground Storage Act* tries to deal with this potential problem principally by preferring the holder of the oil and gas rights. There are two provisions of the *USA* that

[331] *Oil and Natural Gas Act*, S.N.B. 1976, c. O-2.1. There is, however, no provision dealing with compensation.

deal with this hierarchy. First, s.9(5) imposes on an underground storage exploration licensee the duty not to interfere with a broad category of other interests as follows:

> A person performing exploration operations under this Act shall not interfere with the operations of any licensee or lessee under the *Oil and Natural Gas Act*, the *Bituminous Shale Act* or the *Quarriable Substances Act*, any holder of a mining or mineral claim or mining lease under the *Mining Act*, any holder of a mining licence or mining lease continued under the *Mining Act*, or any holder of a mining right granted under the *Ownership of Minerals Act* or section 25 of the *Mining Act* or any predecessor of that section for the location upon which the operations are conducted.

There is no similar provision with respect to storage leases although the Crown might achieve a similar result through s.12(4) of the *Act* which provides that any lease or renewal shall be subject to any special conditions imposed by the Minister.

Second, s.12.1 of the *USA* (added in 1999) provides that:

> A person who holds a valid and subsisting oil and natural gas lease issued under the *Oil and Natural Gas Act* is entitled to receive a storage lease for the formation in respect of which it holds the oil and natural gas lease, provided that it complies with the provisions of this Act in all other respects.

This provision gives the holder of a production lease a preferential right to receive a storage lease.

9.5 Conclusions in relation to New Brunswick

New Brunswick has had storage legislation in place since 1978 but is only now beginning

to develop its first storage project. The provincial ownership rules are clear and simple; all storage rights are vested in the Crown. There are therefore no private owner holdout problems that need to be dealt with other than with respect to surface owners.

10.0 NOVA SCOTIA

10.1 Introduction

Nova Scotia has one cavern storage project, the Alton Project, currently under development.[332] Once developed, the storage will be connected to the Halifax Lateral of the Maritime and Northeast Pipeline's natural gas transmission system, potentially thereby providing service to customers in both Canada and the United States.

10.2 Ownership of storage rights and the Crown disposition system

The Nova Scotia storage regime is similar to that in force in New Brunswick although Nova Scotia's *Underground Hydrocarbons Storage Act*[333] (*UHSA*) lacks a clear Crown vesting position. Arguably, however, the *UHSA* is premised on the assumption that storage rights are already vested in the Crown by virtue of either the *Mineral Resources Act*[334] (*MRA*) or the *Petroleum Resources Act (PRA).*[335] The vesting clause in the *MRA* reads as follows:

> 4 (1) All minerals are reserved to the Crown and the Crown owns all minerals in or upon land in the Province and the right to explore for, work and remove those minerals.
>
> (2) Every grant of Crown lands made on or after the twenty-second day of April, 1910, shall, whether the same is so expressed therein or not, be construed and held to reserve to the Crown all the minerals in or upon the land so granted and the right to explore for, work and remove those minerals.

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[332] Details are available as part of the Environmental Impact Assessment conducted for the project, see online: <https://www.gov.ns.ca/nse/ea/AltonNaturalGasStorage.asp>.
[333] S.N.S. 2001, c.37.
[334] S.N.S. 1990, c. 18. For an interesting discussion of this section in the context of compensation that might be payable to a surface owner where there is a Crown taking to allow development of a silica deposit see *Re Shaw Group*, 2001 NSUARB 19.
[335] R.S.N.S. 1989, c.342.

> (3) Every grant of Crown lands made at any time on or before the twenty-second day of April, 1910, shall, whether the same is so expressed therein or not, and notwithstanding the provisions of such conveyance or of any enactment or law, be construed and held to have reserved to the Crown all the minerals in or upon the land so granted and the right to explore for, work and remove those minerals.
>
> (4) Every person who has acquired Crown lands by conveyance or prescription is deemed not to have acquired the minerals in or upon the Crown lands or the right to explore for, work and remove those minerals and no person is entitled to acquire minerals or such right by conveyance or prescription.

The similar vesting clause in the *PRA* also emphasizes the vesting of the substance (petroleum, defined to include natural gas as well) rather than the pore space:

> 10 (1) All petroleum located in or under Nova Scotia lands is and is deemed always to have been vested in the Province and every grant made by the Crown shall be construed and held to reserve all the petroleum in the lands so granted.

The *UHSA* creates a two stage tenure system consisting of a hydrocarbon storage area licence to evaluate the potential of the relevant lands (ss.8 – 12, a one year term renewable up to four times) and a hydrocarbon-storage lease (ss. 15 – 16, a twenty year term, renewable). The regulations specify that an applicant for a licence must already hold a mineral right for salt and potash under the *Mineral Resources Act*[336] and must have obtained a written statement from the Minister "approving the use of the geological

[336] Underground Hydrocarbons Storage Regulations, N.S. Reg. 148/2002 [UHS Regulations]. Note that the Code of Practice Respecting the Underground Storage of Hydrocarbons, December 2002 <http://www.gov.ns.ca/energy/resources/spps/codes-guidelines/Code-of-Practice-Underground-Hydrocarbons.pdf> at 4 indicates that "The initial exploration and definition of suitable areas for underground hydrocarbon storage in salt formations must be carried out under a Special License for exploration for salt issued under the *Mineral Resources Act*."

formation for the development of a storage reservoir".[337] The lease gives the lessee (s.15(4)) "the exclusive right to develop and utilize the storage area for the injection, storage or withdrawal of hydrocarbons in a storage reservoir".

A licence is available on application, apparently on a first-come first-served basis; there is no provision for nominating and bidding.[338] A licensee pays rent of $2.50 ha and a lessee rent of $5.00 ha.[339] The application for a licence must include a proposal for a work program designed "to determine the suitability of a storage area for the future development of a storage reservoir"[340] and involving expenditures of $125 ha over the duration of the licence. More detailed information must accompany an application for a lease including information about all wells drilled and about fresh water strata,[341] and the applicant must also file a development program which "describes the milestone events in the development of a storage reservoir in the storage area".[342] A lessee must apply for an approval to construct a storage reservoir from the Nova Scotia Utility Review Board within two years of obtaining a lease.

10.3 Surface rights and other resource conflicts

The *UHSA* deals with surface rights issues by providing that a licensee may not enter onto the relevant lands without the consent of the owner "or person entitled to grant consent" or, in the case of Crown lands, the consent of the Minister responsible for those lands (s.12). Absent consent, the licensee may apply to the Minister for a surface rights permit which the Minister may grant subject to terms and conditions and the payment of compensation (s.13).[343] The *Act* provides that there is no appeal from the issuance of a surface rights permit or the amount of compensation payable. A separate section (s.19) deals with compensation for damage (although this only applies to activities undertaken

[337] *UHSA*, s.8(2) and UHS Regulations, *ibid*., s.4. Presumably this is simply an approval in principle that the use of the formation for these purposes will not cause an irrevocable resource use conflict.
[338] UHS Regulations, *supra* note 336, ss. 4 et seq.
[339] UHS Regulations, *ibid*., s.13.
[340] UHS Regulations, *ibid*., s.19(1).
[341] UHS Regulations, *ibid*., s.20.
[342] UHS Regulations, *ibid*., s.21(1).
[343] There is further detail in s.28 of the UHS Regulations, *supra* note 336.

pursuant to a lease rather than pursuant to the exploration licence).

The *Act* deals with the potential for conflict between a storage operation and other interest owners through s.12 which provides that no application for a licence shall be accepted for areas that are subject to leases under the *Mineral Resources Act*, production agreements under the *Petroleum Resources Act,* or areas for which there is in force a prohibition on exploration or development activity.[344] Similarly, (s.12) the holder of a storage licence shall not undertake work on lands subject to a licence under the *MRA* or an agreement under the *PRA* "without the consent of the right holder of the licence or agreement". Where such a party refuses consent, s.13(2)(c) suggests that the holder of the hydrocarbon licence will be able to access the surface rights provisions discussed in the previous paragraph.

We suggested above that, while the *Act* does not contain a comprehensive vesting provision like that contained in the New Brunswick legislation, the *Act* proceeds on the basis that the property rights with respect to storage are already vested in the Crown. Thus the *Act* treats the entire province as open for the granting of licences (subject to the limitation expressed in the previous paragraph) and seemingly for leases as well. However, the *Act* also contains two sections[345] which provide for compulsory vesting orders to be made by the Minister on application of a lessee with respect to any land or interest in land, or any right of way or easement that might be required for the lessee's purposes. It is our view that these provisions deal with ancillary surface rights (e.g compressor stations) that may be required, and not with the storage rights themselves, but the point may not be completely clear. The arguments in favour of the proposed interpretation are at least three. The first is that it is unnecessary to apply the provision to the storage rights themselves if, as argued above, these rights are already vested in the

[344] See also s.8(2) which provides that before the Minister responsible for this Act proceeds with an application for a licence the Minister for Natural Resources must first approve "the use of the geological formation for the development of a storage reservoir". In addition, s.16 of the UHS Regulations, *supra* note 336, provides that the Minister may refuse to grant a licence or lease "if the Minister decides that granting the licence or lease could threaten or adversely affect an agreement, licence or lease issued under the *Mineral Resources Act* or the *Petroleum Resources Act*."

[345] Section 17 is headed "vesting orders" and s.18 provides that the *Expropriation Act* will apply to lands taken under the vesting order section.

Crown. The second is that the right to apply for a vesting order is only available to a lessee. The Crown could hardly grant the exclusive rights represented by such a lease if it were not already the owner. And third, the regulations in dealing with this issue define the lands that are to be acquired or made the subject of an order as, for a licensee, those lands required "for the purpose of passing over, entering upon or working the lands covered by the licence".[346]

10.4 Regulation of storage projects

The regulation of storage projects falls within the jurisdiction of the Nova Scotia Utility Review Board. Thus, s.22 of the *UHSA* provides that the holder of a storage area lease needs the Board's approval in order to "construct and operate a storage reservoir" and the Board's approval is also required (s.24) to suspend or discontinue storage operations. The province has also developed its own Code of Practice for Underground Storage of Hydrocarbons.[347] The Code is based on that of the Canadian Standards Association Code.

The Alton Natural Gas Storage Project was also subject to review under the terms of the province's *Environment Act*[348] and Environmental Assessment Regulations[349] on the basis that it was "A storage facility that has a total storage capacity of over 5000 m^3 and is intended to hold liquid or gaseous substances, such as hydrocarbons or chemicals other than water" within the meaning of the regulations.[350]

10.5 Conclusions with respect to Nova Scotia

The natural gas storage industry in Nova Scotia is just beginning to develop. The province has adopted free-standing storage disposition legislation. That legislation seems to be premised on the idea that all storage rights are already vested in the Crown by virtue

[346] UHS Regulations, *supra* note 336, s.28(1).
[347] Code of Practice Respecting the Underground Storage of Hydrocarbons, December 2002, *supra* note 336. The Code provides that it does not apply to the storage of hydrocarbons in aquifers or to the storage of other gases or fluids.
[348] S.N.S. 1994-95, c.1.
[349] N.S. Reg. 26/95.
[350] *Ibid*., Schedule A.

of Crown vesting provisions in provincial mining and petroleum legislation. It would certainly be anomalous if mining and petroleum rights were vested in the Crown but not storage rights; but still, this might usefully be clarified. The disposition legislation provides for two forms of tenure, a storage exploration tenure and a long term lease tenure for continuing operations.

11.0 OTHER JURISDICTIONS

This part of the paper briefly canvasses the position in the two provincial jurisdictions (Newfoundland and Prince Edward Island) which do not have a natural gas storage regime. It also looks briefly at the relevant rules for Yukon, federal oil and gas lands in the Northwest Territories and Nunavut and the offshore. The section concludes by examining the federal role in natural gas storage.

11.1 Newfoundland and Prince Edward Island

As indicated in the introduction to this paper, there is no provision in either Newfoundland or Prince Edward Island[351] for natural gas storage operations.[352] The issue is not dealt with in the relevant oil and gas legislation[353] and there is no free-standing legislation dealing with storage. The oil and gas legislation in PEI contains a comprehensive Crown vesting clause vesting "all oil and natural gas whatsoever" in Her Majesty but makes no special mention of pore space ownership or storage rights.[354] The vesting clause in the Newfoundland legislation is somewhat less comprehensive insofar as it carves out of the vesting any express statutorily authorized Crown grant made before April 15 1965,[355] but vesting is also expressly confined to the petroleum substance insofar as "Petroleum …. is declared to be and to have always been property separate

[351] We understand from Ronald Estabrooks, (telephone conversation, August 26, 2009) Energy Advisor, Department of Environment, Energy and Forestry, (Energy and Minerals Division) that there have been no "serious" inquiries regarding potential storage projects. P.E.I. may not have workable geological conditions for storage development: there are a number of salt formations but these are typically too deep for economical development as storage. It is also suggested that there is currently no economic need since P.E.I. is close to the Maritimes and Northeast pipeline. There may still be economic arguments in favour of storage given that storage may allow a utility to make more efficient use of its pipeline capacity.

[352] There is also no provision for natural gas storage in the *Indian Oil and Gas Act*, R.S.C. 1985, c. I-7 or the Indian Oil and Gas Regulations, 1995 S.O.R. 94/7453. This is a surprising omission.

[353] *Oil and Natural Gas Act*, R.S.P.E.I. 1988, c. 0-5; *Petroleum and Natural Gas Act*, R.S.N.L.1990, c. P-10.

[354] *Oil and Natural Gas Act*, *ibid*., s.3.

[355] *Petroleum and Natural Gas Act*, *supra* note 353, s.3. See also LIA Agreement, January 2005, between the Labrador Inuit Association, Canada, Newfoundland and Labrador, regarding land ownership, resource sharing, and self-government. Under that Agreement (Chapter 4) Inuit own surface lands and an undivided interest in subsurface resources. The surface title is defined in such a way as to include geothermal resources. The agreement does not specifically deal with storage rights. For the ext of the Agreement see http://www.ainc-inac.gc.ca/al/ldc/ccl/fagr/nl-eng.asp

from the soil." This latter qualification would seem to make it very difficult to argue that the Crown vesting extended to storage rights.

11.2 Yukon

It is likely that storage rights in Yukon may be owned either by the territorial government or by First Nations at least in relation to those First Nation lands that include mineral title.[356] Yukon's oil and gas legislation[357] contemplates the creation of a natural gas storage regime but such a regime has yet to be created. Section 16 of the Yukon *Oil and Gas Act* makes it clear that exploration and production tenures do not carry with them storage rights:

> An oil and gas disposition does not grant the right to store oil or gas or any other substance in an underground formation in the location of the disposition

The broad regulation making power of s.65 contemplates that the Commissioner in Executive Council may make regulations with respect to, *inter alia*, subsurface storage and, on the regulatory side, s.73(1)(c) provides that no person may commence a storage operation without the approval of the conservation authority. The only production in Yukon at present is in the south east and that gas is shipped into the Spectra system.

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[356] For the terms of Yukon First Nation Final Agreement, see the agreements page of the Council of Yukon First Nations website, online: <http://www.cyfn.ca/ouragreements>.

[357] *Oil and Gas Act*, R.S.Y. 2002, c.162. The *Act* is both a disposition statute and a regulatory statute. The disposition parts of the statute only apply to Crown lands and would not apply, for example, to First Nation lands. The regulatory and conservation provisions of the statute (e.g. s.73) would be laws of general application that would apply throughout Yukon unless a First Nation occupied the field in relation to its own lands.

11.3 The federal regime for Nunavut, Northwest Territories (and the east coast offshore)

The federal oil and gas legislation for the Northwest Territories and Nunavut, the *Canada Petroleum Resources Act*,[358] applies to lands that belong to Her Majesty in right of Canada, or in respect of which Her Majesty in right of Canada has the right to dispose of or exploit the natural resources.[359] The legislation does not apply to petroleum resources held by Inuit or First Nations pursuant to the terms of land claim agreements, and presumably, within these lands, any storage rights are vested in the relevant group at least where the First Nation or Inuit own the mineral title.[360] The *Act* contemplates a separate form of tenure for storage operations. Thus, s.43 provides that:

> 43. (1) The Minister may, subject to any terms and conditions the Minister considers appropriate, issue a licence for the purpose of subsurface storage of petroleum or any other substance approved by the Minister in frontier lands at depths greater than twenty metres.
>
> (2) No frontier lands shall be used for a purpose referred to in subsection (1) without a licence referred to therein.

The reciprocal federal\provincial offshore legislation on the east coast contains a similar provision.[361]

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[358] R.S.C. 1985, 2nd supp., c. 36.
[359] See the definition of frontier lands, *CPRA*, *ibid*.
[360] For these agreements, see the INAC agreements webpage, online: <http://www.ainc-inac.gc.ca/al/ldc/ccl/fagr/nwt-eng.asp>.
[361] *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c. 3, s.86, and *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act* S.C. 1988, c. 28, s.89. And on Crown vesting in the offshore see the *Oceans Act*, S.C. 1996, c. 31, s.8:

> 8. (1) For greater certainty, in any area of the sea not within a province, the seabed and subsoil below the internal waters of Canada and the territorial sea of Canada are vested in Her Majesty in right of Canada. (2) Nothing in this section abrogates or derogates from any legal right or interest held before February 4, 1991.

The federal regulatory statute for the NWT and Nunavut, the *Canada Oil and Gas Operations Act,*[362] does not contain express provisions for the regulation and approval of natural gas storage projects.

11.4 Gas storage projects as interprovincial works or undertakings

The discussion to this point in the paper has been organized along geographical lines, jurisdiction by jurisdiction. The discussion assumes that jurisdiction over natural gas storage projects will be largely, if not exclusively, provincial (except to the extent that we need to consider federal property whether in the territories or within a province). This is an entirely appropriate assumption. The determination of who owns storage rights (as between the Crown, mineral owners, and surface owners) is clearly a matter of property and civil rights and a part of provincial jurisdiction under s. 92(13) of the *Constitution Act, 1867*. The same would be true of Crown disposition legislation (s.92(5) or s.92A) and legislation dealing with the regulatory approval of storage projects.

To the extent that storage rights in a province may be federally owned (e.g. within a national park), the federal government's jurisdiction might be engaged, but it is also possible that the federal government might obtain jurisdiction over natural gas storage operations by virtue of its jurisdiction over federal works and undertakings. The point is illustrated by the Federal Court of Appeal's decision in *Dome Petroleum Ltd v. National Energy Board*.[363] The case involved salt caverns used for the storage of ethane and ethylene liquids rather than natural gas, but the principles behind the decision are, with some reservations, equally applicable to natural gas storage which might be operated in conjunction with an interprovincial pipeline.[364]

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[362] R.C.S. 1985, c. O-7.
[363] (1987) 73 NR 135.
[364] There are perhaps some physical differences that need to be emphasized. For example, the evidence presented in this case suggested that, to the extent that there was an industry practice of pipeline operators providing storage for liquids, "it is usually limited to the short-term storage that is necessary to allow time to remove the product before the arrival of another batch of the same product." See National Energy Board, *National Energy Board, Reasons for Decision, in the Matter of a Public Hearing Into the Matter of Certain Terminal, Storage and Related Facilities Owned or Leased and Operated by Dome Petroleum Limited in Windsor, Ontario* (Ottawa: Supply and Services Canada, January 1986) at 26 [NEB Decision]. It is clear that the storage was highly integrated with the operation of the pipeline.

The case involved the Cochin pipeline system which was designed to ship natural gas liquids (ethane, ethylene, butane and propane) in batches from Fort Saskatchewan, Alberta, to the east. The pipeline was federally regulated by the National Energy Board and tolls on the Canadian parts of the pipeline were set by the Board under the terms of the *National Energy Board Act*.[365] The pipeline crosses into the United States in south east Saskatchewan and crosses back into Canada at Windsor, terminating in Sarnia. There were a number of delivery points en route where the pipeline operators provided appropriate storage facilities for deliveries.[366] The pipeline operators proposed to add a delivery point for propane at Windsor and this gave rise to the question as to whether shippers on the pipeline might also have regulated access to salt cavern storage owned by the pipeline operators (through subsidiaries) at the Windsor terminal. It appears from the record that the facilities had been constructed and operated to this point under the terms of provincial legislation, but that no steps had been taken by the province, through the Ontario Energy Board, to regulate access or tariffs.[367]

The NEB, on the basis of an inquiry report conducted by a single member, concluded that it should regulate access to these facilities and that it was constitutionally able to assert jurisdiction because the storage caverns and related facilities were developed to enable the system to move ethane which was the core federal undertaking: "The ethane storage caverns and related facilities have always been dedicated to serving this purpose and have never served any other purpose. These facilities are essential to the core federal undertaking".[368] The Board supported its decision by also noting "the degree of physical connection and operational integration between the Ethane Shippers' facilities and the pipeline, as well as the corporate interrelationship between the owners of the ethane storage facilities and of the pipeline ….".[369] Thus, even though there were arguably two distinct functions, transportation and storage, the Board assumed jurisdiction. The Board

[365] Now R.S.C. 1985, c. N-7.
[366] The storage facilities in the US were regulated by FERC (NEB Decision, *supra* 364 at 6). They were part of the service offered by the pipeline owners in order to attract business.
[367] NEB Decision, *ibid*. at 26.
[368] NEB Decision, *ibid.* at 35. The Board decision appears as an appendix to Presiding Member J.R. Hardie's report.
[369] *Ibid*.

was also able to do so because the definition of the term "pipeline" then, as now, also included storage.[370]

On appeal, the Federal Court of Appeal declined to interfere with the Board's decision. On its understanding of the facts, the terminalling facilities were provided by the owner of the transportation undertaking and were therefore "part and parcel of that undertaking" and "an integral and essential part" of the Cochin system.[371]

[370] The current definition reads as follows: "'pipeline' means a line that is used or to be used for the transmission of oil, gas or any other commodity and that connects a province with any other province or provinces or extends beyond the limits of a province …. and includes all branches, extensions, tanks, reservoirs, storage facilities, pumps, racks, compressors, loading facilities …." (*National Energy Board Act*, R.S.C. 1985, c. N-7, s.2).
[371] *Supra* note 363 at para. 18.

12.0 CONCLUSIONS

The main body of this working paper is organized along jurisdictional lines covering each of the provinces that has developed gas storage legislation and omitting the two that have not (Newfoundland and Prince Edward Island). Each of the subsections of the working paper contains a brief summary for that jurisdiction. Rather than repeating those summaries here we have tried to organize this conclusion around the themes introduced in the introduction, while adding some details. Hence, this conclusion addresses the following matters: (1) ownership of storage rights, (2) the treatment of holdout problems where storage rights are privately owned, (3) disposition rules for government owned storage rights, (4) resource sterilization, and (5) regulation.

Who owns natural gas storage rights?

The literature on the ownership of natural gas storage rights in Canada suggests that there is some uncertainty as to who owns pore space for storage purposes. Is pore space owned by the owner of the mineral estate or is it owned by the owner of the surface estate? Given this uncertainty, governments in Canada have responded in several ways.

First, some governments have responded by vesting natural gas storage rights in the Crown or the government. This serves both to clarify and simplify the ownership position. A prospective storage operator need only deal with one owner and that owner is a public owner. This approach also serves to resolve the potential holdout problems that may arise when a single owner in a fragmented ownership situation refuses to agree to the assembly of the properties required for a storage project at the price offered, or indeed at any price. This is the position taken in Quebec and New Brunswick: both have elected to vest pore space and storage rights in the government. The position is not quite as clear in Nova Scotia, although the provincial storage legislation seems to proceed on the basis that storage rights are already vested in the Crown by virtue of provincial petroleum or mineral legislation.

Second, a single jurisdiction, Alberta, has chosen to enact legislation to clarify the ownership position and, in the course of doing so, has vested natural gas storage rights with the owners of petroleum and natural gas rights. Thus, in Alberta, storage rights may owned either by the Crown or by private parties depending upon the background mineral titles. Since about 80% of mineral rights in Alberta are owned by the provincial Crown this makes Crown ownership dominant though certainly not exclusive. One still encounters many townships in the settled parts of the province with fragmented (Crown\freehold) ownership patterns. In sum, the Alberta legislation has clarified the matter of ownership but it does not completely resolve matters from the perspective of a prospective storage operator seeking to assemble the necessary block of rights. There is still the potential for holdout problems.

A third group of provinces has not seen the need to clarify the ownership rules for natural gas storage, although each seems to proceed on the *assumption* that storage rights follow mineral ownership and that, as a result, storage may be vested in the Crown or a private owner depending on the background mineral ownership. This is the case in Ontario, Manitoba, and Saskatchewan.

Fourth, one other jurisdiction, British Columbia, proceeds on the premise that ownership of natural gas storage rights is unclear and that such rights may be owned by the surface owner or the mineral rights owner. British Columbia's response to this acknowledged uncertainty is to create a procedure for vesting storage rights in the Crown, subject to the payment of compensation where a private owner can show that it has been divested of its ownership rights. The BC model provides certainty to an operator proposing to assemble a storage project, but the model delivers that certainty on a case-by-case basis rather than by the enactment of a global rule (as in Alberta) that vests storage rights in one category of owner. The BC model also puts the onus on the private party who claims compensation on the grounds that it has been divested of its storage by the operation of the scheme to establish that claim. This is the case whether that party presents its claim on the basis of its ownership of surface rights or on the basis of its ownership of mineral rights.

Dealing with holdouts

A storage operator needs to assemble and acquire all of the interests in the target storage formation. If it fails to do so, the operator may, at worst, not be able to proceed with its project; at best it runs the risk of another party producing its stored gas. A storage operator will also require surface access for injection wells and other facilities. In most cases we can expect the operator to proceed by way of contract, storage agreement, lease, or voluntary unitization to acquire the necessary rights – all with the necessary consent of the relevant owners of storage rights (whether private or public). But this may not always be possible. It may not be possible to trace owners; or an owner may simply not consent, either at the offer price, or at all. For example, the owner may simply not like the idea of gas storage under his or her lands.

Faced with this reality, some jurisdictions recognize that it may be appropriate to allow the operator to acquire the necessary rights compulsorily where negotiations fail. For most jurisdictions this is fairly straightforward in relation to any surface rights that an operator may require, but the practice suggests that it is much more contentious in relation to the storage rights themselves.

In relation to surface rights, the western jurisdictions generally have a surface rights regime either as stand-alone legislation (Alberta, Saskatchewan, and Manitoba) or as part of petroleum and natural gas legislation (British Columbia). Generally, these jurisdictions have found it fairly easy to amend this legislation over the years to accommodate new activities as they develop, including injection activities for enhanced oil recovery operations and gas storage operations. This is clearly the case for British Columbia and Alberta. Nova Scotia prescribes the surface rights access and compensation regime within the storage legislation itself, as do Ontario (in the *Ontario Energy Board Act*) and New Brunswick. In Saskatchewan and Quebec however it is less clear that the legislation has been amended to afford a storage operator the same access to surface rights legislation (or its equivalent) as would be available for exploration and production operations.

The picture is considerably more diverse in relation to the storage rights themselves. First, legislative measures to deal with holdouts are unnecessary in those jurisdictions that vest storage rights in the government (New Brunswick and Quebec), in any jurisdiction that seems to assume that it has done so (Nova Scotia), or in any jurisdiction which has a means of vesting storage rights in the Crown on a case-by-case basis (British Columbia). But, of those jurisdictions that contemplate private ownership of storage rights, only one, Ontario, has addressed the problem of how an operator may gain access to storage rights owned by a private party that is holding out and which rights are necessary to complete the storage unit.

Ontario has the requisite legislation and has used it, but none of the other provinces (Alberta, Saskatchewan, and Manitoba) have specific legislation on the books, and we have concluded in this paper that existing provisions dealing with such matters as pooling and unitization do not, as currently framed, permit an operator to compulsorily acquire storage rights. The Ontario legislation provides a compensation regime that allows an operator to compulsorily acquire storage rights from a private owner. Compensation appears to be payable on the basis of the "going-rate" in the pool or the region, and is calculated on the basis of a per hectare fee rather than on the basis of storage capacity. British Columbia also provides for the possibility of compensation to the owner of private storage rights whose rights may be affected by a Crown vesting order. Both Ontario and British Columbia provide that the amount of compensation is to be determined by an expert board rather than the courts: in Ontario, the Ontario Energy Board (OEB); and in British Columbia, the Mediation and Arbitration Board (the provincial surface rights board). While the OEB has decided such cases, no such cases have been brought before the BC Board. The Ontario legislation gives the OEB very general directions in terms of determining compensation (just and equitable compensation for any damage and for any rights acquired). The BC legislation adopts a listing model that is typical of western surface rights legislation and seems ill-suited for determining compensation for the loss of storage rights.

How does the government dispose of its natural gas storage rights?

Where natural gas storage rights are vested in government -- either by virtue of a general Crown vesting, as in New Brunswick and Quebec, or by virtue of some other element of its title (e.g. in Alberta, Crown ownership of petroleum and natural gas rights) -- the government needs to have a disposition regime for disposing of that category of resource rights, in much the same way as the government develops a scheme to dispose of rights to other resources such as petroleum and natural gas.

Governments appear to have adopted two distinct approaches to this challenge. Most governments have adopted a specific tenure scheme for the acquisition of storage rights. Typically this is a two-step tenure, with some form of a short term exploration tenure and then a longer holding tenure. In some cases this may take the form of dedicated gas storage legislation. This is the case, for example, in each of New Brunswick and Nova Scotia, and was the case originally in British Columbia. However, most jurisdictions have elected to deal with tenure issues within the context of provincial petroleum or mining legislation as follows: British Columbia, the *Petroleum and Natural Gas Act*; Saskatchewan, the *Crown Minerals Act*; Manitoba, the *Oil and Gas Act*; Ontario, the *Mining Act* and the associated regulations; and Quebec, the *Mining Act* and the regulations. While most jurisdictions maintain a clear separation between the disposition of the storage right on the one hand and the regulation of the storage project on the other, Manitoba's approach seems conceptually confused insofar as a permit for a storage project under the *Oil and Gas Act* seems to serve as both the regulatory and the property authorization for the project. There is also some (more limited) overlapping of function in the Quebec model.

Alberta has taken a conceptually different approach and does not provide a distinct and stand-alone storage tenure. Rather, the Crown natural gas storage tenure grows out of an existing production tenure which the tenure holder extends as to both function (storage in addition to production) and duration (the tenure is continued by production and\or storage) by entering into a gas storage unit agreement with the Crown and other affected

parties. Alberta seems to have adopted this approach in recognition of the fact that the dominant mode of storage in that province is in depleted reservoirs. Certainly, this represents a very pragmatic response to the reality that a storage scheme in a depleted reservoir will have to take account of, and build upon, existing tenures.

Other jurisdictions also have to grapple with this reality even where, in theory, they have distinctive and stand-alone storage tenures. In managing the transition from production to storage, a jurisdiction will need to think about whether it is necessary for the tenure holder to acquire a new form of tenure and\or whether an existing tenure holder should have a preferential right to acquire a storage tenure. Most jurisdictions seem to accept (at least where the storage property is a depleted reservoir) that an operator will require overlapping production and storage tenure, if only because of the risk that the operator will produce some native gas for which it will be royalty liable and for which it will need a production tenure.

Alberta's scheme apparently handles this transition seamlessly. It seems messier in other jurisdictions. In British Columbia, for example, it is significant that the one active storage project (Aitken Creek) is not developed on the basis of a storage tenure but on the basis of an original production tenure combined with a scheme approval. A provincial policy paper in BC suggests that future storage projects will require both a production tenure and a storage tenure, and the injunction in the Quebec legislation and regulations that a storage operator cannot produce any more mineral substances than it injects will also likely prompt the storage operator, at least the risk averse storage operator, to acquire a production tenure as well as a storage tenure. Most if not all storage operations in Ontario seem to be dominated by privately owned storage tenures which have evolved from a variety of production leases and storage agreements that defy orderly classification. One jurisdiction (New Brunswick) proposes to deal with the transition from production to storage by giving the holder of the production tenure a right or a preferential right to receive a storage tenure, while the Nova Scotia legislation stipulates that a storage tenure will not be issued for areas that are under a production tenure.

The practice shows that governments charge for storage rights for publicly owned storage in different ways. First, governments may charge a rental for the storage tenure. This may be a flat rental. For example, British Columbia levies a flat rental of $7.50 per ha per year, Nova Scotia fixes the lease rental at $5.00 ha, while in Alberta and Saskatchewan it is $3.50 per ha. Both Ontario and Quebec, however, contemplate that the rental should be based on the storage capacity of the property. In Ontario this will be the greater of the bid amount or 30 cents per thousand cubic metres, while the Quebec scheme reserves greater discretion to the Minister who may fix the rent for a storage lease based on the depth, thickness, extent and economic prospects of the underground reservoir. Second, it is possible that governments may dispose of storage rights by means of a bonus bidding system in the same way in which they dispose of production rights. The Ontario scheme provides for bonus bidding -- both cash, and, as noted above, bidding based on a proposed storage rental. In Alberta, bonus bidding is also the norm since storage rights begin as an exploration and production tenure and then roll over to a gas storage unit agreement. The original exploration and production tenure will almost invariably have been acquired at a Crown sale and on the basis of a bonus bid. However, it seems unlikely that the bidding party would have taken account of potential storage values when originally bidding on the property.

Resource sterilization

Development of a storage facility may sterilize the development of adjacent resources (or at least lead to resource use conflicts) and may engender safety concerns. Governments respond to this in several ways. First, where the government is disposing of storage rights it may take care to protect existing production interests. For example, Nova Scotia provides that the Minister shall not accept an application for an exploratory storage licence for areas that are subject to leases under the *Mineral Resources Act*, production agreements under the *Petroleum Resources Act*, or areas for which there is in force a prohibition on exploration or development activity. Second, governments and regulators may address these concerns at the regulatory stage where governments are approving storage projects. For example, a regulator may require that the applicant provide consents

from the mineral rights owners of offsetting acreage. This is the practice in Alberta through the Energy Resources Conservation Board and seems to be required in Saskatchewan as well. Governments and regulators have also discussed the need to reserve protective corridors around a project. Some regulators are uncomfortable with this idea, suggesting that it is up to the storage operator to identify its project boundaries and not transfer risk to the government or third parties. This seems to be the position in British Columbia and Alberta. Ontario allows for a narrow protective corridor while the Quebec regulator contemplates that the protective perimeter shall be at least 10% of the reservoir measured at its widest place. In Manitoba, the legislation goes so far as to provide that adjacent owners may be entitled to compensation in the event that development of a gas storage property results in resource sterilization and loss of value. Once a storage project has been approved, jurisdictions may also address safety and resource concerns in additional ways. For example, the regulator may require special approvals for drilling and mining activities within a certain margin of the perimeter of the project. This is the case in British Columbia and most notably in Ontario.

Regulation

All of the provincial jurisdictions regulate the safety and conservation aspects of storage projects, whether those projects involve publicly owned storage or privately owned storage. And, as stated above, the various jurisdictions generally try to maintain a clear separation between the government's role as owner of the storage resource (where relevant) and the government's role as regulator of storage projects. Here are some examples: in British Columbia, storage rights are acquired from the Ministry of Energy Mines and Petroleum Resources, project approval falls to the BC Oil and Gas Commission and the BC Utilities Commission may subject the facility to economic regulation; in Alberta, storage rights are acquired from the Department of Energy, while project approval and safety regulation is the responsibility of the Energy Resources Conservation Board; and in Ontario, government storage rights are acquired from the Ministry of Natural Resources, drilling is regulated by the same Department, and the

overall project approved and regulated by the Ontario Energy Board. However, in other cases, the separation is not as clear, for example in Quebec.

In some jurisdictions storage projects will trigger the need for an environmental assessment (EA). This was the case, for example, with Nova Scotia's first gas storage project, the Alton Project, but it is by no means the norm. Gas storage projects in Alberta do not trigger the need for an EA, and in British Columbia, new storage projects in depleted reservoirs in the Peace District of the province are expressly excluded as reviewable projects. Salt cavern projects may present more obvious environmental issues (acquisition of water rights for the salt dissolution process and ultimate disposal of the brine) than do depleted reservoir projects.

In addition to regulation for safety, environmental and resource conservation reasons, gas storage projects may also be subject to economic regulation. Historically this seems to have occurred because storage was initially developed in association with gas distribution utilities which were natural monopolies and were regulated as such. This is clearly the case for storage in Ontario, Alberta, and Quebec, but we can also see this influence in other provinces. For example, although there is no operating storage in Manitoba, the provincial regulatory scheme contemplates that storage, if developed, will be subject to rate regulation. Similarly, the Nova Scotia system contemplates that storage projects will be subject to review and approval by the Nova Scotia Utility Review Board, although it is not completely clear whether such a review is directed at safety issues or at matters of economic regulation. In recent years, there has been a trend to deregulate storage, in some cases to remove it from the rate base of regulated utilities (Alberta), and in other cases (especially Ontario but also Alberta) to emphasise that new storage will operate in a competitive market with market-based rates rather than rates based upon ideas of cost of service. While British Columbia in recent years toyed with subjecting the Aitken Creek facility to a greater degree of economic regulation, the province seems to have backed off, but has left in place a complaints-based system of regulation that might be triggered if a party believed that the operator was abusing its market power.

Tab “E”

TITLE: The Legal Framework for Carbon Capture and Storage in Alberta

AUTHORS: Nigel Bankes, Jenette Poschwatta, And E. Mitchell Shier

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ABSTRACT:

[Le résumé français suit l'anglais]

Carbon capture and storage (CCS) technologies are gaining currency as a means of disposing of greenhouse gases and helping states meet their international obligations under such instruments as the Kyoto Protocol. However, while the utility of these technologies has become increasingly evident, their relative novelty has meant that the legal issues surrounding their application have remained largely unresolved. This article examines the property, regulatory, and liability issues associated with CCS in an Alberta context. The authors draw upon existing law and practice in relation to analogous activities including enhanced oil recovery, acid gas disposal, and natural gas storage to identify changes and clarifications that might be desirable in order to develop an appropriate legal framework for CCS in Alberta.

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Les technologies de capture et stockage de dioxyde de carbone (CSC) deviennent de plus en plus populaires pour éliminer les gaz à effet de serre et aider les États à respecter leurs obligations internationales en vertu d'ententes comme le Protocole de Kyoto. Cependant, bien que ces technologies s'avèrent de plus en plus utiles, en raison de leur nouveauté relative, les questions juridiques entourant leur application demeurent essentiellement non réglées. Cet article examine la propriété, la réglementation et les questions de responsabilité liées au CSC en Alberta. Les auteurs font appel aux lois et pratiques existantes relatives à des activités analogues, incluant la récupération assistées des hydrocarbures, l'élimination de gaz corrosifs et le stockage de gaz naturel dans le but d'identifier les changements et les clarifications pouvant être souhaitables pour le développement d'un cadre juridique convenant au CSC en Alberta.

Table of Contents

The Legal Framework for Carbon Capture and Storage in Alberta

I. Introduction

1 Carbon capture and storage (CCS) is one of a number of potential technological options[1] to reduce anthropogenic emissions of carbon dioxide (CO2).[2] As such, CCS may help states meet the stabilization objective of the United Nations Framework Convention on Climate Change[3] and the quantified emission limitations of the Kyoto Protocol to the United Nations Framework Convention on Climate Change.[4] CCS refers to the capture of the CO2 produced by various industrial processes and the storage/disposal[5] of that CO2 in a storage/disposal reservoir where it will remain for a long period of time without significant atmospheric leakage.[6] While there exists a range of possible storage/disposal reservoirs including ocean storage/disposal as well as potential industrial uses, this article deals only with the legal issues associated with geological storage/disposal.

2 Geological storage/disposal sites may be located onshore or offshore. For some states (for example, Norway and some member states of the European Union (EU)) offshore storage/disposal is the only large-scale option available, while for other states (for example, the United States, Canada, and Australia) onshore sites are more likely.[7] The issue of offshore storage/disposal gives rise to a range of questions under international law that need not be considered in the context of an onshore storage/disposal project.[8]

3 The CCS literature generally identifies up to four different phases in any CCS project: (1) capture; (2) transport (to the injection well); (3) injection; and (4) post-closure. This article focuses on stages 3 and 4 in the context of onshore CCS projects. The distinction between stage 3 and stage 4 is that stage 4 commences when active injection has ceased and the proponent has demonstrated site stability. Stage 4 is therefore concerned with the long-term storage/disposal of CO2 and with necessary monitoring of the site to detect leakage to the atmosphere.[9]

4 The balance of the article proceeds as follows. Part II provides a sketch of the key features of the four stages of CCS. Part III discusses the main barriers to the adoption of CCS. The next three parts of the article discuss three types of legal issues. Thus, Part IV deals with property issues, Part V with regulatory issues, and Part VI with liability issues. Much of the analysis is premised on the assumption that, in identifying and examining the legal issues associated with CCS, a great deal can be learned from analogous operations including natural gas storage, enhanced oil recovery (EOR), and acid gas disposal (AGD) schemes.[10]

II. The Four Stages of CCS

A. Capture

5 Carbon capture is most likely to occur at large-point sources. These sources include large fossil fuel or biomass energy facilities, major CO2-emitting industries such as cement producers, refineries, iron and steel manufacturing, oil sands production and upgrading (including facilities to produce hydrogen from natural gas to use in the refining and oil sands upgrading process), and petrochemicals and natural gas production (especially where the gas stream includes a high CO2 content, for example, gas production from the Sleipner field and the Snohvit field, both located on the Norwegian shelf). The cost of capturing CO2 (including the costs of compression) represents the lion's share of the CCS process costs and may account for as much as 75 percent of overall CCS costs, although technological innovations may change these proportions. The IPCC estimates that capture costs will range between US$ 5-115/tCO net captured, depending upon the type of project.[11]

6 All forms of capture involve a significant energy penalty since the capture process requires the expenditure of energy.[12] Given the costs of capture, commentators suggest that early CCS projects should focus on those point sources that produce CO2 streams with a higher CO2 content since the per unit costs of capture will likely be lower. Such projects will include natural gas projects, where the methane stream has a high CO2 content which has to be removed to meet pipeline and marketing specifications, and petroleum-refining and upgrading projects which produce hydrogen from natural gas by a process known as steam[13] methane reforming which produces a stream of nearly pure CO2. Various incentives may be devised to encourage the adoption of capture technology, including carbon taxes and a cap and trade system.[14]

7 Some of the legal issues associated with the capture stage of CCS are intellectual property issues involved in the protection of the capture technology. Other issues relate to health and safety con-

cerns arising from dealing with a compressed CO2 gas stream. These issues are not the subject of this article.[15]

B. Transportation

8 Once captured and compressed, CO2 can be readily transported from the capture site to a storage/disposal (injection) site. While various options may be feasible, large volumes are most likely to be transported by pipeline, at high pressure, in a dense or supercritical phase. Most jurisdictions regulate CO2 pipelines in the same manner as they regulate natural gas pipelines.[16] For example, in Alberta, the construction and operation of an intra-provincial CO2 pipeline is regulated by the Alberta Energy and Utilities Board (AEUB) under the terms of the Pipeline Act.[17] Similarly, an interprovincial or international CO2 pipeline (such as the Souris pipeline that provides CO2 for the Weyburn project) is regulated by the National Energy Board (NEB) under its Act.[18] A key concern is to ensure that the CO2 stream is dried in order to eliminate the possibility of corrosion from the formation of carbonic acid.

9 Possible incentives to encourage this phase of CCS include public funding for CO2 pipeline infrastructure. For example, in Alberta there has been discussion of a possible CO2 pipeline to link the capture of oil sands-related emissions in the northern part of the province with enhanced oil recovery projects in the south.[19]

C. Storage

10 There are four main types of geological storage/disposal sites: (1) depleted oil and gas reservoirs; (2) deep saline formations; (3) (unminable) coal beds; and (4) salt caverns. Each has different characteristics and potential. In addition, and of particular interest in the short term, producing oil and gas reservoirs offer considerable opportunities for CO2 injection as part of EOR operations and perhaps enhanced gas recovery (EGR). Incremental revenue from these activities may be used to offset capture and storage costs. Further incentives that may stimulate this part of the CCS cycle include carbon taxes or a cap-and-trade system, as well as more targeted programs such as royalty incentives for EOR projects.[20]

1. Enhanced Oil Recovery

11 While varying from reservoir to reservoir, the primary recovery of oil will typically result in production of 5-15 percent of the original oil in place.[21] Recovery may be enhanced by secondary recovery mechanisms (such as a water-flood operation) or enhanced still further by a tertiary recovery operation such as a CO2 miscible flood. As of 2004, there were about 80 CO2-EOR projects operating around the world, most in the U.S. (especially in the Permian basin and using primarily natural, rather than anthropogenic, CO2) but with some operations in Canada, including the intensively studied Weyburn Project in the Williston Basin area of Saskatchewan.[22]

12 The most important obstacle to the widespread adoption of CO2-EOR projects is the availability of carbon dioxide. Given this constraint, CO2-EOR projects are typically operated[23] with an eye to minimize CO2 usage and maximize CO2 recovery. If storage/disposal acquires a value that exceeds its EOR value, that objective will change as operators seek to maximize CO2 retention. A recent European study suggested that the storage/disposal capacity of reservoirs in the United Kingdom and Norwegian North Sea sectors would be 4.9 Gt CO2, if they were operated to minimize CO2 usage, as opposed to 9.7 Gt if the goal were to maximize storage/disposal.[24] While these vol-

umes may be relatively small when compared with other storage/disposal options, these reservoirs will likely serve as early storage/disposal targets since revenue from enhanced recovery will offset capture and storage costs. The same European study estimated that widespread application of CO2-EOR in selected fields in these two sectors might (disregarding economics) enhance recovery by between 4.6 and 9.4 billion barrels.[25] In addition to enhanced recovery from oil reservoirs, there is likely some potential for EGR if CO2 were injected into depleted gas reservoirs.

13 It is evident that at some point, an EOR or EGR operation may merge into a CO2 storage/disposal operation when oil or methane can no longer be produced economically. But it will likely be difficult to draw a bright line between these two activities. For example, it seems likely that any depleted reservoir, if subjected to CO2 "disposal" (in other words, a CO2 soak rather than a CO2 flood), may be re-entered at some point in the future and produce incremental quantities of hydrocarbons.[26]

2. Depleted Oil And Gas Reservoirs

14 A depleted oil and gas reservoir may be used for long-term storage/disposal of CO2. Such reservoirs are attractive targets because their geological characteristics are well known and they are already connected to a pipeline infrastructure. The IPCC CCS Report estimates that oil and gas reservoirs may have a storage/disposal capacity of between 675 Gt and 900 Gt[27] of CO2. The In Salah gas project (Algeria), which commenced operations in 2004, is an example of a CCS project in a depleted reservoir. In this case, the CO2 stream (derived from the gas stream itself, which contains CO2 concentrations of between 1 and 9 percent) is injected into the aquifer zone of one of the shallow gas-producing reservoirs.[28] Depleted oil and gas reservoirs have also been used in North America (and especially Alberta) for the disposal of acid gas waste streams from gas-processing facilities.[29]

3. Deep Saline Formations

15 Deep saline formations occur in sedimentary basins around the world and are not confined to hydrocarbon areas. The IPCC estimates that there exists at least 1,000 Gt capacity available, but that it may be as high at 10,000 Gt. Sleipner, the first commercial deep saline project, commenced operations in 1996 in the Norwegian sector of the North Sea. The project injects about 1 Mt of CO2 annually into the Utsira formation, about 1,000 metres below the seabed.[30] Other commercial deep saline projects include some of the acid gas injection projects in North America.[31]

4. Storage In Coal

16 Carbon dioxide injected into coal seams will displace methane adsorbed in the coal, thereby resulting in permanent sequestration unless the coal is subsequently mined, whereupon the pressure changes in the reservoir would cause the adsorbed CO2 to be released into the atmosphere. As with EOR and EGR projects, coal CO2 storage/disposal projects should produce a revenue stream in the form of sales methane, leading some to describe this type of operation as enhanced coal bed methane recovery (ECBM). Not all coal seams are suitable for CO2 injection and methane recovery. In particular, they must be "permeable and homogenous, with little faulting or folding."[32] The IPCC CCS Report acknowledges that there are no existing commercial CO2 coal projects, but estimates available storage/disposal as between 3 Gt and 200 Gt.[33]

5. Salt Cavern Storage

17 Salt caverns, like depleted oil and gas reservoirs, have long been used as gas storage facilities around the world, but the creation of such caverns is expensive and each cavern offers only limited storage capacity (for example, 0.5 Mt). Salt caverns are created when water is pumped into salt formations, thereby dissolving the salt. The resulting brine solution is pumped to the surface and disposed of through deep well injection. Given costs and limited capacity it seems unlikely that operators will make widespread use of this method of storage/disposal, notwithstanding that the performance of such structures as storage facilities is well known.[34]

6. Conclusions On Storage Options

18 In sum, there exist several options for geological storage/disposal of CO2. Some of these options (EOR, EGR, and ECBM) offer a revenue stream that may offset capture and storage/disposal costs. In general, the technology for the various storage/disposal options is well known, with perhaps the greatest uncertainties associated with CO2 storage/disposal in coal.

D. Post-Closure

19 The post-closure stage refers to the long-term storage/disposal of CO2 once injection has come to an end. The principal need during this stage of the project is for the continued monitoring of the behaviour of the stored substances and the identification of any leaks. Monitoring techniques include 4D seismic and testing of CO2 levels in freshwater aquifers and soils. Although there is some scientific debate concerning the required duration of monitoring, it is likely these activities will need to occur over a period of decades, if not centuries. Remedial action may be required to deal with cases of leakage (for example, from abandoned wells). In order to encourage adoption of CCS, it will be necessary to adopt clear rules dealing with the allocation of liability for various types of potential harms and losses, including liability under a national and international emissions regimes, liability for catastrophic events, and liability for any required remedial action.

III. Barriers To The Adoption of CCS

20 The principal barrier to the widespread adoption of CCS is the absence of adequate economic incentives to capture large point sources of CO2 emissions. However, this is likely not the only barrier. Other barriers include the risks associated with CCS and the public perception of those risks, as well as the regulatory management of risk. David Keith, for example, makes the point this way:

> Technological capability is a necessary but insufficient condition for CCS to play a major role in mitigating CO2 emissions.... CCS must evolve ... into a large-scale technological system for managing fossil fuel carbon.... such a technological system [needs inter alia] regulations that are accepted by industry and are able to achieve broad public understanding and acceptance.... Efforts to build a robust regulatory environment for geological storage cannot wait until the technology is ready for large-scale application.[35]

Similarly, the Australian Guiding Principles note that "current uncertainty about a guiding framework that will apply to CCS projects means that industry is unlikely to invest in the technology....

industry and the community cannot have confidence in the costs or in the rights and obligations that might apply for management of CCS."[36]

21 The balance of this section of the article does three things. First, it describes some of the analogies to CCS that we might have in mind while thinking about CCS projects, namely (a) EOR, (b) gas storage, and (c) AGD. Second, we describe the risks associated with CCS. Third, we offer some preliminary comments on the different regulatory responses to the classification of CO2.

A. Three Analogies For CCS

22 We have already discussed EOR above. It represents a direct analogy for the capture, transportation, and injection phases of CCS. The most significant difference is that EOR is not aimed at the long-term disposal or sequestration of CO2. Indeed, quite the contrary; an operator may have an incentive to seek to produce and re-use injected CO2 in another reservoir.

23 Many jurisdictions also have long-standing experience with natural gas storage schemes. While the goal of gas storage is also not that of long-term storage, we may draw upon the regulatory schemes for storage operations in thinking about the acquisition of storage/disposal rights and the regulatory approval for such schemes.

24 A few jurisdictions, notably Alberta and British Columbia,[37] also have considerable experience with acid gas disposal. Some commentators consider that AGD schemes offer a particularly important and useful analogy precisely because (unlike the first two examples) CCS and AGD schemes share the same goal of long-term disposal of a waste stream.[38]

25 Acid gas disposal or injection refers to the injection and geological disposal of mixed streams of CO2 and hydrogen sulphide (H2S). AGD began in Alberta in 1989 as a response to the dual challenge posed by the need to reduce sulphur dioxide emissions from natural gas processing plants and by falling prices for elemental sulphur produced as part of conventional processing. In essence, the idea is to take the sulphur emissions stream and inject it back into the ground. While the principal emissions target has always been H2S, the waste stream from the typical processing plant also contains CO2 as an impurity. The injection ratios for approved injection projects vary between 83 percent H2S and 14 percent CO2 to 2 percent H2S and 95 percent CO2. Since 1989, the AEUB has approved 48 AGD schemes for a variety of target formations, including saline formations (26), depleted oil and gas reservoirs (18), and in four cases, into the water leg of a producing oil reservoir.[39] Those living close to processing plants see AGD schemes as providing significant environmental and health benefits, since such schemes offer the opportunity to reduce sulphurous emissions to essentially zero.[40]

B. The Risks of CCS

26 Carbon dioxide is an essential part of the natural carbon cycle and a necessary ingredient in the life-cycle of plants and animals through the processes of photosynthesis and respiration.[41] The normal exhalation of breath contains approximately 3.5 percent CO2.[42] At normal atmospheric conditions, CO2 exists as a gas. It is 1.5 times denser than air, is non-flammable, and at low concentrations is generally considered to be odourless. As a normal but minor (370ppmv) constituent of air it is considered harmless. Higher concentrations and long-term exposure to elevated CO2 levels can be hazardous (CO2 acts as an asphyxiant in the range of 7-10 percent), and there are also hazards

associated with handling CO2 under pressure. The release of concentrated amounts of CO2 may pose risks since CO2 is denser than air and tends to accumulate in low-lying areas.

27 The risks associated with CCS fall into two broad categories: (1) the operational risks such as the environmental, health, and safety risks associated with the capture, transportation, and injection of CO2, and management during the post-injection phase; and (2) the global risks associated with CCS failure.

28 The global risks arise from uncertainty surrounding the effectiveness of CCS as a method of reducing GHG emissions. Based on observations of naturally occurring CO2 storage, the risk that CCS will fail on a global scale is very low.[43] The IPCC CCS Report states that, in sites that are well selected, designed, operated, and monitored, it is "very likely" that 99 percent of stored CO2 will be retained for the first 100 years and that it is "likely" that 99 percent of stored CO2 will be retained for the first 1,000 years.[44]

29 Operational risks include: the risk of harm to human or animal health and the environment due to the localized escape of CO2 at the surface, the chemical effects of CO2 due to subsurface release, and the quantity-based effects due to increased pressure or fluid[45] displacement by injected CO2. Possible risks associated with surface release include suffocation of humans or animals and ecosystem impacts such as damage to tree or grass root systems.[46] Release of CO2 in the subsurface may result in metal mobilization or changes to groundwater chemistry. Quantity-based risks include ground heave, induced seismicity, displacement of groundwater resources, and damage to hydrocarbon production. The overall risk for each of these is proportional to the magnitude of the potential hazard and the probability that the hazard will occur.

30 The local impact of a release is greatly dependent upon the location of the release and the resulting concentration of CO2. Episodic or localized releases are more likely to have significant impact than generalized, low-level releases. The risk of a particular localized release occurring may be measured by looking at comparable activities. For example, the injection of CO2 or any other fluid deep underground necessarily causes changes in pressure and displacement of other fluids. Experience with injection of other fluids, such as waste water, into the deep subsurface provides a mechanism for understanding the risk of CO2 injection.[47] Contamination of groundwater by brines displaced by fluid injection is rare, and[48] it is expected that the same will apply to the injection of CO2.

31 Fault activation is primarily dependent upon the quantity and rate of injection, rather than the type of fluid injected. The underground injection of fluids or CO2 into porous rock at pressures higher than original formation pressures may induce fracturing and fault slip.[49] In the past, there have been occurrences of micro-seismic activity as the result of fluid injection.[50] The picture is different for EOR, where no significant seismic effects have been attributed to the injection of CO2, even in situations where reservoir pressures exceed the original formation pressure.[51]

32 Injection wells and abandoned wells have been identified as one of the most probable[52] leakage pathways for CO2. The risk of leakage through abandoned wells is related to the number of wells in the storage/disposal area, their depth, and the method and materials used in abandonment.[53] Regulators will need to be satisfied as to the integrity of abandonment materials and procedures, but these challenges are relatively well known since reservoirs containing abandoned wells have been, and continue to be, used as gas storage facilities in many parts of the world. The risk of leakage is reduced by a thorough knowledge of all abandoned wells in a target area. While our understanding of abandoned well-bore behaviour over long periods of time is limited, there is a great deal known on

how to deal with well leaks and blow-outs should they occur. Studies of natural gas storage operations show that only 10 of approximately 600 storage reservoirs operated in Canada, the U.S., and Europe have been identified as having experienced leakage, most from wellbore integrity problems.[54] Monitoring using observation wells and surface monitoring is effective in controlling the risks associated with natural gas storage.

33 The risks associated with CCS must be understood within the context of the trapping[55] mechanisms involved. There are four main mechanisms to trap CO2 in the subsurface. First, there are structural traps where a physical barrier prevents migration of CO2 to the surface. The physical barrier, or cap rock, commonly takes the form of impermeable layers of shale or evaporties. Second, at the pore scale, capillary trapping immobilizes a substantial fraction of CO2 as tiny isolated bubbles in a residual phase. Third, the CO2 will dissolve into other pore fluids, such as brines and hydrocarbons, over a period of decades to centuries. In this state, the CO2 cannot be released without active intervention. And finally, over hundreds to thousands of years, the dissolved CO2 may react with minerals in the rock, where it will precipitate as a new carbonate mineral.[56] At that point, the CO2 is permanently trapped as rock. The critical point to observe with the geological and chemical trapping mechanisms is that the highest risk for leakage occurs early in the process. As time passes, the CO2 in the subsurface becomes more stable and there is a corresponding reduction of risk.

34 Most risks associated with CCS are small and continue to decrease over time; however, in rare cases, leakage may occur. In these situations, a remediation plan will be needed to stop the leak and to prevent human or ecosystem impact. Risks may be higher in areas where there are a number of abandoned wells. In Alberta, most, if not all, CCS areas will have numerous abandoned wells that must be monitored and maintained to ensure long-term safe sequestration of CO2.

C. The Legal Characterization of Carbon Dioxide And CCS Activities

35 Carbon dioxide has well-known commercial applications. In addition to its use in EOR projects, as already discussed, it is also used for carbonated beverages, fire extinguishers, and refrigeration, and dry ice. These established uses of CO2, combined with our understanding of the generally non-toxic nature of CO2, lead some reports and proponents of CCS to emphasize that CO2 should be treated as a commodity and not as a pollutant or as waste.[57] The reality, however, is that the regulatory treatment of CO2 is not consistent. For example, the federal government of Canada has chosen to list CO2 as a "toxic substance" under the terms of the Canadian Environmental Protection Act, 1999,[58] and while the EPA in the U.S.[59] has proven reluctant to regulate CO2 as a pollutant under the Clean Air Act, several states and non-governmental organizations have had some success in their efforts to have the EPA reverse its stance.[60] By contrast, the preamble to Alberta's Climate Change and Emissions and Management Act[61] emphasizes the non-toxic nature of atmospheric CO2, and Alberta does not classify CO2 as a pollutant, waste, or hazardous waste when in the form of an atmospheric gas.[62] The CCEMA currently requires reporting of CO and other specified gases into the environment at or in excess of the level prescribed in the Specified Gas Reporting Standard.[63] Internationally, under the Basel Convention, atmospheric CO2 is not considered a waste.[64]

36 The general conclusion here is that the categorization of CO2 and CCS projects may vary given the type of activity and project. It will be important to ensure that the classification will not lead to an inappropriate level of regulation that may represent an unreasonable barrier to the adoption of CCS technology. At the same time, the regulatory framework for CCS needs to be responsive to the risks and uncertainties associated with CCS projects.

IV. The Property Issues[65]

37 The concept of ownership is often explained as a bundle of rights,[66] including a set of rights to use the property for a variety of different purposes. One of the "use rights" held by the surface owner of real property is undoubtedly the right to use lands to store substances including wastes (subject of course to any applicable regulations).[67] Such a right includes the right to give or deny (subject only to the state's right of eminent domain) to others the right to engage in that activity. This concept seems straightforward, and the same principles should apply to the subsurface disposal of a waste substance (or the subsurface storage of a more valuable non-waste stream), whether disposal is to a saline aquifer or a depleted oil and gas reservoir.

38 This section of the article deals with the application of these principles to a number of different scenarios. The article deals first with the easy cases, in which the target formation is owned by a single owner. Such cases include disposal into an aquifer (owned by the Crown) and disposal into a depleted reservoir for which there are no severed estates (for example, the petroleum, natural gas, and coal rights have not been split). The more difficult cases of split title or severed estates will then be considered. Finally, the article looks at related surface rights issues. The analysis draws upon the legal treatment of the analogous problems associated with gas storage rights and acid gas disposal. The province sought to clarify the legal issues associated with gas storage rights in a set of amendments to the Mines and Minerals Act[68] in 1994.[69] We argue here that those amendments, while effective in dealing with storage issues, do not deal with disposal rights.

39 In general, this section of the article tries to answer two types of questions. The first question is: From whom must the proponent or operator of a CCS project acquire a CO2 disposal right? In answering that question, we must keep in mind both the owner of the fee simple estate and any relevant working interest owners. The second question relates to the form of the disposal right, particularly where the Crown is the relevant owner: How can we expect the Crown to dispose of its disposal rights?

A. Disposal Into A Saline Aquifer

40 The property rights issues associated with disposal into a saline aquifer will be straightforward in any jurisdiction where there is a statutory provision vesting ownership rights in relation to water in the Crown.[70] Section 3(2) of Alberta's Water Act[71] declares that: "The property in and the right to the diversion and use of all water in the Province is vested in Her Majesty in right of Alberta."

41 The term "water" is not confined to potable water, and the definition of water in the Act expressly includes water found on or under the ground. A recent decision of the Supreme Court of Canada relied on this section to conclude that "connate water" is owned by the Crown and that gas dissolved in the connate water is owned by the Crown, rather than by the owner of either the petroleum or the natural gas in a hydrocarbon reservoir.[72] Given these legal rules, it seems fairly clear that an operator who proposes to inject CO2 into an aquifer must acquire that right from the Crown, regardless of who may own the petroleum and natural gas rights in relation to these lands. It also seems likely that the operator will only need to deal with the Crown, since it is highly unlikely that any other party will have the equivalent of an oil and gas working interest in or to the aquifer.

42 However, if the Crown owns the CO2 disposal rights, how will a CCS operator acquire that right? There is both a practical and a normative aspect to this question. The practical issue is one

that will be of most concern to the operator. One might expect that a CCS operator would acquire the right, under the Water Act, but the Act is not structured to accommodate this form of right, and thus it seems more likely that a disposal right (if "right" is the correct term) will be acquired under the MMA.[73] Current practice in relation to AGD schemes supports this conclusion.

43 The normative aspect is concerned with the question of how the Crown ought to dispose of rights to a scarce resource (disposal space). The claim here is that the Crown has well-defined disposition rules for granting oil and gas rights and gas storage rights. To this point, at least, the Crown deals with injection/disposal rights much more casually. We argue that the Crown should put in place a clearer system for disposing of disposal rights.

44 The following paragraphs expand on each of these points.

45 At the risk of oversimplifying things we may say that the regulatory universe of the Water Act comprises two things: (1) approvals of diversions, and (2) approval of activities that affect water bodies. It seems clear that the injection of CO2 does not fall within the definition of a diversion,[74] but it also seems fair to say that the concept of an activity requiring an approval, while technically broad enough to embrace a CO2 injection well, is designed to deal with activities that affect surface waters and potable ground water, rather than deep saline aquifers.[75]

46 It seems more likely, therefore, that the Crown will choose to follow current practice in relation to AGD schemes and authorize CO2 disposal operations pursuant to s. 56 of the MMA. Section 56 provides as follows:

> Injection wells
>
> 56(1) Subject to section 57 [this is the section that seeks to clarify the ownership of storage rights and is discussed further in Part IV.C of this article], a person has, as against the Crown in right of Alberta,
>
> (a) the right to use a well or drill a well for the injection of any substance into an underground formation, if the person is required by or has the approval of the Alberta Energy and Utilities Board to do so ....
>
> (2) A person who exercises a right referred to in subsection (1)(a)
>
> (a) shall indemnify the Crown in right of Alberta for loss or damage suffered by the Crown in respect of any claims or demands made by reason of anything done by that person or any other person on that person's behalf in the exercise or purported exercise of that right, and
>
> (b) shall abandon the well when so directed or authorized by the Alberta Energy and Utilities Board, in accordance with the directions of the Board.[76]

This is a rather curious section. It seems to operate as a general approval or licence and does not, on its face, contemplate the grant of any further form of right. Rather, it anticipates that exercise of the right is dependent upon AEUB approval, thereby conflating what are ordinarily thought of as two

separate issues: (1) the property right to engage in an activity, and (2) the regulatory approval of that activity.

47 Part V of the article, below, discusses the AEUB's regulatory approval mechanism in more detail; however, for present purposes it is important to anticipate that discussion in one particular. The relevant AEUB guide, Directive 065,[77] requires that an applicant for approval of a disposal scheme must provide evidence of the applicant's right to dispose into the proposed zone in the following forms: (1) for unleased Crown land, a letter of consent from the Crown; (2) for freehold lands, consent from the freehold mineral holder;[78] and (3) for leased lands where the lease is held by a person other than the applicant, a letter of consent from the leaseholder. This AEUB requirement leads in turn to a practice in which Alberta Energy issues so-called "letters of consent" to parties who wish to engage in injection operations.

48 The consent letter[79] is a short, standard form which states that "authorization is granted for acid gas disposal into the xx formation," subject to five conditions. The first two conditions are linked and require that the approval needs to be validated by the addressee acquiring a well licence from the AEUB within six months, in the absence of which the authorization will be null and void whereupon the addressee will need to make a fresh application. The third condition stipulates that the addressee cannot test or produce hydrocarbons from any zone not under lease, and that if unanticipated hydrocarbons are encountered, all operations must cease and any information disclosed to the public via the AEUB.[80] Fourth, all data relating to operations in undisposed Crown land is to be submitted to the AEUB (and thence to the public). The fifth condition simply stipulates that the operation, including licensing and ultimate abandonment, must also meet the AEUB's requirements. Finally, and although not listed as a condition, the standard form also reiterates the indemnity requirement of s. 56(2)(a) of the MMA.[81]

49 Several observations on this somewhat extraordinary way of affording rights to Crown lands seem in order. First, the letter clearly characterizes the activity as that of "disposal" and not "storage." Second, there does not appear to be any charge or fee associated with the grant of these disposal rights.[82] This represents a significant departure from Crown practice in relation to the disposition of other forms of rights. Given that pore storage/disposal space represents a limited and potentially scarce resource, it is not clear why rights to this resource are allocated as if it were a free good. Third, neither the MMA nor the letter expressly addresses the duration of the right, although perhaps it might be said that, implicitly, the right of disposal continues for as long as the addressee retains an AEUB well licence in good standing -- in other words, until abandonment. Fourth, while both the statute and the letter require the addressee to indemnify the Crown, it is not clear that the indemnity is couched in broad enough terms to completely protect the public interest. Finally, neither the statute nor the letter deal with issues of assignment. Are we to assume that the letter confers a personal and non-assignable right? Or are we to assume that the right is assignable in conjunction with an assignment of the relevant well licence?[83]

50 In sum, the procedure for acquiring disposal rights from the Crown is informal and ad hoc, and it will likely be necessary to revisit this issue before CCS is widely adopted. In doing so, it may be possible to draw upon modern gas storage legislation.[84] For example, recent legislation in Nova Scotia[85] provides a scheme whereby a party may apply for a one-year storage area licence, which affords the licensee the exclusive right to conduct activities to evaluate the storage potential of the licensed lands. Assuming that the area proves up, the licensee may then apply for a 20-year (renewable) storage area lease. Similarly, Ontario's legislation provides for the grant of a storage lease

to store listed substances (which substances do not include CO2) in "underground geological formations located on Crown lands."[86] However, the legislation also provides that a natural gas storage lease may be disposed of by tender, in which case the tender bid shall provide for two competitive variables: the cash bonus and a storage rental, calculated by reference to the amount of calculated storage space available.[87] Ontario storage leases are granted for a 10-year renewable term.

B. Disposal Into A Depleted Oil And Gas Reservoir Where There Is No Split Title

51 If we assume there is a single owner of the mines and minerals estate, it seems relatively clear that a CCS operator must obtain the consent of that owner in order to commence an operation.[88] That owner may be the Crown or a private owner.

52 Where the Crown is the owner it seems that the most likely way for the Crown to authorize a CO2 disposal project would be by way of a letter of consent, under s. 56 of the MMA, as discussed in the previous section. In addition, in order to avoid potential liability concerns, our operator will likely require[89] or consider it prudent to acquire consents from any parties holding outstanding working interests in the pool (if any) who may be affected by the proposed operation.

53 Where the mines and minerals estate is privately held, an owner will likely provide the necessary consent either by way of a specific grant of disposal rights, or (and perhaps more likely) as one of the bundle of rights contained in the words of grant of a typical oil and gas lease. Indeed, given the fact that any CO2 "disposal" into an oil and gas reservoir will likely trigger some incremental recovery, there would be good reason for an operator to ensure that it had acquired more than just CO2 injection rights.

54 This raises the question of the extent to which freehold oil and gas lease forms typically grant disposal rights. We cannot provide a complete answer to that question here, but we can comment on one lease form. Two parts of the lease are important: the granting clause and the habendum. The Canadian Association of Petroleum Landmen (CAPL) 1999 lease[90] provides that the lessor leases and grants exclusively to the lessee its rights and title in the leased substances:

> [T]ogether with the exclusive right and privilege to explore for, drill for, operate, produce, win, take, remove, store, treat and dispose of the Leased Substances and the right to inject substances into the Lands for the purposes of obtaining, maintaining or increasing production of the Leased Substances from the Lands, the Pooled Lands or the Unitized Lands and to store and recover any substances injected into the Lands.[91]

This form of lease clearly permits the lessee to inject CO2 (whatever the source of the CO2; in other words, it is not confined to CO2 produced along with the leased substances) but it would not appear to allow a lessee to inject CO2 for disposal purposes since the purpose of the injection must be to enhance the recovery of leased substances.[92] Similarly, while the lessee clearly has the right to store injected substances, the working rights do not expressly grant the right to dispose. On the other hand, the lease language does make it clear that the lessee would also be able to produce injected CO2 and use it, for example, for an EOR operation in another pool.

55 The CAPL lease is continued in force at the end of the primary term by "Operations." "Operations" are defined to include injecting substances (subject to the same purposive limitation as above)

or "the recovery of any injected substances."[93] When operations so defined cease, the lease will automatically come to an end.

56 If a CCS operator needs the consent of the owner of the mines and minerals estate, however, there is also the question of the areal extent of the required consents. It seems evident that this cannot be confined to the bottom-hole location of the injection well, but must also extend to any area of the oil and gas reservoir to which the CO2 plume may extend.[94] This supposition triggers a further question: What is the position if the CCS operator has identified a prospective formation for disposal but the mineral rights owners will not agree to grant the necessary rights? Can the operator seek to acquire such a disposal right using expropriation or similar legislation? Or suppose that our operator has acquired disposal rights within a portion of the reservoir but cannot acquire rights for the balance of the reservoir? Can our operator seek the equivalent of a compulsory unitization order with respect to its proposed disposal operation?[95]

57 It is well known that Alberta's compulsory unitization legislation has never been proclaimed,[96] but it is also the case that when the MMA was amended in 1994 to deal with a suite of gas storage issues, the proposals did not include a compulsory acquisition scheme to facilitate assembling a storage project.[97] This makes Alberta somewhat unusual since many jurisdictions in both Canada and the U.S. allow an operator to expropriate the necessary interests (surface and subsurface) in order to implement a storage project.[98] Some statutory schemes also deal with third-party access to such storage once created.[99] Such schemes might in principle be made to fit cases of CO2 disposal, although they will likely require amendment to ensure that the statutory scheme applies to cases of disposal as well as storage, and applies to gases other than hydrocarbons.

C. Disposal Into A Depleted Oil And Gas Reservoir Where There Is A Split Title/Severed Estate

58 The Borys[100] and Anderson[101] decisions confirm that there are many examples in Alberta of split title or severed estates; that is, situations in which the fee estate in some or all of the natural gas, petroleum, and coal is held in different titles in relation to the same quarter section of land. In a case of split title, one of the questions that the operator of a disposal project will pose is this: From whom do I need to acquire disposal rights? Can I acquire such a right from either the gas owner or the petroleum owner, or must I acquire the right from both?

59 Uncertainty as to the correct answer to this question in the context of storage rights[102] led the province to enact a declaratory amendment to the MMA in 1994.[103] This amendment was clearly intended to address privately owned mineral rights as well as Crown mineral rights.[104] For present purposes it must be understood how that legislation clarified the position, and then it can be considered whether the legislation also clarified the position in relation to disposal rights.

60 The 1994 amendments clarified three things. First, the legislation confirmed that "a person [who] owns the title to petroleum and natural gas in any land" also owns "the storage rights with respect to every underground formation within that land."[105] The MMA defines storage rights as "the right to inject fluid mineral substances into a subsurface reservoir for the purpose of storage."[106] Second, the legislation provides that where title is split between a gas owner and a petroleum owner, the owners of the separate estates are to be treated as "co-owners of the storage rights with respect to every underground formation within that land."[107] But what does that mean? In their discussion of the section, Acorn and Ekelund comment that the section "deliberately does not state the nature of the co-ownership as being joint or otherwise. In practical terms this means that a storage

scheme cannot proceed in such a case unless both co-owners are parties to the contractual arrangements. It leaves the matter of compensation of each of them to negotiation."[108] But this comment ought to be taken a litle further. First, there are only two forms of co-ownership in Alberta: joint tenancy and tenancy in common, and there is a statutory presumption in favour of a tenancy in common.[109] Second, as a matter of law, any tenant in common can make use of the estate and, in the absence of equitable waste, cannot be restrained from doing so by any other co-owner.[110] Third, any co-owner owes a duty to account for more than any just share of rents or profits received.[111] Thus, while Acorn and Ekelund, the principal architects of the legislation, may be correct when they assert that "[i]n practical terms"[112] an operator will require the consent of both owners (because that will be the risk-averse approach), it is far from clear that they are correct as a matter of law.

61 Third, the legislation clarifies the position of the Crown vis-à-vis its lessees. Thus, s. 57(5) of the MMA makes it clear that a typical Crown oil and gas lessee or licensee does not own storage rights. Instead, the subsection provides that storage rights must be acquired expressly, most likely by way of a gas storage (unit) agreement which confers these additional rights on the Crown lessee.[113]

62 We can now consider whether these clarifications would also apply to a CO2 disposal operation.

63 There are several reasons for thinking that this package of amendments will not cover all cases of CO2 disposal. First, the commentary from Acorn and Ekelund makes it clear that these amendments were designed to deal with problems that had arisen in the context of gas storage, not disposal of other substances. Second, the amendments apply to storage rights, and, as we have seen, the term "storage right" is defined as the right to inject "fluid mineral substances" into a reservoir.[114] "Fluid mineral substances" are defined, in turn, to mean "a fluid substance consisting of a mineral or of a product obtained from a mineral by processing or otherwise."[115] It seems fairly clear that if a produced natural gas stream contained CO2 , and if the CO2 were separated from that stream for compression (to form a liquid) and injection, then the resulting product would fall within the definition of a fluid mineral substance.[116] However, it seems equally clear that CO2 captured from an industrial process, such as a thermal generating plant, would not fall within this definition. Third, the amendments deal with storage, and storage and disposal are two different things.[117] The MMA does not define "storage," and while s. 1(2) of the MMA purports to allow the Minister to determine the purpose for which a mineral substance was injected, all the evidence suggests that this section is designed to permit the Minister to distinguish between injection for storage purposes and injection for conservation reasons.[118]

D. Surface Rights And Disposal Operations

64 The final property law issue is concerned with surface rights. If a CCS operator has acquired the disposal rights from the mineral owner, does the operator have an implied right to use as much of the surface as may be necessary for injection wells in order to be able to carry out its operation? Or, alternatively, must the operator obtain a separate consent from the surface owner? And what is the situation if that owner refuses to consent? Whatever the position may be at common law, the position seems to have been clarified in Alberta by a long-standing provision of the Surface Rights Act[119] entitled "right of entry for conservation scheme."[120]

65 The general scheme of the SRA is well known. Its general purpose is to do away with the implied right of entry that the mineral owner had as a matter of common law. In place of that common

law right, s. 12 of the SRA contemplates that an oil and gas lessee no longer has a right of entry to the surface of any land unless and until it either enters into a separate surface rights agreement with the surface owner, or obtains a right of entry order from the Surface Rights Board (SRB). Upon making such an order, the SRB must also make a compensation award according to the statutory formula under s. 25 of the Act. Section 12 of the SRA is limited in scope. Thus, it deals with access for mineral purposes and access for linear developments -- specifically: pipelines, transmission lines, and telephone lines. However, s. 13 extends this modified right of access scheme to the right of entry for conservation purposes:

> 13(1) When the surface of any land is required for the drilling or operating of a well, or for the necessary installations at or pipelines to or from a well, the Board may make an order granting right of entry in respect of the surface of the land where the well is to be used for the purpose of
>
> (a) repressuring, recycling or pressure maintenance in a petroleum or natural gas field, pool or area,
>
> (b) the storage or disposal of
>
> (i) natural gas,
>
> (ii) processed or treated natural gas, or
>
> (iii) products of petroleum or natural gas,
>
> (c) the storage and disposal of water or any other substance produced from or to be injected in an underground formation, or
>
> (d) obtaining water for any operation mentioned in clause (a), (b) or (c).
>
> (4) The provisions of this Act governing right of entry in respect of the surface of land for any purpose mentioned in section 12(1) apply insofar as they are applicable to an application or an order for right of entry in respect of the surface of land for any of the purposes mentioned in subsection (1) of this section.[121]

The section deals with access for both pipelines and wells where the well is to be drilled for any one of four purposes. The first purpose relates to classical conservation schemes. The second and third purposes both deal with storage or disposal wells, while the fourth purpose deals with a water well drilled in order to obtain water for a conservation scheme.

66 Both the second and the third purposes are potentially relevant here. The second purpose is more confined, since it deals with storage or disposal of natural gas, processed gas, and the products of petroleum or natural gas. While this might cover the situation of a well drilled to dispose of CO2 derived from a gas stream, it would not cover CO2 derived from an industrial source. The third purpose, however, is extraordinarily wide and covers "any ... substance ... to be injected in an underground formation."[122]

67 We conclude that this section is broad enough to allow the operator of a CO2 injection well and associated pipeline infrastructure to use the modified right of entry provisions of the SRA.

V. Regulatory Issues

68 This Part of the article deals with a suite of regulatory issues that will arise in the context of the last two phases of the CCS cycle: approval of the disposal project, and associated wells and post-closure.[123] Thus, this Part discusses the general regulatory scheme in place for approval of an injection well, followed by a discussion of the particular regulatory requirements for both EOR and AGD where they are of interest in relation to CCS. Finally, we note the lack of regulation surrounding long-term monitoring of abandoned wells and argue that such regulations are required for CCS.

A. Approval of CO2 Disposal/Storage Projects And Injection Wells

69 The two analogies that best inform the required regulatory scheme for CCS in Alberta are EOR and AGD. Both are regulated in Alberta by the province's oil and gas regulator, the AEUB, under the terms of the Oil and Gas Conservation Act[124] and the Oil and Gas Conservation Regulations.[125] The OGCA does not deal with geological disposal beyond a number of generic sections. Most of the detail is found in the OGCA Regulations, and more specifically, in various AEUB directives.

70 Section 39 of the OGCA provides that no person may commence a scheme for "enhanced recovery,"[126] or for "the storage or disposal of any fluid or other substance to an underground formation through a well,"[127] without the approval of the AEUB. The section is broad enough to give the AEUB jurisdiction over approval of any injection well, whether the "fluid or other substance" is CO2 derived from a natural gas stream or CO2 derived from an industrial source.

71 Section 39(1)(d) also requires the AEUB to forward any application for approval of storage/disposal schemes to the Minister of the Environment for that Minister's approval as it "affects matters of the environment."[128] The AEUB is required to make any approval "subject to the same conditions imposed by the Minister of the Environment."[129] It is possible that the Minister might require an environmental assessment of a CCS scheme under Division 1 of the EPEA before granting its approval.[130]

72 Several sections of the OGCA Regulations deal with EOR, gas storage, and disposal schemes,[131] but the most relevant are those sections of Part 15 of the OGCA Regulations ("Certain Applications") which prescribe the form of applications for these types of projects. However, these provisions -- s. 15.040 (enhanced recovery), s. 15.060 (gas processing and underground storage), and s. 15.070 (disposal of fluid or other substance) -- do little more than refer the applicant to, and require compliance with, Directive 065.[132]

73 Directive 065 requires a classification of the injection well under AEUB Directive 051: Injection and Disposal Wells -- Well Classifications, Completions, Logging, and Testing Requirements.[133] Section 2.4 of Directive 051 classifies any well used for the injection of "CO2 ... or other gases used for storage or enhanced recovery [and] sour or acid gases for disposal, storage, or cycling operations"[134] as a Class III well. Injection and disposal wells are classified by type of fluid injection in order to identify those wells that require increased levels of monitoring and surveillance. Directive 051 provides for the completion and logging requirements for each classification of well, including: (i) cementing and casing requirements; (ii) logging requirements to show hydraulic isola-

tion; (iii) operating parameters; and (iv) other tests, such as daily annular and injectivity monitoring.[135] Class III well completion and logging requirements are based on the presence of H2S in the injection stream. Since H2S is significantly more hazardous than CO2, the regulatory standards for completion and logging of a Class III disposal well ought also to be adequate for CCS.

74 Directive 065 requires applicants to notify those particular parties who may be affected by a resource scheme.[136] The minimum requirements for notification are different for EOR and AGD schemes. For example, for new EOR schemes, the applicant must notify all well licensees for wells in the applied-for approval area and the area within a quarter section of the applied-for approval area.[137] The applicant is not required to provide confirmation of non-objection unless requested by the AEUB, and does not need to notify licensees of abandoned wells.[138] In contrast, the requirement for a Class III disposal well includes notification of the unit operator, the approval holder of the scheme, all well licensees, all mineral lessees, and all mineral lessors.[139] The area of the notification varies with the disposal site. If disposal of acid gas is into a depleted hydrocarbon pool, the notification area is the AEUB-designated pool; if into an aquifer, a radius of 1.6 km from the section containing the disposal well. The applicant is required to provide a statement as to the parties contacted respecting the application and confirmation of non-objection, or provide specific details regarding objections or concerns.

75 The AEUB's mandate for developing notification requirements is based on s. 26 of the Energy Resources Conservation Act,[140] which requires that the AEUB ensure all persons potentially directly or adversely affected are given notice of an application and have a reasonable opportunity to make representations to them regarding the application. In principle, it seems that the notification requirements for CCS projects should draw on the notification requirements developed for both EOR projects and for Class III disposal wells. Thus, CCS rules should incorporate the broader geographical notification requirements prescribed for EOR projects,[141] as well as the depth of notification requirements prescribed for Class III disposal wells. The rules should, at a minimum, also require notification of licensees of abandoned wells.[142] In short, the notification requirements for CCS need to be sensitive to the scale of CCS projects, both geographically and temporally, to ensure that all potentially directly and adversely affected persons will receive notice.

1. Enhanced Oil Recovery

76 In addition to the general regulatory requirements for EOR or AGD, there are particular requirements for each that are relevant to CCS. A CCS project will likely be similar in terms of geographical scale to an EOR project, making EOR a useful analogy for approval of large geographical schemes. The AEUB has stated that its objective in regulating EOR schemes is to ensure that hydrocarbon recovery is optimized. In meeting this objective, the AEUB must also ensure that scheme operations are conducted in a safe manner that is in the best interest of the public, protects the environment, and is equitable to other well licensees.[143] Many of the requirements for AEUB approval of an EOR scheme are not relevant to CCS due to the different objectives; however, one requirement is relevant. The AEUB requires that that the proposed approval area for an EOR scheme must reflect the area that will be effectively swept by the injection wells, and the approval area must not extend beyond the AEUB's Pool Order boundary for the subject pool.[144] This requirement has application to CCS. At a minimum, a CCS project would need to encompass a similar concept; however, the focus would not be on whether the swept area is within the Pool Order boundary, but rather whether the sequestration area or plume capture area (a concept similar to the swept area) is within Pool Order boundary.[145]

77 As we have already noted, one of the drawbacks to basing CCS regulation on existing rules for EOR projects is that they have different objectives. CCS projects aim for permanent disposal, while EOR projects aim for enhancing recovery of hydrocarbons -- in such cases, CO2 injection is simply a means to that end. The dissonance between these two objectives is illustrated by those provisions of Directive 065 which require that gases produced from an EOR scheme be conserved in accordance with AEUB Directive 060: Upstream Petroleum Industry Flaring, Incinerating, and Venting.[146] Directive 060 requires an operator to conserve gas, if it is economic to do so.[147] The directive primarily deals with the conservation of solution gas, but it also addresses other produced gases and in particular states that: "inert gases such as nitrogen and carbon dioxide (CO2) from upstream petroleum industry equipment or produced from wells ... can be vented to atmosphere."[148] Clearly, such a provision is entirely inconsistent with the goals and objectives of a CCS project.

78 Very few EOR applications have triggered a public hearing or produced formal reasons for decision from the AEUB. These few decisions tend to focus on economic or technical considerations[149] or deal with the possible implications of waterflood schemes on groundwater and surface water.[150]

2. Acid Gas Disposal

79 By contrast with an EOR application, an application for an acid gas disposal scheme must address the need for permanent disposal.[151] The AEUB states that an application for acid gas disposal will likely be approved if the AEUB is satisfied that:

- the disposal will not impact hydrocarbon recovery,
- the disposal fluid will be confined to the injection formation,
- the offset owners within 1.6 km of the disposal well(s) have been consulted and have no objections or concerns to the disposal scheme, and
- the applicant has the right to dispose into the requested formation.[152]

In order to satisfy itself as to each of these matters, the AEUB's Directive 065 requires an applicant for AGD approval to provide information on containment of injected substances, reservoir characteristics, hydraulic isolation, equity, and safety.[153]

80 Under the heading of "Containment," the AEUB expects the applicant to be able to show that the injected fluids will be contained "within a defined area and geologic horizon, to ensure that there [will be] no migration to hydrocarbon-bearing zones or groundwaters."[154] Hence, the applicant will be expected to provide a complete and accurate drilling history of offsetting wells within several kilometres, as well as information on the permeability of the cap rock and any fracturing. The applicant will also be expected to identify folding and faulting and comment on how this relates to seismic risk -- both the effect of seismic activity on the integrity of the project, and the effect of disposal schemes on (increased) seismic activity. Under the heading of "Reservoir Characteristics,"[155] the applicant will need to describe and analyze the native reservoir, the composition of the waste stream and phase behaviour, as well as migration calculations and proposed bottom hole injection pressures. Board approvals will be limited to 90 percent of formation fracture pressures. The AEUB will expect an assessment of the effect of the acid gas on the target zones. Under the heading of "Hydraulic Isolation,"[156] the AEUB expects the applicant to demonstrate that all potable wa-

ter-bearing zones as well as hydrocarbon-bearing zones are hydraulically isolated from the proposed injection wells by cement and/or casing with all injection occurring through tubing appropriately isolated from the casing by packer, with casing integrity confirmed by an inspection log.

81 Many of the "safety" concerns that apply to AGD projects are the same as those that apply to all sour gas wells and facilities including pipelines. These include a requirement for the development of an emergency response plan (ERP), including an emergency planning zone that is the area of land that may be impacted by an H2S release and may include the processing plant, the injection well, and the connecting pipeline. The AEUB expects to see evidence of broad public consultation on both the ERP and all other matters related to the proposed project. Finally, under "equity" issues the AEUB expects the applicant to provide evidence that all offsetting mineral rights owners have been contacted, as well as details of outstanding objections or concerns.[157]

82 Perhaps surprisingly, very few AGD applications have triggered a public hearing and formal reasons for decision from the AEUB approving a project. This suggests that in most cases the applicant has been able to allay possible public concerns through its consultation activities. The following paragraphs discuss some of the issues that have been raised in the few published AEUB decisions that relate to AGD.

83 The concern that seems to have been raised most frequently is the potential for flaring (and therefore acid gas emissions) in the event that the injection facility is shut down for any reason. Past decisions of the AEUB dealt with this issue somewhat inconsistently. In some cases, the AEUB seems to have been content with a commitment from the operator to reduce throughput,[158] while in other cases, the AEUB has accepted or required an undertaking from the operator that it will shut down operations in such an event, thereby confining any flaring to those small volumes necessary to depressure and render equipment safe.[159]

84 In one case, an intervener raised concerns as to containment of the acid gas at the disposal site and was especially concerned that there was perhaps an unrecorded abandoned well that might affect the integrity of the disposal scheme.[160] The AEUB assessed these concerns, but satisfied itself that: (1) proposed bottomhole pressures would be significantly lower than fracture pressures; (2) the existing data confirmed the hydraulic isolation of the target formation; (3) the proponent would monitor producing wells for any increase in H2S levels that might indicate problems with acid gas containment; and (4) a review of Board records, interviews with long-time residents, as well as the "checks and balances" in the energy sector made it "extremely unlikely for a company to have drilled an unlicensed well in the 1970s."[161]

85 Other concerns that have been raised include concerns as to whether other operators will know of the existence of an AGD project when carrying out operations many years into the future, and concerns as to contamination of groundwater sources.[162] Another general concern relates to the length of acid gas pipeline, a concern that the AEUB has generally dealt with by requiring the close co-location of processing and injection facilities.[163]

86 While the AGD regulatory model represents a compelling analogy to be applied to CCS projects, it will require some modification to account, in particular, for the much larger scale of CCS projects. It is anticipated that CCS schemes will be approximately 10 to 100 times larger than current acid gas disposal schemes.[164] Similarly, it is unrealistic to maintain the emphasis that Directive 065 places on structural trapping. While this may be appropriate in the case of depleted oil and gas reservoirs, it is less applicable in the case of injection into a saline formation where the plume of

acid gas is no longer physically contained as it is in reservoirs. Thus, instead of emphasizing containment, there will be a need to develop regulations and guidance on plume spread and migration, and on associated monitoring requirements. Given that transparency is a concern, it may also be important to provide for the explicit treatment of CCS issues in the statute and regulations, rather than deferring everything to the much more discretionary guidelines. Finally, a CCS regulatory scheme will need to make explicit provision for monitoring and verification of the behaviour of the CO2 plume both during and after active injection. We expand on this point in the following section.

B. Regulation of The Abandonment or Post-Injection Phase of A CCS Project

87 At some point in any CCS project, the active injection phase will come to an end. At that point, the operator will seek to abandon the injection facilities, subject, of course, to the need for long-term monitoring of the behaviour of the CO2 plume and monitoring for the integrity of the disposal operation. How should these activities be regulated? In order to answer that question we can look at the regulatory framework that applies to conventional wells and to injection wells used in AGD schemes.

88 The general regulatory scheme in Alberta is based on a distinction between subsurface and surface abandonment, and surface reclamation.[165] Pursuant to a Memorandum of Understanding between the AEUB and Alberta Environment,[166] the AEUB is generally responsible for ensuring the proper suspension and abandonment of wells (under the OGCA), while Alberta Environment is responsible for surface land reclamation activities and any required decontamination (or remediation) under the EPEA.[167] This article focuses on the responsibilities of the AEUB.

89 The Memorandum of Understanding defines "abandonment" as the permanent dismantlement of a licensed facility so that it is permanently incapable of its licensed use.[168] Abandonment includes: "leaving downhole or subsurface structures in a permanently safe and stable condition ...; the removal of associated equipment and structures; the removal of all produced liquids; and the removal and appropriate disposal of structural concrete."[169]

90 All abandonment operations are to be conducted according to AEUB Directive 020: Well Abandonment Guide.[170] The objective of proper well abandonment is to cover, with cement, all non-saline ground water and to isolate or cover all porous zones.[171] The Directive applies to all wells, including those involved in EOR or AGD.

91 Under Directive 020, the licensee must determine whether the planned abandonment operation is routine or non-routine. If an abandonment operation is routine, it does not require AEUB approval prior to work starting. Non-routine operations do require prior approval.[172] The specific requirements for downhole abandonment vary depending on the type of well being abandoned, the well's geographic location, the impact of the well on any oil sands zones, and any wellbore problems.

92 Prior to beginning any surface abandonment, a licensee must inform all affected parties, including the landowner and/or occupant of the land. A licensee is also required to complete certain tests on the well prior to beginning any routine or approved non-routine surface abandonment operations such as fluid level testing, surface casing vent flow testing, and gas migration testing. Some areas also require a site inspection by the AEUB prior to beginning surface abandonment. Surface abandonment may begin after testing shows there are no wellbore problems. Normally, surface abandonment must be completed within 12 months of downhole abandonment.

93 The directive requires that completion reports and plug logs must be submitted to the AEUB.[173] A licensee must keep all test results and abandonment details. If the licence for an abandoned well is transferred, the new licensee assumes all responsibility for monitoring the abandoned well.[174]

94 Much of this regulatory scheme can likely be directly applied to the abandonment phase of a CCS project. But there is one significant gap: Directive 020 does not require ongoing monitoring or verification of a well after surface abandonment, while monitoring and verification will certainly be required for a CCS project to ensure that the project remains both operationally safe and effective over the long term.[175] CCS abandonment must consider both proper well-by-well abandonment and overall project abandonment.

95 A CCS project requires verification in order to assess the amount of CO2 that is stored underground, to assess the behavior of the CO2 plume, and to assess how much, if any, CO2 is leaking back into the atmosphere. Effective monitoring and verification are a key component to minimizing the risks associated with CCS by providing a trigger for remedial action.[176] They will also play a key role in achieving public acceptance of CCS as a means of reducing GHG emissions. Most long-term monitoring can be accomplished using the same technologies currently used in industry. Many of these technologies are used in the injection phase and would need to continue post-injection.

96 There are currently no established monitoring protocols for CCS projects.[177] Given that geological storage/disposal of CO2 may persist over many millions of years, the questions surrounding long-term monitoring are complex. The Australian Guiding Principles suggest that a regulatory framework for monitoring and verification in CCS should be able to deliver mechanisms to:

- establish data on the atmospheric, near-surface and sub-surface environment;

- monitor the project environment to manage and mitigate health, safety and environment risks;

- ensure certain standards for health, safety and environment and subsurface behaviour of the CCS stream are met before responsibility for the project is transferred from private to public interests (if deemed appropriate); and

- develop and manage a monitoring and verification plan to cover all stages of the CCS project including post-closure.[178]

There is a need for regulations to address long-term monitoring in a way that is both cost-effective and effective at detecting leaks or unexplained movement of the plume.

97 The length of time for which monitoring and verification is required is a subject of much discussion. While there are some calls for extensive and on-going monitoring, a more practical solution appears to be that long-term monitoring cease once it has been demonstrated that the plume of CO2 is no longer moving.[179]

98 In conclusion, a CO2 injection operation is already subject to regulation by the AEUB under the OGCA and the OGCA Regulations. However, while these regulations have been designed to cover analogous operations such as AGD and EOR, they require some adjustment to deal with CCS. In particular, we think that it is important that the OGCA, the regulations, and Directive 065 deal

explicitly with CCS issues. While the existing provisions might be used as a model, they require amendment to deal with the scale issues associated with CCS, and to require long-term monitoring and verification of the fate of the CO2 plume.

VI. Liability Issues

99 There are at least two distinct types of liability issues associated with CCS projects.[180]

100 The first type of liability is the potential liability of the operator (or another party) to those who suffer harm either as a result of slow leakage (the operator of a conventional oil or gas reservoir may suffer economic loss as a result of leakage into its reservoir, or acidification of the vadose zone might reduce crop yields or impair habitat values or harm burrowing animals), or as a result of a more catastrophic event (loss of life as a result of CO2 accumulating in high densities in low-lying areas). Closely associated with this is the need to ensure that the operator (or other party) has adequate funds to take necessary remedial action (re-completing a well that has lost its integrity, etc). We shall refer to this set of liability issues under the heading "legal liability issues," the first sub-group of issues as general (or third-party) legal liability issues, and to the second sub-group as remedial liability issues.

101 A second type of liability is the liability that may accrue from an atmospheric release of CO2 within a national or international greenhouse gas reduction regime. Thus, a release from a CO2 disposal project will be treated as an emission for the purposes of the Kyoto Protocol which will be added to the national account. It is also possible that the emission may trigger a liability under domestic implementing legislation (when enacted), perhaps requiring the person responsible (the operator or another party) to acquire credits to offset the emissions. We shall refer to this set of issues as the CCS accounting issues.

A. Legal Liability Issues

102 In discussing the legal liability issues, most of the literature distinguishes between the first three phases of the CCS cycle and the fourth, or post-closure, phase. It is generally assumed that prior to the post-closure phase, any liability for harm caused should be covered by the liability rules of the laws of general application on the grounds that there are no special risks or other unusual consideration associated with these activities.[181]

103 This section of the article deals first with the general legal liability issues and then discusses the remedial liability issues in the context of each of conventional oil and gas operations and acid gas disposal schemes. In Alberta, general legal liability is largely a matter of common law, while remedial liability issues are largely covered by statute. In each case we emphasize that the same rules apply to both acid gas disposal schemes and conventional oil and gas operations. The section concludes by discussing a more normative question, that is: What sort of liability regime should we put in place for CCS schemes? Our overall conclusion is that the general approach of the current liability regime can be applied with some minor modifications to CCS operations. However, we also consider two other liability regimes in order to identify additional design elements that might be taken into account in designing a CCS liability regime.

1. General Legal Liability

104 In Alberta, losses suffered as a result of an oil spill or similar incident may be recovered (if at all) by a tort action based in negligence and/or nuisance[182] or through strict liability on the basis of trespass or the rule in Rylands v. Fletcher.[183] The OGCA does not create a private cause of action or a special liability regime for those who suffer harm as a result of a release. Other jurisdictions do provide special liability rules for release events, including blow-outs during drilling operations.[184] The same principles apply to both AGD operations and to conventional oil and gas operations. The likely defendant would be the project operator, but others (including the owner(s) of the CO2 stream, and the owner and occupier of land) might also be joined as defendants on principles of joint and several liability.[185] The operator might seek to shift this liability to others (owners/suppliers of the CO2 stream) through various contractual indemnity arrangements. For example, the operator might seek to have the owners of the waste stream (perhaps the owner of the coal-fired generating plant[186]) indemnify it against both harm or damage that it may suffer directly, or as a result of actions brought by third parties.[187] Alternatively, the suppliers of the CO2 might reasonably argue that the operator of the disposal project should indemnify them once the operator has taken custody and control of the CO2. They will argue that the operator's charges should reflect this assumption of risk, leading the operator to self-insure or acquire insurance on the market. This second allocation of risk seems more appropriate (because it provides the relevant incentive to the operator to take all reasonable and prudent measures to prevent escapes) and, therefore, more likely to be reflected in the private contractual relations between the parties.

2. Remedial Liability

105 By contrast with the general legal liability rules, the remedial liability rules are governed by statute. These rules allocate liability for two types of situations: (1) liability for proper abandonment in the event of a default by a licensee; and (2) provisions for cost recovery in the event of a failure to comply with an AEUB order relating to a spill, blow-out, or similar incident. As to the first situation, the OGCA contemplates that all suspension and abandonment activities are the responsibility of the licensee and/or the working interest owners in the well or facility.[188] In default thereof, the AEUB may authorize any person to carry out those operations for the account of the licensee and other working interest owners in the well or facility. In the event of default in covering these suspension, abandonment, and related reclamation costs, these costs can be recovered from the "Orphan Fund"; the Fund is financed by a levy on the industry.[189] The OGCA does not contemplate that abandonment will serve to transfer any continuing liability to the government. In fact, s. 29 states that: "Abandonment of a well or facility does not relieve the licensee, approval holder or working interest participant from responsibility for the control or further abandonment of the well or facility or from the responsibility for the costs of doing that work."[190] In general terms, once a well has been abandoned and a reclamation certificate issued, a licensee is no longer able to transfer the licence for that well.[191]

106 As to the second category of events, various sections of the OGCA (ss. 100, 104-105) contemplate that the AEUB may order the licensee of the well or other facility to take necessary action, and in default thereof authorize others to do so. In such a case, the AEUB may recover these costs from the licensee and working interest owners in the well or other facility; however, in this case there is no secondary liability on the Orphan Fund, except to the extent that some of these costs might also be characterized as (re-) abandonment costs. As with the general legal liability rules, these remedial liability rules apply equally to conventional oil and gas operations and to AGD schemes.[192]

107 In sum, the general liability regime provides that the licensee and those with an interest in the well or facility have the primary liability for suspension, abandonment, and reclamation. That liability is a continuing liability. The industry fund offers a secondary source of funds to cover that liability, but this statutory scheme is limited to these types of costs. The statutory scheme does not create a special liability regime to cover harms suffered by others as a result of a release. This scheme applies to all wells including AGD wells.

3. Application To CCS

108 These, then, are the default rules that we might expect to apply to a CCS storage/disposal operation in Alberta. However, some of the CCS literature argues that it is necessary to modify these default rules during the post-closure period on the grounds that they will prove inadequate over the long-term duration of a disposal project. Thus, many commentators assert or assume that the point at which we move from the injection phase (including a period to satisfy a regulator that the project is stable and performing as anticipated -- for example, the CO2 is dissolving in the aquifer at anticipated rates and the CO2 is migrating no more than anticipated) to the post-closure phase, we will need to shift liability for the project from the private operator to the public.[193] Commentators justify this liability shift on pragmatic (corporations do not have a long enough "life") and philosophical grounds (this "reflects the fundamentally public nature of the risks and benefits of this type of storage"[194]). In particular, the literature emphasizes that as time passes, it is increasingly unlikely that the defendant will still be an extant or viable entity capable of discharging its liabilities. Should this happen, those who suffer harm will not be compensated (in other words, the site will be orphaned and the costs will lie where they fall) and where a project requires remediation (for example, re-abandonment of an injection well), the cost of carrying out that activity will likely fall on government where the operator no longer exists.

109 As a result of these concerns, some have suggested that governments should "accept post-closure responsibility for the stored CCS stream once the regulator has approved site closure."[195] Australian governments seem to favour this approach, and the U.S. Interstate Compact Commission has noted that "Given the long time frames ... innovative solutions to protect against orphaned sites will need to be developed."[196] The IOGCC suggests that government will need to provide the ultimate assurance.[197]

110 The Alberta experience suggests that we should be cautious before assuming the need to create a special liability regime for dealing with the post-closure phase of a CCS project. The Alberta regulations suggest that it may be possible to require that the CCS industry itself[198] provide the additional security needed to assure the public that resources will be available to take the necessary remedial action in the event of a leak or catastrophic release from a storage/disposal reservoir. The Alberta regulations also suggest that this additional security might be confined to the costs actually incurred in containing any release, as well as to any necessary re-abandonment operations, and that it is unnecessary to create a fund to deal with a broader range of possible compensation claims. By the same token, however, the coverage could be extended to provide a fund to compensate third parties who suffer loss as a result of a release event, although it would probably be necessary to also create a private cause of action to make such a scheme effective.[199]

111 One difficulty that would exist if we were to apply the current liability scheme relates to the restriction on the transfer of licences of abandoned wells, as discussed in Part VI.A.2, above. In non-CCS situations, this restriction on transfer is necessary in order to assure proper allocation of

liability; however, it is hardly appropriate for a CCS scheme. For example, suppose a CCS scheme involved an area that contained several properly abandoned wells that had been issued reclamation certificates. Under the present liability regime, if one of the abandoned wells leaked as a result of repressurization from the injection of CO2 in a CCS operation, the licensee for the abandoned well would be liable for remediation -- not the CCS operator.[200] The licence holder for the abandoned well would then be forced to seek indemnity through the courts. Such a system of allocating liability would be ineffective and inefficient. We suggest that the operator of a CCS scheme should be required, as a term and condition of project approval, to take an assignment of licences for all abandoned wells within the CCS approval area, and that Directive 006[201] be modified to allow for transfer of all such wells.

112 Should it be necessary to go beyond these suggested modifications to the existing system and to think about a more radical re-structuring of a liability scheme, we have identified two possible schemes that may provide useful analogies. The first draws upon the post-closure liability rules recently developed by Saskatchewan to deal with its mining sector (including uranium mines), and the second draws upon the international liability regime for tanker spills. We summarize each of those schemes in the following sections.

4. Post-Closure Liability For Mining Operations (Saskatchewan)

113 Saskatchewan has a mature mining industry, including several uranium mines located on Crown lands.[202] The regulatory framework for mining requires that planning and approval for decommissioning and reclamation occur during the initial stages of development.[203] The operator of a mine must conduct a detailed review of the decommissioning plan and the financial assurance instrument at least once every five years, whenever requested to do so by the Minister, or within the 12 months preceding the permanent closure of such facility.[204] An operator who wishes to permanently close a mine must: (a) advise the Minister in writing at least 60 days before commencing the permanent closure; and (b) implement the approved decommissioning and reclamation plan according to the timeframe set out in the plan.[205]

114 Once the site decommissioning and reclamation plan is completed, the site enters a transition-monitoring phase during which the mining company must demonstrate, at its own expense, that the site is physically and chemically stable. The operator must maintain financial assurances sufficient to cover the cost of the remaining obligations (as outlined in the decommissioning and reclamation plan) for the balance of the transition period, and must maintain a contingency amount for any unexpected problems. The province will inspect the site and review the mining company's site monitoring and maintenance. During the transition-monitoring phase, the mining company is liable for human health and safety concerns as well as any impacts on the environment.[206]

115 When the transition-monitoring phase is completed to the satisfaction of the province, the operator may apply for a release from the requirements in the decommissioning and reclamation plan.[207] A closed site can be entered into the Institutional Control Program, wherein the operator is released from further monitoring and maintenance responsibilities and is released from its surface lease.[208] Entry into the "Institutional Control Program" transfers custodial responsibility to the province, which would then manage those mine sites located on Crown land.

116 All mines under the Institutional Control Program are listed on the Institutional Control Registry (the Registry).[209] The Registry identifies the inspection schedule for each site to confirm that the site remains stable. Inspection reports are reviewed and approved before being entered into the

Registry. Prior to being accepted into the Institutional Control Program, the operator must deposit an amount sufficient to cover the anticipated future monitoring and maintenance costs for the closed site, a fee, and an amount for unforeseen events.[210] While the responsibility for monitoring and maintaining the site are transferred to the government, the majority of the costs are borne by industry.

117 The Saskatchewan system is based on the premise that making companies responsible for the perpetual care and maintenance of former uranium mines will be a significant barrier to investment in new developments and, further, that holding companies responsible is a sub-optimal solution in any event, since we cannot expect companies to exist in perpetuity.[211] In contrast, governments are institutions that operate on those time horizons, and that do have the interests of the general public in mind. The most important idea that emerges from this review is a possible system for providing for long-term monitoring managed by the state but paid for upfront by the operator (or those who contribute CO2 to the CCS project), with the state assuming responsibility once post-abandonment site stability has been demonstrated.

5. The Oil Spill Liability Regime

118 There is a significant literature in international law dealing with the creation of civil liability regimes for hazardous activities.[212] The best known such regime is that which exists for liabilities associated with spills from oil tankers. The regime is based on two conventions and their related protocols: the International Convention on Civil Liability for Oil Pollution Damage, 1992 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992.[213]

119 There are, of course, significant differences between the liabilities associated with oil tanker spills and the liabilities associated with CCS projects. Perhaps the key difference is that oil spill liability is associated with a particular event or accident, whereas CCS liability needs to address not only those scenarios, but also other issues such as the costs associated with re-abandonment and chronic leaks. However, the literature on the tanker regime does serve to draw attention to a number of key design issues, including: the form of liability, the chanelling of liability, the scope of liability, compulsory insurance, limitations on liability, and an industry levy.

120 It is most convenient to describe the two conventions sequentially, bearing in mind that the Fund Convention is designed to provide supplementary coverage. The basic scheme of the Civil Liability Convention is to channel liability for a spill to the ship's owner rather than to other possible parties who might be implicated, including the charterer of the vessel, the owner of the cargo, the captain and crew.[214] Liability is strict, subject to conventional exceptions.[215] But the Civil Liability Convention also caps liability (unless there is evidence of malice or recklessness), with the cap based on the tonnage of the vessel. In return, the ship's owner must maintain insurance to the level of the liability cap.[216] The liability limits are specified in terms of special drawing rights as defined by the International Monetary Fund; currently, the maximum liability for the largest vessels is capped at approximately US$142 million.[217]

121 The Fund Convention kicks in when the fund constituted by the tanker owner proves inadequate. Thus, the Fund Convention provides an additional tranche of liability funding based on the same strict liability principles. A key difference, however, is that the Fund under the Fund Convention is constituted by payments not from the tanker owner or another part of the tanker industry, but instead by payments made by the receivers or importers of oil.[218] The Fund Convention is also sub-

ject to a cap,[219] although subsequent amendments and protocols have served to raise the liability levels.[220]

122 The two most important ideas that emerge from this review are the importance of channeling liability to a designated person, such as an operator/licensee, in order to avoid a multiplicity of law suits and in order to facilitate insurance, and, second, the idea of securing liability contributions from different parts of the relevant industries.

B. CCS Accounting Issues

123 Unlike biological sequestration which results in the removal of CO2 from the atmosphere and therefore results in the creation of a sink that may offset emissions in the national accounts, a CCS project is designed to ensure that CO2 is never released to the atmosphere. Thus, CO2 that is captured and stored does not enter into the national accounts as an emission. However, the national accounts of a party to the Kyoto Protocol will have to deal with such things as the incomplete capture of CO2 either from the original waste stream or at subsequent compression facilities, as well as leakage from transportation facilities such as pipelines. It is also clear that a country will need to be able to ascertain and account for leakage from storage/disposal reservoirs. It will also be necessary to deal with the allocation of the accounting responsibility for a CO2 release in a case such as Weyburn, where the CO2 is captured in the U.S. and then transported for disposal/EOR injection in Canada.

124 The IPCC offered guidance on these matters for the first time in its 2006 IPCC Guidelines for National Greenhouse Gas Inventories.[221] Given the inadequacy of empirical evidence allowing the estimation of emissions for accounting purposes, the IPCC has developed a recommended methodology that calls for, inter alia, both modelling to predict the fate of CO2 over centuries to millennia, and the adoption of monitoring programs including post-injection monitoring.

125 The IPCC also specifically addressed a series of transboundary CCS scenarios. In the first scenario (which mirrors the Weyburn project, except that Weyburn is an EOR project rather than a disposal project) CO2 is captured in country A (the U.S., in the Weyburn example) and exported for storage/disposal to country B (Canada, in the Weyburn example). The IPCC states that:

> Country A should report the amount of CO2 captured, any emissions from transport and/or temporary storage that takes place in Country A, and the amount of CO2 exported to Country B. Country B should report the amount of CO2 imported, any emissions from transport and/or temporary storage (that takes place in Country B), and any emissions from injection and geological storage sites.[222]

126 Hence, in this scenario as applied to Weyburn, Canada is the location of the disposal/storage site that assumes the accounting liability for any subsequent failure in the Weyburn sequestration.

127 In a second scenario the CO2 is injected in country A, but migrates from the storage/disposal site and leaks in country B. In this case:

> Country A is responsible for reporting the emissions from the geological storage site. If such leakage is anticipated based on site characterization and modelling, Country A should make an arrangement with Country B to

> ensure that appropriate standards for long-term storage and monitoring and/or estimation of emissions are applied (relevant regulatory bodies may have existing arrangements to address cross-border issues with regard to groundwater protection and/or oil and gas recovery).[223]

A third scenario deals with a storage/disposal site in country B that is used by a number of different countries. In this scenario, as in the first, it is country B that is to report and accept responsibility for any leakage.

128 In addition to the international issues, there could also be domestic statutory liability. This issue will need to be explored once federal and provincial greenhouse gas legislation develops and becomes more specific and detailed.

VII. Conclusions

129 Carbon capture and storage has the potential to contribute to a suite of greenhouse gas mitigation measures. The principal obstacle to the adoption of CCS is the economics of the capture phase. However, it will also be important to resolve some outstanding legal issues associated with storage/disposal before CCS can be adopted on a broad basis in Alberta. In this article we have reviewed a set of legal issues under each of three headings: property issues, regulatory issues, and liability issues.

130 Under the heading of property issues, we think that the Alberta regime requires the following changes/clarifications:

- There is a need to clarify the ownership of disposal rights where there is a split mineral title. This clarification might be modeled on the current s. 57 of the MMA dealing with storage rights.

- There is a need to clarify the disposition system that the Crown adopts for disposal rights. The current scheme, based on letters of consent under s. 56, is inadequate and fails to reflect the scarcity value of the storage/disposal resource.

- There is a need to clarify the (non-) application of the Water Act to CO2 injection into a saline aquifer. This might be achieved by amending the regulations so as to provide that a CO2 disposal well is not an activity that requires approval under that Act. Such an amendment might also confirm that the statutory vesting clause includes the exclusive right to dispose of substances into Crown-owned water.

131 We have concluded that the surface rights regime does not require any amendment in order to accommodate CCS insofar as an operator already has a right of access to drill a CO2 disposal well under s. 13 of the SRA.

132 Under the heading of regulatory issues we think that the following changes are required:

- Amend the OGCA to deal explicitly with CCS schemes.

- Amend Directive 065 to create a new part to deal with CCS schemes. The new part should draw upon those existing parts of the Directive dealing with EOR, gas storage, and AGD schemes as relevant. The new provisions should pay particular attention to post-closure monitoring requirements, and should require assignment of well licences to the operator of the storage project within the project boundaries.

- Amend the Environmental Assessment (Mandatory and Exempted Activities) Regulation to list CCS (perhaps above a certain threshold) as a mandatory activity.

133 Under the heading of liability issues, we propose the following:

- Development of a remedial liability regime for CCS operations. Such a scheme might be based on the Orphan Fund principles, but liability to contribute to any levy should be tailored in an appropriate way to those involved in CCS operations.

- Consideration should also be given to expanding the scope of claims that might be made against a CCS Fund so as allow claims to be made by third parties who suffer harm as a result of a CCS release event.

- The liability scheme for CCS operations should require the CCS operator to obtain the licences for all abandoned wells in the CCS approval area, and Directive 006 should be modified to allow for transfer of such wells even if they are currently restricted.

* * *

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1 Other options include: (1) reducing energy consumption; (2) switching to less carbon-intensive fuels (e.g. coal to gas); (3) increasing use of non-carbon fuels (hydro, renewables, and nuclear); and (4) biological sequestration of carbon.

2 Unlike biological sequestration, which involves the uptake of CO2 from the atmosphere, CCS serves to avoid/reduce emissions.

3 9 May 1992, 1771 U.N.T.S. 107, 31 I.L.M. 849 (entered into force 21 March 1994).

4 11 December 1997, UN Doc. FCCC/CP/1997/7/Add.1, 37 I.L.M. 22 (entered into force 16 February 2005) [Kyoto Protocol].

5 In general we will use the term "storage/disposal" to draw attention to the fact that while the literature generally uses the term carbon capture and storage rather than carbon capture and disposal, the whole purpose of CCS is, in fact, disposal. The distinction is important in the legal and regulatory context since different rules may well apply to "storage" and "disposal" schemes. We will use the single term "storage" to refer to activities such as natural gas storage, where the goal really is storage rather than disposal.

6 A key source is the Intergovernmental Panel on Climate Change (IPCC), online: <www.ipcc.ch/index.htm>. See IPCC, IPCC Special Report on Carbon Dioxide Capture and Storage, Prepared by Working Group III of the Intergovernmental Panel on Climate Change, B. Metz et al., eds. (Cambridge: Cambridge University Press, 2005), also available online: IPCC <www.ipcc.ch/ipccreports/ srccs.htm> [IPCC CSS Report]. Another accessible source is Mary Griffiths, Paul Cobb & Tom Marr-Laing, Carbon Capture and Storage: An arrow in the quiver or a silver bullet to combat climate change? A Canadian Primer (Drayton Valley, Alta.: Pembina Institute, 2005), online: The Pembina Institute <www.pembina.org/pub/584> [Pembina Primer]. Another source by a leading Canadian authority on CCS, and which emphasizes the policy challenges, is David W. Keith, Towards a Strategy for Implementing CO2 Capture and Storage in Canada, Environmental Protection Series, EPS/2/IC/1, 2002, Prepared for the Oil, Gas, and Energy Branch, Environment Canada (December 2002), online: University of Calgary <www.ucalgary.ca/ keith/papers/46.Keith.2002.StrategyFo rCCSinCanada.e.pdf>.

7 International Energy Agency (IEA), Discussion Paper for 2nd IEA/CSLF Workshop on Legal Aspects of Carbon Capture and Storage, Paris, France, (17 October 2006), online: IEA <www.iea.org/Textbase/work/2006/carbon/2.pdf> at 15 [IEA/CSLF Legal Aspects -- Draft]. The final report was published in June 2007: IEA, Legal Aspects of Storing CO2:Update and Recommendations (Paris: IEA, 2007) [IEA Legal Aspects -- Final Report].

8 The questions include: Is the geological disposal of CO2 prohibited or regulated by the terms of relevant maritime conventions, including the United Nations Convention on the Law of the Sea, 12 October 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1261 (entered into force 16 November 1994), the Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter, 29 December 1972, 1046 U.N.T.S. 120, 11 I.L.M. 1294 (entered into force 30 August 1975) [London Convention 1972], or regional agreements such as the Convention for the Protection of the Marine Environment of the North-East Atlantic, 22 September 1992, 32 I.L.M. 1069 (entered into force 25 March 1998)? See also the 1996 Protocol to the London Convention 1972, 7 November 1996, 36 I.L.M. 1 (entered into force 24 March 2006), online: International Marine Organization (IMO) <www.imo.org/includes/ blastDataOnly.asp/data_id%3D19136/PROTOCOLAmended2006.doc>. The Protocol was amended effective 10 February 2007 to allow for geological sequestration projects: see online: IMO <www.imo.org/home.asp?topic_id =1488>. There is a significant and growing literature on these questions. See e.g. Ray Purdy & Richard Macrory, Geological carbon sequestration: critical legal issues, Tyndall Centre for Climate Change Research Working Paper No. 45 (January 2004), online: Tyndall Centre for Climate Change Research <www.tyndall.ac.uk/publications/working_papers/wp45.pdf >; Chris Hendriks, M.J. Mace & Rogier Coenraads, Impacts of EU and International Law on the Implementation of Carbon

Capture and Geological Storage in the European Union, ECS04057 (June 2005), online: <pdf.wri.org/ccs_impact_of_eu_law_on.pdf>; IEA Legal Aspects -- Final Report, ibid., c. 3 and Annex 5.

9 Ministerial Council on Mineral and Petroleum Resources, Carbon Dioxide Capture and Geological Storage: Australian Regulatory Guiding Principles (2005) online: Australian Government; Department of Innovation, Science and Research <www.industry.gov.au/assets/documents/ itrinternet/Regulatory_Guiding_Principles_for_CCS2005112414565 2.pdf> at 8 [Australian Guiding Principles].

10 See also Nigel Bankes & Jenette Poschwatta, "Carbon Capture and Storage in Alberta: Learning From the Acid Gas Disposal Analogy" (2007) 97 Resources 1, online: Canadian Institute of Resources Law <www.ucalgary.ca/ cirl/pdf/ Resources97.pdf>. We offer a brief discussion of AGD in Part III.A, below.

11 IPCC CCS Report, supra note 6 at 11; Keith, supra note 6 at 7.

12 IPCC CCS Report, ibid. at 4. The nature of the penalty will vary with the technology and the purity of the CO2 stream. The IPCC CCS Report estimates a power plant equipped with a CCS system will need between 10 to 40 percent more energy than a plant of equivalent output without CCS.

13 Keith, supra note 6 at 10.

14 For a useful discussion of the various incentives that can be used to encourage adoption of CCS, see IEA Legal Aspects -- Final Report, supra note 7, especially at 48-60. For the recently introduced incentive structure in Alberta, see the Specified Gas Emitters Regulation, Alta. Reg. 139/2007, which entered into force on 1 July 2007. The regulation applies to all industrial facilities in Alberta that emitted 100,000 tonnes or more of greenhouse gases in any year starting in 2003. Each established facility must reduce its average emissions intensity to 88 percent of its 2003 to 2005 baseline. Emission intensity reduction targets for new facilities (those that began operation after 31 December 2000) will be phased in over a six-year period. Facilities unable to comply with the target reduction may either purchase emission offsets, fund credits, or pay into a provincial fund to develop technology to reduce emissions.

15 The intellectual property issues are identified and discussed in IEA Legal Aspects -- Final Report, supra note 7 at 43-48, Annex 3.

16 Interstate Oil and Gas Compact Commission (IOGCC), Carbon Capture and Storage: A Regulatory Framework for States -- Summary of Recommendations 2005, online: IOGCC <www.iogcc.state.ok.us/PDFS/CarbonCaptureandStorageRepo rtandSummary.pdf> [IOGCC Report].

17 R.S.A. 2000, c. P-15. The Pipeline Act applies to any pipeline used to convey a "substance": s. 1(1)(t) (this is subject to a number of exceptions, none of which are relevant here).

While the Act does not define the term "substance," it is clearly a word of broad import that undoubtedly includes a pipeline designed to carry CO2.

18 National Energy Board Act, R.S.C. 1985, c. N-7; National Energy Board (NEB), Souris Valley Pipeline Limited, Reasons for Decision, MH-1-98 (October 1998) [MH-1-98].

19 David Ebner, "Alberta eyes carbon dioxide pipeline for oilsands" Globe and Mail (6 March 2007).

20 See e.g. CO2 Projects Royalty Credit Regulation, Alta. Reg. 120/2003.

21 The discussion in this paragraph is largely based on E. Tzimas et al., Enhanced Oil Recovery using Carbon Dioxide in the European Energy System, Institute for Energy, Petten, The Netherlands (December 2005), online: Institute for Energy <ie.jrc.cec.eu.int/publications/scientific_publications/2005/EUR21895EN.pdf>. Similar studies prepared in the U.S. suggest similar potential for enhanced recovery if CO2 is more broadly available. The U.S. Department of Energy has commissioned ten basin studies for EOR potential. The reports are available online: U.S. Department of Energy <www.fossil.energy.gov/programs/oilgas/eor/Ten_Basin-Or iented_CO2-EOR_Assess ments.html>.

22 For further information on Weyburn, see the website of the Petroleum Technology Research Centre (PTRC), online: PTRC <www.ptrc.ca/weyburn_first.php>. The Weyburn Field covers about 70 square miles; original oil in place -- 1.4 billion barrels; recovery prior to using CO2 -- 370 million barrels; projected incremental recovery -- 155 million barrels; projected CO2 injection -- about 20 million tonnes (see Oilfield Statistics). The operator for the Weyburn project is Encana; the operator for the adjacent Midale project is Apache. Monitoring for the project includes a 10 km perimeter around the field.

23 For example, while the operators plan to inject about 20 MtCO2 in the Weyburn EOR project, it is estimated that the storage capacity of the reservoir is about 45.15 Mt: see PTRC, IEA GHG Weyburn CO2 Monitoring & Storage Project Summary Report 2000-2004, vol. III, Proceedings of the 7th International Conference on Greenhouse Gas Control Technologies, Vancouver, Brisith Columbia, 5-9 September 2004, online: PTRC <www.ptrc.ca/siteimages/Summary_Report_2000_2004.pdf> at 149.

24 Tzimas et al., supra note 21 at 4.

25 Ibid. at 14. Relevant economic factors (including the price of oil, the costs of CO2, and the value of carbon credits) would affect the extent to which operators would actually adopt CO2-EOR.

26 This possible method of characterizing the impact of CCS on recoveries was suggested at the IOGCC Meeting on Long-Term Storage of CO2 in Geologic Formations (Workshop Report), Alta., Utah (17-19 July 2002), online: CO2 Capture Project <www.co2captureproject.org/news/documents/

IOGCC%20CO2%20Storage%20Workshop.doc>. The concept is that a third opportunity for recovery falls between EOR and CCS. In this scenario, the pool could be "charged" with CO2 at the same level as would be anticipated in a disposal/storage situation. The charged field would then be left to a CO2 soak for a period of several years before reopening for additional recovery (possibly supplemented by additional CO2 injection). If this was a viable method of recovery, the additional recovery should be subject to continued capture and re-injection of all CO2 produced. The soak phase could then be characterized as a field revitalization rather than either storage or disposal of CO2, bringing the activity firmly within the conservation mandate of the AEUB. Maintenance of tenure may become an issue due to the extended time of the soak. It may be necessary to reward those companies willing to invest in the project by providing a future stake in the production. For Crown lands, a reward system could be set up to provide companies that invest in this process with a right of first refusal to reopen the field post-soak, subject to a condition of capturing all produced CO2 and an obligation to use the field for final disposal of CO2. This right of first refusal could be proportionate based on the CO2 captured and used in the soak.

27 IPCC CCS Report, supra note 6 at 221. These figures might be increased by 25 percent if hypothesized undiscovered fields were included.

28 Fred Riddiford et al., "Monitoring Geological Storage: The In Salah Gas CO2 Storage Project," online: University of Regina <uregina.ca/ghgt7/PDF/papers/nonpeer/529.pdf>.

29 Stefan Bachu & Kristine Haug, "In Situ Characteristics of Acid-Gas Injection Operations in the Alberta Basin, Western Canada: Demonstration of CO2 Geological Storage" in Sally M. Benson, ed., Carbon Dioxide Capture for Storage in Deep Geologic Formations -- Results from the CO2 Capture Project: Geologic Storage of Carbon Dioxide with Monitoring and Verification, vol. 2 (Amsterdam: Elsevier, 2005) 867.

30 The Sleipner Project is summarized in the IPCC CCS Report, supra note 6 at 202.

31 Discussed in Part III, below.

32 Pembina Primer, supra note 6 at 41.

33 IPCC CCS Report, supra note 6 at 197.

34 Stephan Bachu & Leo Rothenburg, "Carbon Dioxide Sequestration in Salt Caverns: Capacity and Long Term Fate," online: Alberta Geological Survey <www.ags.gov.ab.ca/ activities/CO2/abstracts/Mns_NETL_Conf_Bachu_and_Rothenburg.pd f>. The authors speculate that caverns might be used where there are large emission sources and no alternative storage options (and presumably where there is no developed economic CO2 pipeline infrastructure) and cite the example of the oil sands area of northeastern Alberta (at 1).

35 Keith, supra note 6 at 13.

36 Australian Guiding Principles, supra note 9 at 18.

37 Note that many more jurisdictions have experience in and a regulatory framework for dealing with other forms of geological disposal such as the disposal of brine, oil field waste, and other forms of municipal and industrial waste. These analogies will prove particularly important in the U.S. where the Environmental Protection Agency (EPA) has taken the position that CO2 injection wells should be treated as Class V experimental wells under the terms of the Underground Injection Control (UIC) Regulation of the federal Safe Drinking Water Act, 42 U.S.C. [s]201; the literature on the U.S. UIC is extensive. See e.g. U.S. EPA, Technical Program Overview: Underground Injection Control Regulations, EPA 816-R-02-025 (revised July 2001), online: U.S. EPA <www.epa.gov/safewater/uic/pdfs/techguide_uic_tec_overv iew_uic_regs.pdf> [Technical Program Overview]; Earle A. "Rusty" Herbert, "The Regulation of Deep-Well Injection: A Changing Environment Beneath the Surface" (1996) 14 Pace Envtl. L. Rev. 169; U.S. EPA, Class I Underground Injection Control Program: Study of the Risks Associated with Class I Underground Injection Wells, EPA 816-R-01-007 (March 2001), online: U.S. EPA <www.epa.gov/safewater/uic/ classonestudy.pdf> [EPA -- Study of the Risks]; John A. App, "The Regulatory Climate Governing the Disposal of Liquid Wastes in Deep Geologic Formations: A Paradigm for Regulations for the Subsurface Storage of CO2?" in Benson, supra note 29, 1173; David W. Keith et al., "Regulating the Underground Injection of CO2" (2005) 39 Environmental Science & Technology 499A, describing Florida's deep injection of municipal wastewater. See also Mark Anthony de Figueiredo, The Liability of Carbon Dioxide Storage, Ph.D Dissertation, Massachusetts Institute of Technology (February 2007), online: Carbon Capture & Sequestration Technologies @ MIT <sequestration.mit.edu/pdf/Mark_de_Figueiredo_PhD_Disse rtation.pdf> at 79-100.

38 See e.g. Sam Wong et al., "Economics of Acid Gas Reinjection: An Innovative CO2 Storage Opportunity," online: University of Calgary <www.ucalgary.ca/ keith/papers/ 56.Wong.2003.EconomicsOfAcidGasReinjection.e.pdf>

39 Bachu & Haug, supra note 29 at 867, 870.

40 There are several AEUB decisions in which interveners have attempted to have the AEUB require operators to adopt AGD in preference to some alternative emissions control technology. See e.g. the discussions in AEUB, Decision 99-27: Petro Canada Oil and Gas Application to Install Compressors at the Wilson Creek Gas Plant and at LSD 3-19-43-4 W5M, Wilson Creek Field (1 November 1999) at 8.

41 IPCC CCS Report, supra note 6 at 385.

42 Ibid. at 17.

43 There are several naturally occurring CO2 storage sites. For example, about 200 MtCO2 has thought to have been trapped more than 65 million years ago in the Pisgah Anticline northeast of the Jackson Dome, Mississippi. Many of the petroleum basins show retention time longer than 10 million years: ibid. at 244-45.

44 "Very likely" is a probability between 90 and 99 percent while "likely" is a probability of 66 to 90 percent: ibid. at 12, 14.

45 See Elizabeth J. Wilson, Timothy L. Johnson & David W. Keith, "Regulating the Ultimate Sink: Managing the Risks of Geologic CO2 Storage" (2003) 37 Environmental Science & Technology 3476; Elizabeth J. Wilson & David W. Keith, Geologic Carbon Storage: Understanding the Rules of the Underground, online: University of Calgary <www.ucalgary.ca/keith/papers/58.Wilson.2003.GeologicC arbonStorage.f.pdf>.

46 Natural seeps typically occur in highly fractured volcanic zones, quite unlike the interior of a stable sedimentary basin which is the likely location for CO2 storage. One such seep, in central Italy, has a release rate high enough to be lethal to plants and animals. At least 10 people have died in the Lazio region over the past 20 years: IPCC CSS Report, supra note 6 at 247. A series of earthquakes created a natural seep near Mammoth Mountain, California. Within a year, 4 hectares of pine trees were discovered to be losing their needles, and 8 years later the area of dead and dying trees had expanded to 40 hectares: IPCC CSS Report, supra note 6 at 248. The most catastrophic event was the venting at Lake Nyos, Cameroon which killed about 1,700 people: IPCC CSS Report, supra note 6 at 308.

47 App, supra note 37 at 1173.

48 IPCC CCS Report, supra note 6 at 248.

49 Ibid. at 249.

50 See Jürgen E. Streit, Anthony F. Siggins & Brian J. Evans, "Predicting and Monitoring Geomechanical Effects of CO2 Injection" in Benson, supra note 29, 751.

51 IPCC CCS Report, supra note 6 at 249.

52 Ibid. at 228; see also George W. Scherer et al., "Leakage of CO2 Through Abandoned Wells: Role of Corrosion of Cement" in Benson, supra note 29, 827.

53 Well density is particularly high in North America (e.g. more than 350,000 wells in Alberta and over one million wells in Texas) and much lower in other parts of the world (e.g. just over 16,000 wells in the North Sea): David Hawkins & Stefan Bachu, "Deployment of large-scale CO2 geological storage: Do we know enough to start now?" (Paper presented to the GHGT-8, 8th International Conference on Greenhouse Gas Control Technologies, Trondheim, Norway, 19-22 June 2006), online: <https://events.adm.ntnu.no/ei/viewpdf.esp?id=24&file=d%3A%5CAmlink%5CEVENTWIN%5Cdocs%5Cpdf%5C950Final00299%2Epdf> at 3; Pembina Primer, supra note 6 at 38.

54 See Kent F. Perry, "Natural Gas Storage Industry Experience and Technology: Potential Application to CO2 Geologic Storage" in Benson, supra note 29, 815.

55 Dr. S. Julio Friedmann, "Technical feasibility of rapid deployment of geological carbon sequestration," Written testimony submitted to the House Energy and Commerce Committee, Energy and Air Quality Sub-committee Hearing: Carbon Capture and Sequestration: An Overview (6 March 2007), online: Committee on Energy and Commerce <energycommerce.house.gov/cmte_mtgs/110_eaq-Hrg.030607. Friedmann-Testimony.pdf> at 2.

56 If the CO2 is injected into unusable coal seams, it will physically absorb onto the coal, sometimes displacing other gases such as methane.

57 IOGCC Report, supra note 16 at 40-41, 51.

58 S.C. 1999, c. 33 at Schedule 1; Order Adding Toxic Substances to Schedule 1 to the Canadian Environmental Protection Act, 1999, P.C. 2005-2037, C. Gaz. 2005.II.139, S.O.R./2005-345.

59 Pub. L. 89-272, [s]101(8), 79 Stat. 992, as am. by 84 Stat. 1690, 91 Stat. 791, 42 U.S.C. [s]7521(a)(1).

60 In Massachusetts v. Environmental Protection Agency, 49 U.S. 1438 (2007), the U.S. Supreme Court allowed the plaintiffs to proceed with their action seeking to compel the EPA to develop CO2 emission regulations for new vehicles.

61 S.A. 2003, c. C-16.7 as am. by the Climate Change and Emissions Management Amendment Act, S.A. 2007, c. 4 [CCEMA], which came into force on 20 April 2007. The CCEMA does not dovetail well with the Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12 [EPEA]. That Act does not treat general CO2 emissions as a hazardous waste, but would still apply in certain circumstances. For example, a specific release of CO2 that caused an adverse effect would be reportable under s. 110.

62 CO2 in Alberta is only a hazardous waste when it falls into one of the categories specified in the Waste Control Regulation, Reg. 192/96. Examples are compressed or liquefied CO2 that is discarded or off-specification.

63 Alberta Environment, Specified Gas Reporting Standard (March 2007), online: Alberta Government <www3.gov.ab.ca/env/air/pubs/ghg_specified_gas_reportin g_standard.pdf>.

64 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 22 March 1989, 1673 U.N.T.S. 126, 28 I.L.M. 657 (entered into force 5 May 1992), text available online: <www.basel.int/> [Basel Convention]. The U.S. is not a party to the Basel Convention, but it arrives at the same conclusion under the bilateral Agreement between the Government of Canada and the Government of the United States of America concerning the Transboundary Movement of Hazardous Waste, 28 October 1986, Can. T.S. 1986 No. 39 (entered into force 8 November 1986). This agreement applies only to hazardous wastes and municipal waste. The CO2 import/export from the U.S. to Canada which occurs as part of the Weyburn EOR project would not trigger this agreement since the CO2 in this project is not regarded as waste, and certainly not as hazardous waste.

65 For further and comprehensive discussion of some of these issues in an Australian context, see Minter Ellison, Carbon Capture and Storage: Report to the Australian Greenhouse Office on Property Rights and Associated Liability Issues (Canberra, Austl.: Australian Greenhouse Office, 2005), online: Australian Government; Department of Climate Change <www.greenhouse.gov.au/ccs/publications/pubs/ccs.pdf>.

66 See e.g. Bruce Ziff, Principles of Property Law, 4th ed. (Toronto: Carswell, 2006) at 2.

67 See also EPEA, supra note 61, s. 182, confirming that "[n]o person shall dispose of waste on any land owned by another person unless the owner of that land agrees to the disposal of the waste on the land."

68 R.S.A. 2000, c. M-17 [MMA].

69 Mines and Minerals Amendment Act, 1994, S.A. 1994, c. 22.

70 Or at least they will be straightforward if we make the assumption that the permission of the owner of the water is a sufficient permission. This issue was raised tangentially in Chance v. BP Chemicals Inc., 670 N.E.2d 985 (Ohio Sup. Ct. 1996) [Chance]. In Chance the plaintiffs were adjacent landowners who sued BP Chemicals Inc. (BP) as the operator of several deep injection wells alleging that the injection plume had migrated under their lands and inter alia constituted an actionable trespass. The Court rejected the claim on the grounds that the plaintiffs had not been able to establish an actionable trespass. One of BP's defences was that it was injecting into a brine formation and that the brine waters were "waters of the state" within the meaning of the relevant Ohio statute (at 992). The Court took the view that this assertion, even if correct, could not constitute a complete defence (at 992):

> To the extent that appellee appears to be arguing that the way the injectate disperses into the native brine serves to insulate appellee from all liability in all circumstances, we reject appellee's contention. The native brine exists naturally in the porous sandstone into which the injecting is done. The injectate displaces and mixes with the brine in the injection zone. Appellants have a property interest in the rock into which the injectate is placed, albeit a potentially limited one, depending on whether appellants' ownership rights are absolute. If appellee's act of placing the injectate into the rock interferes with appellants' reasonable and foreseeable use of their properties, appellee could be liable regardless of the way the injectate mixes with the native brine.

71 R.S.A. 2000, c. W-3. Given the decision in Chance, ibid., it might be prudent to amend this provision of the Water Act to add a declaratory clause to the effect that "the property in and the right to the diversion and use of all water includes the right to dispose of substances into that water."

72 Anderson v. Amoco Canada Oil and Gas, 2004 SCC 49, [2004] 3 S.C.R. 3 at paras. 12-13, 42 [Anderson].

73 Supra note 68.

74 Section 1(1)(m)(i) of the Water Act defines a "diversion of water" as "the impoundment, storage, consumption, taking or removal of water for any purpose, except the taking or removal for the sole purpose of removing an ice jam, drainage, flood control, erosion control or channel realignment." Furthermore, the regulations to the Act exempt a diversion of saline groundwater from the provisions of the Act: see Water (Ministerial) Regulation, Alta. Reg. 205/98, Sch. 3 at 1(e).

75 That said, Sch. 1 of the Water (Ministerial) Regulation, ibid., contains an extensive list of "activities" that are exempt from the need to acquire an approval. The Regulations do not exempt a CO2 injection well. It is clear from the definition in the Act that a CO2 injection well does not qualify as a water well for the purposes of the Act.

76 MMA, supra note 68, s. 56.

77 AEUB Directive 065: Resources Applications for Conventional Oil and Gas Reservoirs (July 2007) at 117 [Directive 065]. Effective 1 January 2007, the AEUB has been realigned into two separate regulatory bodies, the Energy Resources Conservation Board (ERCB), which regulates the energy industry, and the Alberta Utilities Commission (AUC), which regulates the utilities industry. As part of this realignment the title pages of all existing AEUB directives now carry the new ERCB logo. However, no other changes have been made to the directives, and they continue to refer to the "EUB." As new editions of the directives are issued, these references will be changed. All Directives can be found on the ERCB's website online: ERCB <www.ercb.ca/portal/ server.pt>.

78 The Directive does not specify what the approach should be in the event that the mineral estate has been severed into different component elements.

79 Alberta Energy uses a standard form consent letter for acid gas disposal in undisposed Crown lands: Personal Communication, Dave France, Alberta Energy (4 January 2007), enclosing a copy of the consent letter currently in use [available from the authors]. What is the legal character of this consent letter? It would seem to be a licence in the property law sense of that term; i.e. the letter permits an activity that would otherwise be a trespass: Thomas v. Sorel (1673) Vaugh. 330. Thus, while other Crown agreements are generally understood to confer rights in the form of a profit à prendre, the rights conferred by a consent letter do not confer an interest in land.

80 Presumably this is to ensure that the addressee does not have a competitive advantage in any subsequent Crown sale; the disclosure tracks the requirements that apply in the event of a trespassory testing. On trespass against Crown lands, see Alberta Energy, Information Letter 2005-26: "Trespass on Petroleum and Natural Gas and Oil Sands Rights" (18 October 2005), online: Alberta Energy <inform.energy.gov.ab.ca/Documents/Published/IL-2005-26 .pdf>.

81 Supra note 76 and accompanying text. Actually the language of the letter does not quite track that of the statute. Here is the indemnity text from the letter (supra note 79):

> Under Section 56(2) of the Mines and Minerals Act the Crown shall be indemnified for loss and damage suffered by the Crown and in respect of any claims made against by reason of anything done by you or anyone on your behalf in the exercise or purported exercise of the rights granted herein.

Neither the statute not the letter seems particularly well drafted if the Crown's goal is to obtain a broad indemnity. In particular, the language of the statute seems to be confined to those cases in which the Crown suffers a loss as a result of a claim or demand made by a third party; i.e. it does not seem to cover losses that the Crown itself may suffer. The letter, on the other hand, tries to rectify this by adding the word "and" to the text but then omits the word "Crown" in the phrase "any claims made against [the Crown?] by reason." Note as well that the letter does not address the duration of the indemnity: Is it perpetual? Does it cease upon abandonment? What happens upon the transfer of the well licence?

82 Thus, the Schedule to the Mines and Minerals Administration Regulation, Alta. Reg. 262/97, refers to the fees charged for the issuance of agreements but is silent with respect to letters of consent.

83 The general provisions of the MMA and the regulations dealing with transfers would not seem to be relevant since these deal with assignment of agreements, and a s. 56 disposal right is not an "agreement" within the meaning of the Act since an "agreement" is something that gives rights in respect of a mineral.

84 We do not suggest the Alberta model for disposing of storage rights since in most cases (see infra note 105) gas storage rights are granted by means of a gas unit amendment to an underlying agreement.

85 Underground Hydrocarbons Storage Act, S.N.S. 2001, c. 37. However, while this Act creates a useful regulatory framework for storage rights (and it does not address disposal of non-hydrocarbons), it ducks the important question of ownership of storage rights. Indeed the Act seems to proceed on the basis that the Crown owns storage without explicitly vesting such rights in the Crown (s. 17 dealing with vesting orders seems to relate to property other than the storage right itself).

86 Exploration Licences, Production and Storage Leases for Oil and Gas in Ontario, Ont. Reg. 263/02, s. 16(1); these are regulations to the Mining Act, R.S.O. 1990, c. M-14.

87 Proposed Australian CO2 disposal legislation is discussed in IEA Legal Aspects -- Final Report, supra note 7 at 31-34.

88 The assumption here is that Alberta adopts the so-called English rule, pursuant to which storage rights are held by the owner of a severed mineral estate and not by the surface owner.

The case law and literature supporting this view include Little v. Western Transfer and Storage Company (1922), 69 D.L.R. 364 (Alta. S.C. (A.D.)) and N. J. Stewart, "The Reservation or Exception of Mines and Minerals" (1962) 40 Can. Bar Rev. 328. The position is different in many American states.

89 See the discussion in of the AEUB's requirements in Part V, below.

90 CAPL, Petroleum and Natural Gas Lease and Grant (1999), online: CAPL <www.landman.ca/store/ capl_publication_list.php>. It is possible that other lease forms will offer a more extensive right to dispose and store substances. One example is a Shell lease form which affords the lessee the right to "store ... and dispose of" substances. But in at least some lease forms this right is confined to "leased substances" and while such substances include gaseous substances "whether hydrocarbons or not" this term could hardly extend to CO2 from an industrial source.

91 Ibid. The definition of leased substances is not confined to hydrocarbons but includes all materials and substances produced in association with the hydrocarbons. This would certainly include any natural CO2 in the reservoir.

92 For relevant U.S. case law, see Crawford v. Hrabe, 44 P.3d 442 (Sup. Ct. 2002): where a lease is silent as to the right to use off lease water for injection purposes, such a right might be implied as part of the implied duties (in U.S. law) of a prudent operator, provided that injection is for EOR purposes; such an implication is not likely (since the prudent operator rationale does not hold) where the off lease water is being brought on to the lease for disposal purposes: Farragaut v. Massey, 612 So. 2d 325 (Miss. Sup. Ct. 1992).

93 Supra note 90.

94 The rationale for this is that injecting a substance that migrates under another's land is prima facie a trespass absent a licence or some other form of entitlement: see Kennedy et al., "Tort Liability in Waterflood Operations" (1966) 5 Alta. L. Rev. 52. There are perhaps counter arguments. One argument is a sort of reverse or negative rule of capture argument to the effect that since no liability attaches to a person who drains from another's land, no liability should attach where a substance migrates under another's land: Howard R. Williams & Charles J. Meyers, Williams & Meyers Oil and Gas Law, Prepared by Patrick H. Martin & Bruce M. Kramer (New York: Matthew Bender, 1998) vol. 1 at [s] 204.5. The Supreme Court of Ohio rejected the application of the negative rule of capture in the deep well injection case in Chance, supra note 70. Another argument would be to say that the adjacent owner is only protected by a liability rule and not a property rule and thus cannot claim an injunction against the injecting party and can only claim damages to the extent of any proven loss. For the classic article on the difference between the different forms of entitlement, see Guido Calabresi & A. Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1972) 85 Harv. L. Rev. 1089.

95 This scenario may be of lesser concern in relation to a disposal proposal rather than an EOR-driven unitization or a gas storage proposal (because of concerns that a non-party to the

arrangement will produce stored gas), but that may depend upon the relevant rules: property versus liability, etc.

96 The unproclaimed sections may be found in the Oil and Gas Conservation Amendment Act, R.S.A. 2000, c. 24 (Supp.).

97 Glen Acorn & Michael W.Ekelund, "An Overview of Alberta's Recent Legislation on Natural Gas Royalty Simplification and Gas Storage" (1995) 33 Alta. L. Rev. 342 at 363: "[the section] does not ... provide for procedures similar to those for compulsory unitization by which recalcitrant title owners can be forced into participation in a storage scheme. If a storage scheme is to be conducted under a unit agreement, all title owners will have to be parties; there can be no "windows" in the unit area where unit operation is converted to a storage scheme."

98 In Canada, see e.g. Ontario Energy Board Act, S.O. 1998, c. 15, s. 38 [OEB Act]. Relevant U.S. storage legislation is listed in the IOGCC Report, supra note 16, App. 5.

99 See e.g. Ontario, OEB Act, ibid., s. 39; but note as well recent discussion concluding that it may be unnecessary to regulate the availability and continue with utility-based pricing of storage if there is a sufficiently robust market: Ontario Energy Board (OEB), Natural Gas Electricity Interface Review, Decision with Reasons, OEB File No. EB-2005-0551 (7 November 2006), online: OEB <http:www.oeb.gov.on.ca/documents/cases/EB-2005-0551/Decision_ Orders/dec_reasons_071106.pdf>.

100 Borys v. Canadian Pacific Railway Co., [1953] A.C. 217 (P.C.) [Borys].

101 Supra note 72.

102 The case law and literature referred to in supra note 88, may confirm that the holder of a severed mineral estate owns the storage rights vis-à-vis the surface owner, but are not helpful in deciding between the competing claims of the owners of different severed estates.

103 See supra note 69. The legislation (now MMA, supra note 68, s. 57) is discussed in Acorn & Ekelund, supra note 97 at 360-64. See also Robert J. McKinnon, "The Interplay Between Production and Underground Storage Rights in Alberta" (1998) 36 Alta. L. Rev. 400. A contribution that pre-dates these amendments and is principally concerned with royalty calculation issues is Colin Q. Winter, "Albertan Gas Storage Reservoirs: A New Direction for Royalty Administration" (1993) 31 Alta. L. Rev. 107.

104 While much of the MMA deals exclusively with Crown minerals, s. 2(b) makes it plain that the Act also applies "where the context so permits or requires, to all wells, mines, quarries and minerals in Alberta" (MMA, ibid.).

105 Ibid., s. 57(1)(a). This makes it crystal clear (at least prospectively) that Alberta adheres to the so-called "English" rule: see supra note 88. In addition to the three points discussed in

the text, the amendment also creates a special rule (now MMA, supra note 68, s. 57(2)) dealing with storage caverns (i.e. salt caverns).

106 MMA, ibid., s. 1(1)(z).

107 Ibid., s. 57(1)(b).

108 Acorn & Ekelund, supra note 97 at 362-63.

109 Law of Property Act, R.S.A. 2000, c. L-7, s. 8. That said, a strict reading of this section would suggest that the presumption does not apply to a co-ownership created by statute; however, the idea that a right of survivorship might apply to a statutorily created co-ownership estate will surely be resisted by any court.

110 Job v. Potton (1875), 20 L.R. Eq. 84.

111 Osachuk v. Osachuk, [1971] 2 W.W.R. 481 (Man. C.A.); Law of Property Act, supra note 109, s. 17(2)(c). This of course begs the question of what a "just share" will be in the present context. In the usual case the just share will be referable to the percentage undivided interest of each party, but here the statute offers no guidance. Should we assume that the petroleum and gas owners each have a 50 percent interest?

112 Acorn & Ekelund, supra note 97 at 362.

113 The subsection actually suggests that storage rights may be acquired in one of three ways: (1) by way of a unit agreement; (2) by way of a contract under s. 9(a) of the Act; (3) or by way of an agreement issued with the authorization of the Lieutenant Governor in Council. For Crown unit agreements, see s. 102 of the MMA, which provides that an agreement may cover not only the recovery of minerals but also "the use of the subsurface reservoir for the purposes of storage of fluid mineral substances and the combining of interests in the storage rights in respect of that subsurface reservoir" (s. 102(1)(b)). The Crown's standard form storage agreement is available online: Alberta Energy <www.energy.gov.ab.ca/Tenure/forms/unitgasagreement.pdf >.

114 MMA, ibid., s. 1(1)(z).

115 Ibid., s. 1(1)(h).

116 This is in accord with Acorn & Ekelund, supra note 97 at 361, who note that the definition of fluid mineral substances "[a]t the very least" embraces "natural gas and ... residue gas, ethane, propane, butanes, pentanes plus, a natural gas liquids mix and carbon dioxide obtained from natural gas." The authors gloss over the "fluid" aspect of the concept.

117 See e.g. Acorn & Ekelund, ibid. at 361, who after referring to the definition of "storage rights," go on to say that "[i]t follows, or should follow, from the definition that storage is distinguishable from disposal because 'storage' connotes an eventual recovery from the place

of storage where 'disposal' does not." In support of this interpretation, one might refer to s. 39 of the Oil and Gas Conservation Act, R.S.A. 2000, c. O-6 [OGCA] (discussed further in Part V, below) which clearly distinguishes between a series of activities, including "storage" and "disposal."

118 See Alberta Energy, Information Letter 98-23: "Commercial Gas Storage in Alberta" (22 July 1998), online: Alberta Energy <in-form.energy.gov.ab.ca/il/Documents/Published/IL-1998 -23.pdf> stating that "[c]ommercial storage is considered market driven and is generally defined as storage that is not primarily related to optimization of recovery from its receiving reservoir" (at 1). In other words, "the storage does not involve ... enhanced hydrocarbon recovery through miscible floods; pressure maintenance; or gas cycling to maximize liquid extraction" (at 1). There are other reasons as well for thinking that this section is limited in scope: (1) it only deals with the situation as between the Crown and its lessees (it cannot deal with privately owned storage/disposal rights); and (2) it is, in any event, confined to the disposal of mineral substances which, as we have already suggested, does not include CO2, at least from an industrial source.

119 R.S.A. 2000, c. S-24 [SRA].

120 Ibid., s. 13. Section 12(2) of the Interpretation Act, R.S.A. 2000, c. I-8 confirms that section headers are not part of the enactment, but are inserted for convenience of reference only.

121 SRA, ibid., s. 13.

122 Ibid., s. 13(1)(c).

123 The transportation issues seem relatively straightforward. See the brief discussion earlier in Part II.B, above. The NEB's report on the Souris Valley Pipeline (MH-1-98, supra note 18) provides a good analysis of the issues posed by CO2 pipelines.

124 Supra note 117. In addition to s. 39, the well licensing sections are also relevant. Thus a well includes a well drilled "for injection to an underground formation" (s.1(1)(eee)) and s. 11 provides that no person shall drill a well without a licence, while the familiar s. 16 provides that no person shall apply for a licence unless that person has the relevant rights for the purpose for which the well is being drilled -- neatly combining the property and regulatory aspects of the problem and emphasizing that both are necessary conditions precedent to drilling.

125 Alta. Reg. 151/71 [OGCA Regulations].

126 OGCA, supra note 117, s. 39(1)(a).

127 Ibid., s. 39(1)(d).

128 Ibid., s. 39(2).

129 Ibid., s. 39(3).

130 Supra note 61. Under the EPEA, ss. 41, 44, any Director may refer a proposed activity for further assessment. Upon referral, the Environmental Impact Assessment (EIA) Director must require a proponent of a "mandatory activity" (s. 44(1)) to prepare an EIA but has somewhat more discretion with respect to other activities. Section 59(b) of the EPEA also contemplates categories of exempt activities which are prima facie (subject to an overriding ministerial discretion: s. 47) exempt from the application of the "environmental assessment process." The relevant regulation is the Environmental Assessment (Mandatory and Exempted Activities) Regulation, Alta. Reg. 111/93. That regulation exempts oil and gas wells but not injection or disposal wells. Mandatory activities that may have a CO2 capture process include oil sands upgrading and processing plants, thermal generating plants, and sour gas processing plants.

131 See also s. 14.200, which requires the continuous measurement of any substance injected by a well into an underground formation, as well as the abandonment provisions discussed in Part V.B, below.

132 Supra note 77.

133 (March 1994) [Directive 051].

134 Ibid., s. 2.4.

135 Ibid. at 1.

136 Directive 065, supra note 77, Table 1.

137 Ibid., Table 1, s. 2.1.3.2.

138 Ibid., s. 2.1.3.2. Given that the highest risk for leakage with CCS is abandoned wells, we suggest that licensees of abandoned wells be transferred to the CCS prior to the start of a CCS project. See discussion in Part VI.A.3, below.

139 Ibid., Table 1, s. 4.2.2.

140 R.S.A. 2000, c. E-10.

141 See infra note 145 for a discussion of the problems associated with using fixed radius areas with CCS.

142 See supra note 138 and accompanying text for a discussion regarding transfer of licences.

143 Directive 065, supra note 77, s. 2.1.2.

144 Ibid., s. 2.1.2.1.

145 The concept of Pool Order boundary may need to be changed for CCS in the event that the sequestration area is not equivalent to an existing pool. In the U.S., this same concept is called the "Area of Review," or "AOR," and is typically a fixed radius around a well designed to protect underground sources of drinking water. One study looked at the adequacy of the standard AOR in the Gulf Coast area of Texas in the context of the expected plume behaviour of CCS. The conclusion was that a fixed radius AOR in a CCS project is inadequate as the CO2 trap is typically elongated and includes a vertical dimension in addition to the two customary lateral dimensions: Jean-Philippe Nicot et al., "Area of Review: How large is large enough for carbon storage?" (2006) Bureau of Economic Geology, University of Texas at Austin, online: Bureau of Economic Geology <www.beg.utexas.edu/ environqlty/co2seq/pubs_presentations/UIC_Nicot.pdf>.

146 (16 November 2006) [Directive 060]. This is a new directive that came into effect on 31 January 2007. See also Directive 065, supra note 77, s. 2.1.3.3(B)(17).

147 Directive 060, ibid., s. 2.8: "If conservation is determined to be economic by any method using the economic decision tree process, the gas must be conserved." The conservation of CO2 in a CCS project may not be economic under the Directive.

148 Ibid., s. 8.5.

149 See e.g. ERCB, Decision 73-6: Ndp Exploration Canada Ltd. Application for Concurrent Production of Oil Accumulation and Gas Cap with Gas Cap Cycling, Bonnie Glen D-3A Pool.

150 See e.g. AEUB, Decision 2002-032: Case Resources Inc. Enhanced Oil Recovery Scheme, Oil Well Effluent Pipeline and Water Pipelines, Carrot Creek Field (26 March 2002). In this decision the waterflood involved the use of fresh water.

151 This section draws upon material in Bankes & Poschwatta, supra note 10.

152 Directive 065, supra note 77, s. 4.1.3.

153 In addition to the text of the Directives there has been some discussion of the AEUB's regulatory requirements in the technical literature. See in particular H.L. Longworth, G.C. Dunn & M. Semchuk, "Underground Disposal of Acid Gas in Alberta, Canada: Regulatory Concerns and Case Histories" in Proceedings: Gas Technology Symposium, 28 April - 1 May 1996, Calgary Alberta, Canada (Richardson, Texas: Society of Petroleum Engineers, 1996) 181.

154 Directive 065, supra note 77, s. 4.2.2.

155 Ibid.

156 Ibid., referring to Directive 051, supra note 133.

157 Ibid., under the heading of "Notification -- Equity and Safety."

158 AEUB, Decision 2001-43: Duke Energy Midstream Services Canada Ltd., Application to Modify an Existing Sour Gas Plant and Amend an Existing Acid Gas Disposal Scheme, Pouce Coupe Field (23 May 2001) [Decision 2001-43]. Section 5.1 of the decision refers to Duke's commitment to the effect that if acid gas injection problems could not be resolved within two hours Duke would reduce its inlet rates to one-third. In s. 5.3, the AEUB expressed some concerns about this but seemed content to monitor the situation.

159 AEUB, Decision 99-31: Northrock Resources, Application to Construct and Operate a Sour Gas Processing Facility, Associated Pipelines, Wellsite Facilities, and an Acid Gas Disposal Scheme, Pembina Field (23 December 1999) [Decision 99-31]. See also AEUB, Decision 2000-42: Burlington Resources Canada Energy Ltd., Application to Modify an Existing Sweet Gas Processing Plant to Include Sour Gas Processing, Associated Pipelines, Acid Gas Disposal Well, and Acid Gas Disposal Scheme, Pembina Area (23 June 2000), s. 5.3 [Decision 2000-42].

160 Decision 2001-43, supra note 158.

161 Ibid., s. 6.3.

162 Decision 2000-42, supra note 159, s. 5.3.

163 See Decision 99-31, supra note 159, s. 8.3.1, and noting in that case that the H S pipeline would be installed above grade in a utilidor with H2S detection equipment every 30 metres.

164 Bachu & Haug, supra note 29.

165 Alberta's scheme is analyzed in Nickie Vlavianos, "Liability for Suspension/Discontinuation, Abandonment and Reclamation in Alberta: An Update" (2002) 39 Alta. L. Rev. 864. See also her LL.M. thesis, "Liability for Well Abandonment, Reclamation, Release of Substances and Contaminated Sites in Alberta: Does the Polluter or Beneficiary Pay?" Faculty of Law, University of Calgary, online: Library and Archives Canada <www.collectionscanada.ca/obj/s4/f2/dsk2/ftp01/MQ55188. pdf>.

166 Memorandum of Understanding Between AEP and EUB on Suspension, Abandonment, Decontamination, and Surface Land Reclamation of Upstream Oil and Gas Facilities, reproduced in AEUB, Informational Letter IL 98-02: "Suspension, Abandonment, Decontamination and Surface Land Reclamation of Upstream Oil and Gas Facilities" (26 March 1998), online: ERCB <www.ercb.ca/docs/ils/ils/pdf/il98-02.PDF> [Memorandum of Understanding].

167 Supra note 61.

168 Supra note 166 at 3. This is consistent with the definition of abandonment in s. 1(1)(a) of the OGCA, supra note 117.

169 Memorandum of Understanding, ibid.

170 (7 December 2007) [Directive 020]; OGCA Regulations, supra note 125, s. 3.013.

171 Directive 020, ibid., s. 2.

172 Some examples of non-routine abandonment operations are: (i) the planned abandonment of a well that has a wellbore problem; (ii) a re-abandonment of a well; (iii) a planned surface abandonment of a well with pressure remaining at surface; (iv) a planned surface abandonment of a well where cement does not cover all non-saline groundwater zones; (v) the planned use of cement plugs in a well in a manner that does not meet the requirements stated in the guide; (vi) the planned use of a bridge plug inside the surface casing; (vii) the planned use of any type of plugging device that will be set more than 15 metres above the completion interval; and (viii) the planned removal of un-cemented casing from the well in a manner that does not meet the requirements stated in the Guide.

173 Directive 020, supra note 170, s. 2. The specific requirements are outlined in AEUB, Directive 059: Well Drilling and Completion Data Filing Requirements (24 July 2007).

174 Directive 020, ibid., s. 3.

175 Australian Guiding Principles, supra note 9, s. 5.4.

176 IPCC CCS Report, supra note 6 at 241-42.

177 But there are, of course, extensive monitoring requirements carried out for experimental projects such as the Weyburn project, supra note 22.

178 Australian Guiding Principles, supra note 9, s. 5.4.

179 IPCC CCS Report, supra note 6 at 241.

180 The most thorough survey of liability issues associated with CCS projects is Figueiredo, supra note 37. Figueiredo's thesis deals with two categories of liability issues: tortious liability issues and contractual liability issues. The thesis uses examples taken from natural gas storage, EOR, waste injection projects, and acid gas disposal (the latter in both the U.S. and Canada).

181 Australian Guiding Principles, supra note 9 at 42.

182 Phillips v. California Standard Co. (1960), 31 W.W.R. 331 (Alta. S.C. (A.D.)); Penn West Petroleum Ltd v. Koch Oil Co. (1994), 148 A.R. 196 (Q.B.); Kennedy et al., "Liability for Waterflood Operations," supra note 94.

183 (1868) L.R. 3 H.L. 330.

184 See e.g. Canada Oil and Gas Operations Act, R.S.C. 1985, c. O-7, s. 26 which imposes strict liability on the operator in favour of those who suffer losses as a result of a spill.

185 And for a recent discussion of these issues in an oil and gas context, see Freyberg v. Fletcher Challenge Oil and Gas Inc., 2007 ABQB 353, [2007] 10 W.W.R. 133.

186 Ownership of the waste stream will no doubt vary with the type of capture facility and injection operation. We can expect ownership issues to be precisely delineated where the CO2 has a commodity value (e.g. where it is being used in an EOR scheme). It may be less well delineated where it is a waste stream.

187 The Alberta statutory scheme for injection wells contemplates that a person who exercises an injection right "shall indemnify the Crown in right of Alberta for loss or damage suffered by the Crown in respect of any claims or demands made by reason of anything done by that person or any other person on that person's behalf in the exercise or purported exercise of that right" (MMA, supra note 68, s. 56(2)(a)).

188 OGCA, supra note 117, ss. 27, 30.

189 The Fund is established by Part 11 of the OGCA, ibid., ss. 68-77. The Orphan Fund levy is payable by licensees of wells and other facilities. The amount of the levy is prescribed by Part 16.5 of the OGCA Regulations, supra note 125, and the relevant Board policy document is AEUB, Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process (20 September 2005) [Directive 006].

190 OGCA, ibid., s. 29.

191 There are some exceptions to this general statement. For example, a licence for an abandoned well that is not included within the LLR Program may be transferred: Directive 006, supra note 189.

192 Special rules do apply to oilfield waste management facilities: see Part 16.6 of the OGCA Regulations, supra note 125. These special rules require payment of security which may be used for "the suspension, abandonment, site decontamination or surface land reclamation, or any combination of them, of an oilfield waste management facility" (s. 16.644). The security is payable before construction or operation of the facility commences. For an interesting AEUB decision that deals with the asset basis on which the security deposit is to be calculated, see AEUB, Decision 2006-082: 3R Sand Limited, Application to Amend Waste Approval WM068, Seven Persons Area (8 August 2006). The decision is of broader interest here insofar as the applicant was arguing that the AEUB's jurisdiction was confined to oilfield waste facilities and that part of the facilities should not be so classified insofar as the facility was able to sell cleaned frac sand as a commodity and that therefore the sand could not be a waste. The Board held that all of the facilities should be included in the calculation and commented more broadly that (at s. 5.3):

> It would be unworkable if the EUB's jurisdiction over an oilfield waste facility were engaged or disengaged depending on the commercial demand from time to time of the processed intermediate or end product. The uncertainty of what was being regulated and when the regulation was effective would undermine the purpose of the current waste management legislation.

There are some obvious analogies between this discussion and discussions as to the characterization of CO2: see Part III.C, above.

193 See e.g. James McLaren & James Fahey, "Key Legal and Regulatory Considerations for the Geosequestration of Carbon Dioxide in Australia" (2005) 24 ARELJ 45 at 71-72; David Keith & Malcolm Wilson, "Developing Recommendations for the Management of Geological Storage of CO2 in Canada," Prepared for Environment Canada, Saskatchewan Industry and Resources, Alberta Environment, and British Columbia Energy Mines (November 2002), online: University of Calgary <www.ucalgary.ca/ keith/papers/61.Keith.2002.CanadianCO 2Protocol.e.pdf>. Perhaps the most concrete evidence of adoption of this approach is draft state legislation in Texas and Illinois designed to offer the operator of the proposed FutureGen project an indemnity from post closure liabilities. For Illinois, see U.S., H.B. 1777, Clean Coal FutureGen for Illinois Act, 95th Gen. Assem., Reg. Sess., Ill., 2007.

194 Keith & Wilson, ibid. at 9.

195 Australian Guiding Principles, supra note 9 at 42-43. This proposal emerged from the consultation exercise carried out as part of developing the guiding principles but was accepted in the final document (at 44), although it is not entirely clear if the operator retains primary liability to the extent that it is (a) negligent and (b) still extant.

196 IOGCC Report, supra note 16 at 56.

197 Ibid. at 54-56.

198 This might raise a nice question as to which parties should contribute to a levy: Should it be those who provide the CO2 or the operator? Should there be a separate fund for CCS projects or a single fund? Suppose, for example, that in the same jurisdiction some CCS projects dispose into aquifers and some into depleted reservoirs as part of an EOR project. Under the Alberta Orphan Fund, the general rule is that all facilities, wells, and unreclaimed sites constitute a single class for the purposes of determining the levy, but there is at least one exception for this with respect to the Large Facility Management Program. This Program applies to designated large facilities such as sulphur recovery plants, stand-alone straddle plants, and in situ oil sands central processing facilities. See AEUB, Directive 024: Large Facility Liability Management Program (September 2005) and especially at s. 8.5, noting that "[t]he deemed liability of facilities within the LFP will be tracked separately from the deemed liability ... within the LLR Program. An orphan levy required under the LFP will be based solely on the deemed liability of facilities included within the LFP." This idea of a segregated fund may be a useful model for designing a CCS fund.

199 This would of course raise the question why it is necessary to provide a special regime for CO2 storage/disposal but not for acid gas disposal. Both have the same aim: long-term safe storage. However, an H2S release would likely prove far more hazardous.

200 OGCA, supra note 117, s. 29. See Part VI.A.2, above, for a complete discussion.

201 Supra note 189.

202 The Institutional Control Management Framework, Background Paper, Institutional Controls Working Group (August 2005), online: Government of Saskatchewan <www.ir.gov.sk.ca/Default.aspx?DN=4819,3630,3385,2936,D ocuments> is a key source that outlines the long-term management of decommissioned mine/mill properties located on Crown land.

203 The environmental assessment process requires the proponent of a proposed mine and/or mill to include a conceptual decommissioning and reclamation plan in its environmental impact statement: ibid. at 11.

204 Project approval is received pursuant to the Environmental Assessment Act, S.S. 1979-80, c. E-10.1. The Mineral Industry Environmental Protection Regulations, 1996, R.R.S. 2000, E-10.2, Reg. 7 [MIEP Regulations] governs operations, decommissioning, and reclamation.

205 MIEP Regulations, ibid., s. 18.

206 Environmental Management and Protection Act, 2002, S.S. 2002, c. E-10.21.

207 MIEP Regulations, supra note 204, s. 22.

208 Reclaimed Industrial Sites Act, S.S. 2006, c. R-4.21, s. 5(b).

209 Ibid., s. 6.

210 Ibid., s. 5(b).

211 Eric Cline, "Saskatchewan's New Framework for the Long-term Management of Former Uranium Mine Sites" (2006) Nuclear Energy Review 56, online: Touch Briefings <www.touchbriefings.com/pdf/2402/cline.pdf>.

212 See Anne Daniel, "Civil Liability Regimes as a Complement to Multilateral Environmental Agreements: Sound International Policy or False Comfort?" (2003) 12 R.E.C.I.E.L. 225; Jutta Brunée, "Of Sense and Sensibility: Reflections on International Liability Regimes as Tools for Environmental Protection" (2004) 53 I.C.L.Q. 351; Robin R. Churchill, "Facilitating (Transnational) Civil Liability Litigation for Environmental Damage by Means of Treaties: Progress, Problems, and Prospects" (2001) 12 Y.B. Int'l Env. L. 3.

213 Both conventions [Civil Liability Convention; Fund Convention] are conveniently collected and consolidated: see International Oil Pollution Compensation Funds (IOCP Funds), Liability for Oil Pollution Damage: Texts of the 1992 Conventions and the Supplementary Fund Protocol (2005 Edition) online: IOCP Funds <www.iopcfund.org/npdf/ Conventions%20English.pdf> [Liability for Oil Pollution Damage].

214 Civil Liability Convention, ibid., art. III(4) affords protection to these and other persons such as salvors.

215 Ibid., art. III(2).

216 Ibid., art. VII.

217 See Secretariat of the IOPC Funds, "The International Regime for Compensation for Oil Pollution Damage," Explanatory Note (December 2007), online: IOPC Funds <www.iopcfund.org/npdf/genE.pdf> at 2 [Secretariat Note].

218 Fund Convention, supra note 213, art. 10.

219 The current liability of the Fund is capped at about US$321 million per incident, including the sums paid by the ship owner (or insurer): Secretariat Note, supra note 217 at 3.

220 See in particular the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 in Liability for Oil Pollution Damage, supra note 213 at 53.

221 Prepared by the National Greenhouse Gas Inventories Programme, Simon Eggleston et al., eds., vol. 2 (Japan: Institute for Global Environmental Strategies, 2006), c. 5.

222 Ibid. at 5.20.

223 Ibid. at 5.20-5.21.

Tab “F”

The Law of Energy Underground

Understanding New Developments in Subsurface Production, Transmission, and Storage

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2

The Common Law of Subsurface Activity: General Principle and Current Problems

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I. Introduction

The common law principles governing property rights to the subsurface and to minerals are fundamental to an understanding of the law governing activities that use geological formations. Some more recent uses of subsurface resources pose novel legal questions; carbon capture and storage is a leading example. Apart from new legislation to make specific provision for such activities, one would expect the legal situation to be relatively stable. In fact, there has been uncertainty on two key points, the general principle that the rights of the owner of land extend vertically downwards, and the rights of mineral owners to use subsurface features for non-mineral purposes. This chapter addresses those points of uncertainty and contention. It argues that, on both matters, principle and authority tend towards a broader role than has been suggested by some writers for the rights of the land owner, and a lesser one for the mineral owner. It is possible to connect this to a distinct long-term trend away from the private ownership of minerals. This chapter pursues these themes, in the context of an overview of the law in common law countries other than the United States, the law of which has taken its own complex path, discussed in chapter 3.

Before we proceed, it may be useful to consider the nature of the inquiry that this chapter undertakes. Why does it emphasize private law and private property, with so little statute law, and so many old cases? The first point to make is that property law affects anything concerning land and its resources, both at the surface and below. All other things being equal, the owner of a parcel of land can sue in trespass or nuisance to repel incursions. He or she may not be able to do so if these underlying rules have been supplanted by legislation authorizing the government or a company to enter on land or use it in a way that would otherwise be trespass. Such legislation is common in many fields of natural resources law. However, the interesting thing is that new uses of the subsurface and new technologies may not be covered by that legislation. For example, a jurisdiction may not have yet passed laws for carbon capture and storage (geosequestration), deep-well disposal of waste, or enhanced geothermal systems. If no new laws have been passed for such

activities, then the existing laws will apply. There is no option here; a court must decide the disputes that parties bring to it, according to law, even if the results are unsatisfactory, without waiting for better laws to be passed. This chapter therefore considers the default rules.

Default rules are relevant where new activities are not covered by specific statutory rules, either because an activity is not covered at all, or only around the edges, where some aspects of the activity are provided for but others are not. Default rules are always relevant. As soon as legislation covers one new activity, another one emerges; the next big thing is always just around the corner, and the legislator is often struggling to catch up with it. Default rules are often tort and property law; they are the law that will apply to a land or resources dispute where there is no statute, no contract, and no trust to provide any other legal framework. Property law is also persistent; courts and legislatures are slow to interfere with property rights.[1] Nonetheless, default rules are not necessarily good law, and that is why legislatures often change them. This inquiry does not express any normative preference for default rules; what it seeks is accuracy in understanding them. Nor does it express a preference for common law over statute; what it seeks is to pursue the law whatever its character in the particular matter. In fact, more than in most branches of the law, natural resources law crosses and recrosses the boundary between public and private law. Nor should this inquiry be understood as a historical one. It considers old cases not as antiquities, but as parts of the current law.

II. Rights of ownership of land extend downwards

Little in the law of property and natural resources can be as familiar and as apparently well established as the principle that the rights of the owner of the surface of land extend upwards and downwards. The rights deriving from the ownership or possession of an estate in land are presumed to be capable of exercise on all parts of the land, including upwards and downwards, indefinitely. The Latin phrase that expresses this rule is *cujus est solum ejus est usque ad coelum et ad inferos*; to whom the soil belongs, to that person it belongs all the way to the sky and the depths. There are many exceptions, but this is the general rule. The House of Lords in 1860 declared in *Rowbotham v Wilson*[2] that prima facie the owner of the surface is entitled to the surface itself and everything below it down to the centre of the earth. The main New Zealand text on land law puts it:[3]

[1] 'Next to constitutional rights, property rights are the strongest interests recognised by our law': Hammond J in *White v Chandler* [2001] 1 NZLR 28 at [67].

[2] (1860) 8 HLC 348, 11 ER 463. Also W. Blackstone, 2 *Commentaries on the Laws of England* 18 (1769).

[3] G. W. Hinde, N.R. Campbell, and P. Twist, *Principles of Real Property Law* (2007) 6.002. Footnotes omitted, the main references being to *Corbett v Hill* (1870) LR 9 Eq 671 at 673 and *Wandsworth Board of Works v United Telephone Co Ltd* (1884) 13 QBD 904 at 915 (CA). Generally, see Y. Abramovitch, 'The Maxim "Cuius Est Solum Ejus Usque Ad Coelum" as Applied to Aviation'

The general rule at common law is that the owner of the soil is presumed to be 'the owner of everything up to the sky and down to the centre of the earth' according to the maxim *cujus est solum ejus est usque ad coelum et ad inferos.* Where a parcel of land was granted by the Crown or conveyed from one person to another, the grant or conveyance (unless some contrary indication was shown) passed everything which lay below the surface 'down to the centre of the earth' and everything above it 'up to the sky'.

In the High Court of Australia, Windeyer J in *Wade v NSW Rutile Mining Co*[4] refers to:

> . . . the elementary principle of the common law that a freeholder . . . is entitled to take from his land anything that is his. Except for those minerals which belong to the Crown, the soil and everything naturally contained therein is his.

A consequence of the general rule is that the person in possession of the surface can defend his or her possession of the subsurface. Interference with the landowner's right to possession underground is trespass, just as on the surface. Alderson B once said, 'There is no distinction between trespasses underground and upon the surface.'[5] Thus, in Canadian cases, where construction companies inserted anchor rods under the neighbouring property for temporary support; exemplary damages were awarded against them to deprive them of the profits of its trespass.[6] It was no defence that permission to enter was unreasonably withheld. In New Zealand, *Waugh v Attorney General*[7] dealt with a tunnel that the Navy had used for many years, connecting two of its yards on either side of a ridge. It went under some private properties and streets. There was a period during which the tunnel was unauthorized. The owners of one of the properties sued for damages. That the unauthorized tunnel under their land was a trespass went without argument; the only dispute was the damages. The correct measure was held to be the profit of the Navy gained from using the tunnel rather than using a longer route through the streets. Damages did not need to be measured by the loss suffered by the landowners.

That there are many exceptions to the general rule is often the real legal issue. Several kinds of exception are in the form of mineral rights. Gold and silver are recognized as prerogative minerals vested in the Crown or the state, as decided by the *Case of Mines.*[8] Mineral rights can be severed from the surface by conveyance as a matter of private law, capable of being held as a separate inheritance, in fee, for a term, or as a profit à prendre (i.e., a servitude). In many common law countries, mineral rights have been reserved or excepted to the state upon the grant or patent of land to an individual. Rights to minerals can also be declared by statute to be

(1962) 8 McGill LJ 247; and M. Taggart, *Private Property and Abuse of Rights in Victorian England* (2002) 120. Also 31 *Halsbury's Laws of England* (4th edn) Mines and Minerals, para 19: 'Prima facie "land" or "lands" includes everything on or under the surface.'

[4] (1969) 121 CLR 177 at 185.

[5] *Hunter v Gibbons* (1856) 1 H&N 459 at 465, 156 ER 1281 at 1284.

[6] *Austin v Rescon Construction (1984) Ltd* (1989) 57 DLR (4th) 591 (BC CA) and *Epstein v Cressey Development Corp* (1992) 89 DLR (4th) 32 (BC CA).

[7] [2006] 2 NZLR 812.

[8] (1567) 1 Plowd 310, 75 ER 472.

vested in the state, notwithstanding the terms of any grant, conveyance, or instrument of title. Other exceptions to the general rule of subsurface ownership are not for minerals. As a matter of conveyancing, it is possible to subdivide land into horizontal strata or parcels, whether above the surface or below. The same can be done by statute. Statutory powers can also be used to take particular attributes or characteristics such as pore space or storage capacity and vest them in the state. Alternatively, a statute can grant rights on an agency or company to enter and use the subsurface of land without taking a proprietary right. Finally, it should be noted that underground water, oil, and gas, being fluid and fugitive, are less susceptible to any principle of ownership in situ, and so present something of an exception to the general rule. The exceptions are numerous, but their existence is not in itself a contradiction of the general rule of subsurface ownership.

III. Doubt about the general principle

The validity or breadth of the general principle has been questioned from time to time. Adrian Bradbrook argued that the wide application of the *cuius est solum* doctrine may not be accurate, and suggested that resources at depth constitute a *res nullius* so that ownership will vest in the first person to reduce them into possession.[9] K. Gray and S. F. Gray adopted the argument.[10] Parallel arguments have been made in America.[11] One of the main authorities for the argument needs careful consideration.

Commissioner for Railways v Valuer-General[12] was an Australian case in the Privy Council, and in it Lord Wilberforce gave the maxim *cuius est solum* rough treatment. He called it a tag or brocard, and questioned its standing in Roman law, as well as English law. He said that its use is imprecise and mainly serviceable as dispensing with analysis:

> In none of these cases is there an authoritative pronouncement that 'land' means the whole of the space from the centre of the earth to the heavens: so sweeping, unscientific and unpractical a doctrine is unlikely to appeal to the common law mind.

But it is not necessary to pick a fight with Lord Wilberforce, fortunately, about what appeals to the common law mind, if one finds the *ratio decidendi* carefully. The Privy Council was responding to an argument for a very artificial interpretation of the term 'land' in the Valuation of Land Act 1916, that it meant *only* land that extended upwards and downwards indefinitely, and that if any other parcel lay vertically above or below, then it was not 'land' but a 'stratum' and to be valued

[9] A. J. Bradbrook, 'Ownership of Geothermal Resources' [1987] AMPLA Yearbook 353; A. J. Bradbrook, 'The Relevance of the Cujus Est Solum Doctrine to the Surface Landowner's Claim to Natural Resources Located Above and Beneath the Land' (1988) 11 Adel LR 462 at 473.

[10] K. Gray and S. Gray, *Elements of Land Law* (5th edn, 2009) 18. K. Gray, 'Property in Thin Air' [1991] CLJ 252 criticizes the maxim *cuius est solum*, but in relation to airspace, not minerals.

[11] J. G. Sprankling, 'Owning the Center of the Earth' (2008) 55 UCLA L Rev 979.

[12] [1974] AC 328 at 351 (PC NSW).

under separate rules. What was vital to appreciate[13] was that the application of this interpretation to the subject property (leased premises in a multi-level transport, hotel, retail, and commercial complex in Sydney) included in the valuation only 'strata' areas on each floor above or below which there intruded at some level one or the other of the exceptions from the demise. This left 12 'land islands' where there happened to be no space excepted from the lease at any level. This division was wholly artificial and produced units that were incapable of separate occupation or sale. The company's interpretation of the Act was for a complete dichotomy between 'strata' and land 'in the strict sense', *usque at coelum et ad inferos*—all the way to the heavens and to the depths. It is this strained interpretation of 'land' that the Privy Council was rejecting. Lord Wilberforce was demolishing the proposition that if land was to be valued, it was necessary that it extend all the way up and down. But that was wrong. Horizontal layers or spaces could be valued as land.

Lord Wilberforce may have been impatient with ancient authorities and talk about the centre of the earth, but his decision recognized that subsurface ownership was part of land ownership, and that the *cuius est solum* maxim expressed the principle of the indefinite extension downwards of a freehold. Immediately after his words about what would be unlikely to appeal to the common law mind, he said:

> At most the maxim is used as a statement, imprecise enough, of the extent of the rights, prima facie, of owners of land: Bowen L.J. was concerned with these rights when, in a case dealing with rights of support, he said 'Prima facie the owner of the land has everything under the sky down to the centre of the earth': *Pountney v Clayton* (1883) 11 QBD 820, 838.

Thus, *Commissioner for Railways v Valuer-General* readily accepted that a parcel of land could extend upwards and downwards from the surface, and that it could be defined by boundaries in three dimensions.

IV. Subsurface activity as trespass: *Bocardo v Star Energy*

A case of directional drilling allowed the Supreme Court of the United Kingdom to clarify the vitality of the principle in *Bocardo SA v Star Energy UK Onshore Ltd* in 2010.[14] Bocardo, a land owner, sued Star Energy, an oil company, for trespass for three wells made under its land by directional drilling. All oil and gas in its natural condition was vested in the Crown, by the Petroleum Act 1934 (meaning that Bocardo had no claim to the petroleum), and the oil company and its predecessor, Conoco, held a licence under the Act for petroleum exploration and production.

[13] And italicized as such by the judge, at 346. (The Act provided separately for the valuation of strata in order to deal with the conceptual impossibility of determining the unimproved value of premises in an underground complex that existed and could be occupied only because of excavations that were improvements.)

[14] [2011] 1 AC 380 (SC(E)), [2010] UKSC 35.

The apex or top point of the oil in this particular field lay below Bocardo's land. Conoco did not drill for the oil vertically, but used directional or deviated drilling from a nearby site to get to the right spot. Two wells were drilled for production and ended at points below Bocardo's land, and the third was for water injection, passing under the land and ending at a point beyond it. The closest that any of the wells came to the surface under Bocardo's land was 800 feet, and their lowest point was 2,900 feet. The company had not sought the land owner's permission. Bocardo's case was simply that the wells, with their casing and tubing, were a trespass; title to the land extended downwards and included everything in it, subject to exceptions such as for minerals.

Lord Hope addressed this basic question of liability in terms that the other four judges agreed with. He referred to the many cases, such as *Rowbotham v Wilson*,[15] where it was said that prima facie the owner of the surface is entitled to the surface itself and everything below it down to the centre of the earth. This principle is often put in terms of the maxim or brocard *cuius est solum eius est usque ad coelum et ad inferos*. The first recognized appearance of the maxim was in Accursius, a glossator of the thirteenth century.

The oil company's defence on liability was to build on *Bernstein v Skyviews & General Ltd*[16] as to airspace, and say that a surface owner should be held to own directly down beneath the boundaries of his or her land as far down as necessary for the use and enjoyment of the surface, buildings, and any minerals not excluded from his ownership. However, the Court found no English authority for such a limitation, and held that it was not helpful to make analogies between the rights of an owner of land with regard to the airspace above it and his or her rights with regard to the strata below the surface. There was some such authority from the United States, but the Court agreed with Sprankling[17] that there is also much authority against it, and that the debate remains alive in American law. The Court cited Smillie[18] that 'there appears to be no case in the Commonwealth where a plaintiff has failed on the basis that the area of subsoil invaded was so deep that the surface occupier's possessory rights did not extend that far'.

Lord Hope concluded that the maxim *cuius est solum* still has value in English law. The reasons for saying it has no place as to airspace are a good deal less compelling as to the subsurface. The approach in *Chance v BP Chemicals Inc*[19] that some kind of physical interference with the surface must be shown, would lead to much uncertainty. It overlooks the point that, at least as to corporeal elements, the question is essentially one of ownership. His interesting dictum was that '[a]s a general rule anything that can be touched or worked must be taken to belong to someone'. The law was 'that the owner of the surface is the owner of the strata beneath it, including the minerals that are to be found there, unless

[15] (1860) 8 HLC 348, 11 ER 463. [16] [1978] QB 479. [17] Sprankling (n 11) at 991.
[18] J. Smillie, ch 9 in S. Todd (ed), *The Law of Torts in New Zealand* (5th edn, 2009) 426.
[19] 670 NE 2d 985 (Ohio 1996). *Coastal Oil and Gas Corp v Garza Energy Trust* 268 SW3d 1 (Tex SC 2008), discussed in chapter 3, also takes a limited view of subsurface trespass.

there has been an alienation of them by a conveyance, at common law or by statute to someone else'.[20]

Lord Hope observed that over time the use of technology has penetrated deeper and deeper into the earth, and there must obviously be some stopping point as one reaches the point where pressure and temperature make the concept of ownership so absurd as to be not worth arguing about. But the fact that the strata in this case, between 800 and 2,900 feet deep, could be worked by wells pointed to the opposite conclusion.

As to possession—necessary for trespass—Lord Hope followed the principle that in the absence of evidence to the contrary, the holder of the paper title is deemed to be in possession, so that the owner was deemed to be in possession of the subsurface. The Crown licence gave no right to trespass. Thus, on liability, underground ownership, and underground trespass, the Court was unanimous. On the measure of damages, which took up much of the judgments, the Court was divided; the majority held that, as it was controlled by a background of the legislation, compulsory acquisition principles applied and prevented the surface owner from claiming value that came only from the oil company's development or 'scheme'.

Bocardo v Star Energy was therefore a strong reaffirmation of the general common law principle that the proprietorship and possession of the surface of land extend downwards. There is no depth limit after which geological formations are owned by the state, or are free of ownership as some kind of *res nullius*. There is no restriction on a claim to the ownership or possession of land below the surface that it must be required for the ordinary use and enjoyment of the surface, or that any invasion of it must have a physical effect on the surface. The principle cannot be avoided by dismissing the *cuius est solum* principle and ownership to the centre of the earth as a whimsy; it is better to say that the ownership of the surface extends downwards indefinitely.[21] Certainly, that ownership is subject to any reservations or exceptions made by statute, grant, or common law, chiefly as to minerals (and it does not generally include water or other fluids). The decision is also a sound basis for an understanding of the relationship between the subsurface rights of the proprietor of the surface and the proprietor of any mineral rights.

V. Property rights in minerals

The corollary of the basic principle of subsurface ownership is that minerals, except for gold and silver, are part of the land itself and belong prima facie to the owner of

[20] *Bocardo v Star Energy*, paras 26 and 27.

[21] 'Indefinitely' seems to cover the matter very well. 'Indefinite' conveys that there is no fixed depth limit, and avoids unnecessary pronouncements on Lord Hope's stopping point where ownership is not worth arguing about. 'Indefinitely' is used in some American legislation and is criticized by Sprankling (n 11) at 1002, but he seems to insist that indefinite means infinite and boundaries free from convergence. Equally there seems to be no logic in his argument that, because no court has dealt with a case more than two miles below the surface, ownership below that level is a blank slate.

the soil. More exactly, it is presumed that the land of which a proprietor of an estate has seisin includes the minerals in the land.[22] The *Case of Mines* is authority.[23] Again, it is desirable to note that there are many exceptions, or ways of rebutting the presumption. The consequence is that the word 'land' is interpreted to include minerals, such as in an agreement for the sale and purchase of land.[24]

It is common for the owner of land to sell land excepting the minerals, or to transfer the minerals separately. The transaction can be the conveyance of an estate in fee simple, or it can be for a leasehold estate, or for a profit à prendre; 'there may be a severance of the mines and minerals from ownership of the surface and . . . the mines and minerals so severed are a separate tenement capable of being held for the same estates as other hereditaments'.[25] Because such a transaction severs the mineral rights from the rest of the land, it is convenient to refer to the conveyance as an instrument of severance.

It is to the instrument of severance that one must look in order to determine what minerals and what rights are held by the mineral owner rather than the owner of the land generally. In the nineteenth century, a great number of cases came to the courts of England and Scotland about what was meant when an instrument of severance caused 'minerals' to come into separate ownership. What substances were included? Many of the cases concerned severances of minerals effected under the Land Clauses Acts and other legislation for railways, canals, and waterworks. They had resulted in different tests for determining the meaning of the term 'minerals'. Some cases had held that minerals included any substance that could be got from the ground for a profit.[26] *Glasgow Corp v Farie*[27] held that, instead, the proper test was what the words meant in the vernacular, but a period of uncertainty followed where the relationship between the two tests was unclear. In 1910, the House of Lords tackled the question, plainly intending to bring the uncertainty to an end and settle the law. In *North British Railway Co v Budhill Coal and Sandstone Co*,[28] the House held that the nature and extent of the mineral rights depend upon the interpretation of the original grant or instrument of severance, reading words as they were meant in the vernacular of the mining world, the commercial world, and landowners, at the time of the grant. The vernacular test supplanted the profit test. *North British Railway v Budhill* is also important for making it clear that reserved or excepted minerals could not be the ordinary rock or soil, otherwise the land owner would have bought, or have left to it, only a few feet of turf and mould.

[22] R. Megarry and H. W. R. Wade, *The Law of Real Property* (5th edn, 1984) 64. The 6th edition (C. Harpum, 2000) 3-052 says '[a]lthough prima facie a tenant in fee simple is entitled to all minerals under his land, this is subject to some exceptions'.

[23] (1567) 1 Plowd 310 at 336, 75 ER 472.

[24] *Hobbs v Esquimalt & Nanaimo Railway Co* (1899) 29 SCR 450 (BC).

[25] *Re Algoma Ore Properties Ltd and Smith* [1953] OR 634 at 640 (CA). (This seems more accurate than the expression of Kellock J in *Berkheiser v Berkheiser* [1957] SCR 387 at 395 (Sask) that two separate estates exist.) Early authorities are *Harris v Ryding* (1839) 5 M&W 60, 151 ER 27 (Exch Ch) and *Humphries v Brogden* (1850) 12 QB 739 (KB).

[26] *Hext v Gill* (1872) 7 LR Ch App 699 (HL Eng).

[27] (1888) 13 App Cas 657 (HL).

[28] [1910] AC 116 (HL Scot).

It is impossible to give an exhaustive definition of the meaning of the much debated words that are to be found in s.70. But I hope your Lordships may assist in their interpretation. In the first place, I think it is clear that by the words 'or other minerals' exceptional substances are designated, not the ordinary rock of the district. In the second place, I think that in deciding whether or not in a particular case exceptional substances are minerals the true test is that laid down by Lord Halsbury in *Lord Provost of Glasgow* v. *Farie*. The Court has to determine 'what these words meant in the vernacular of the mining world, the commercial world, and landowners' at the time when the purchase was effected, and whether the particular substance was so regarded as a mineral.[29]

North British Railway v Budhill made another important point by holding that the burden of proof that a particular substance was, at the date of the document to be construed, or is, at the present day, regarded as a mineral is upon those raising the contention.[30] This onus of proof is a reflection of the rule, or presumption, that the proprietor of the surface is proprietor of everything below. In subsequent cases, the House made it clear that as far as they were concerned, they had settled the law with this 'vernacular test'.[31] Much later, *Lonsdale v Attorney General*[32] reaffirmed the continuing primacy of *North British Railway v Budhill*, and demonstrates something of the complexities of the matter in relation to a claim for petroleum rights. 'Minerals' is not a term that has any ordinary primary meaning.

There is a natural tendency to assume that anything subterranean is in the hands of the owners of mineral rights, but a closer examination shows that this is not the case. Mineral rights are grants of minerals, as understood by the vernacular test; they are not grants of all strata, structures, and phenomena below the surface. Where mineral rights are owned separately, they do not necessarily entail property rights to all things subterranean. The leading case on this point is *Pountney v Clayton*,[33] where a railway company used statutory powers to purchase land (the surface) without the minerals. It was held that this allowed the mineral owner to continue working the minerals. Brett MR observed:

> That is a power of election given to railway companies by which they may, if they please, elect to purchase the mines as well as the rest of the land, or only that which is popularly called the surface land, but which really means a right to all the land except the mines.

Bowen LJ said:

> Primâ facie the owner of the land has everything under the sky down to the centre of the earth, but there are certain rights of support which follow as incident thereto when nothing is known about the origin of such rights.... What I have said is, I think, consistent with the language of Lord Wensleydale in *Rowbotham v Wilson*... 'prima facie the owner of the

[29] [1910] AC 116 (HL Scot) at 127 per Lord Loreburn LC.

[30] *North British Railway Co v Budhill* at 134.

[31] *Great Western Rwy v Carpalla United China Clay Co* [1910] AC 83 (HL Eng); *Caledonian Rwy Co v Glenboig Union Fireclay Co* [1911] AC 290 (HL Scot); and *Symington v Caledonian Rwy Co* [1912] AC 87 at 90 (HL Scot).

[32] [1982] 3 All ER 579 at 602, 609.

[33] (1883) 11 QBD 820. The quotation from Brett MR is at 833; that from Bowen LJ at 838–40.

surface is entitled to the surface itself and all below it ex jure naturae: and those who claim the property in the minerals below, or any interest in them, must do so by some grant from or conveyance by him, or it may be from the Crown' ... Now applying what I have said to the grant of the surface of the land, too much stress cannot be laid upon what has been pointed out by the Master of the Rolls, that the surface means not the mere plane surface but all the land except the mines.

This quotation is worthwhile not only because of its confirmation of the general rule, but also because of its affirmation that the ownership of land includes all the land and everything underneath, except the mines or minerals that have been specifically excepted. Even where mineral rights are owned separately, they do not necessarily entail rights to everything in the subsurface.

In *North British Railway v Budhill* itself, Lord Gorell said of the use of the definition of 'minerals' in the railway lands statute in issue that:[34]

The enumeration of certain specified matters tends to shew that its [the Act's] object was to except exceptional matters, and not to include in its scope those matters which are to be found everywhere in the construction of railways, such as clay, sand, gravel, and ordinary stone.

Again, the default position is that the subsurface is in the same proprietorship as the surface, subject only to particular grants of mines and minerals. An understanding of this point makes it possible to deal more readily with questions of the ownership of underground pore space or chambers.

VI. Mine workings and pore space

Some of the newer uses of the subsurface inject fluid into pore space. Pore space comprises the minute voids that exist between the solid grains of minerals that make up rock, filled with fluids such as water, oil, or gas. Carbon capture and storage, gas storage, and deep-well disposal all inject fluids into this pore space. Enhanced oil recovery injects fluids into pore space as part of the extraction of minerals, but other operations are not for the extraction of minerals. In many jurisdictions, the analysis of proprietary rights concerning carbon capture and storage has been couched as a debate between the ownership of pore space by the land owner or the mineral owner.[35] A line of English and Scottish cases (and one Canadian) is often cited in support of the mineral owner, but when read closely the cases do not produce that result, and can be reconciled with general common law principles of subsurface ownership.

The line begins with *Bowser v Maclean*[36] and its facts are typical of the line generally. A surface owner objected to the activities of a mineral owner, who had

[34] [1910] AC 116 (HL Scot) at 134.

[35] O. Anderson, 'Geologic CO_2 Sequestration: Who Owns the Pore Space?' (2009) 9 Wyoming L Rev 97.

[36] (1860) 2 DeG&J 415, 45 ER 682.

coal mine workings which he used not only to extract the coal below the estate of the surface owner, but also to run a tramway to carry coal from his workings under adjoining properties ('foreign coal') and to provide those other mines with drainage and ventilation. The Lord Chancellor held that the miner could not do this, because the land was copyhold, and the copyholder was in possession of the subsoil subject only to the minerals being in the lord of the manor and its lessee. However, the surface owner would have had no complaint in the case of freehold land leased with a reservation of minerals, or freehold land where the surface belongs to one owner and the subsoil, containing the minerals, belongs to another, as separate tenements divided from each other vertically.

Proud v Bates[37] applied *Bowser v Maclean* to an exception in a lease or demise of 'the mines and quarries lying and being within the same [land]... with free wayleave and passage to, from and along the same, on foot or on horseback, with all manner of carriages'. The judge construed this to mean that the mine owner could use the mine passages for the transport of foreign coal or for any other purpose. The mines were altogether out of the demise and, never having been demised or parted with, their owners were at liberty to use them as they may think fit. But the judge did not lay down any general rule; he construed the particular demise. *Proud v Bates* was followed in several subsequent cases. *Duke of Hamilton v Graham*[38] applied it in the House of Lords, to an exception of 'all and sundry the said coal and limestone within the bounds of the lands' which was held to give the owner an absolute right to do what he pleased with the mines, and might use them for any purpose beneficial to himself, not merely for the extraction of the coal and limestone in those lands. The mine owner's right was a right of property *in pleno dominio*, and not a right of servitude, like an easement. There was no distinction to be drawn between the law of England and Scotland on the matter. *Ramsay v Blair*,[39] *Ballacorkish Silver, Lead, and Copper Mining Co v Harrison*,[40] *Eardley v Granville*,[41] and *Batten Pooll v Kennedy*[42] all followed the same reasoning. In Canada, it was followed in *Little v Western Transfer and Storage Co*,[43] where a mineral lease recited that the lessor owned 'the coal and surface rights' and granted 'all the said coal'. The Court reasoned that this suggested and indicated a parity of title between the coal rights and the surface rights, so that the grant was one of the property, the stratum or strata, in which the coal was embedded.

Recent literature on carbon capture and storage has picked up on these cases in the form of the 'English Rule'. For example, Campbell, James, and Hutchings say that '[t]he English Rule states that the mineral interest holder is the owner of rights in the mineral formation separate and apart from its rights to remove the

[37] (1865) 34 LJ (Ch) 406. [38] (1871) LR 2 SC&Div 166. [39] (1876) 1 App Cas 701.
[40] LR 5 PC 49. [41] (1876) 3 ChD 826. [42] [1907] 1 Ch 256.
[43] [1922] 3 WWR 356 (Alta SC TD). See N. Bankes, J. Poschwatta, and E. M. Shier, 'The Legal Framework for Carbon Capture and Storage in Alberta' (2008) 45 Alberta L Rev 585 at 604, referring to the 'English' rule and the 'American' rule. Also see B. J. Barton, *Canadian Law of Mining* (1993) 35–6.

minerals'.[44] Plainly, that is not right. The usage started, it seems, in an early natural gas storage case, *Central Kentucky Natural Gas Co v Smallwood*,[45] which cited *Bowser v Maclean* and *Batten Pooll*, accurately, but distinguished them as dealing with solid minerals rather than fugitive ones, where the formation could be exhausted, but the mineral owner still retained the exclusive right to take all the minerals that find their way into the formation, whether by injection or otherwise. Stamm picked up the idea of an English rule that was the opposite of the American rule.[46] Lyndon, in a creditable short student piece, used the terms as well, but studied the British cases and *Little v Western Transfer and Storage*.[47] Stewart analysed the cases in a fine study that stands the test of time.[48] But then follows a group of writings that cite *Central Kentucky*, Stamm, and Lyndon, but not the British cases themselves, and fall into error.[49] Some other writers have sensibly expressed scepticism of the idea of an 'English Rule'.[50]

What, then, can properly be extracted from these old cases about the application of the common law to modern subsurface ownership questions? Certainly they affirmed that a mineral owner could control passageways for purposes unrelated to mining the minerals in the land. *Hamilton v Graham*, *Ramsay v Blair*, and *Ballacorkish Silver v Harrison* are clear authority and at the highest level; and if there were any rule, perhaps it would be called the Scottish rule. Many of the cases concerned grants of 'mines' and the reasoning in *Proud v Bates* was that mines must be something more than minerals, being where minerals came from. The term 'mines' was understood in a fairly literal manner, unlikely to have lent itself to an

[44] T. A. Campbell, R. A. James, and J. Hutchings, 'Carbon Capture and Storage Project Development: An Overview of Property Rights Acquisition, Permitting, and Operational Liability Issues' (2007) 38 Texas Envtl LJ 169 at 172.

[45] 252 SW 2d 866 (1952); overruled by *Texas American Energy Corp v Citizens Fidelity Bank & Trust Co*, 736 SW 2d 25 (Ky 1987).

[46] A. Stamm, 'Legal Problems in the Underground Storage of Natural Gas' (1957) 36 Texas L Rev 161.

[47] J. L. Lyndon 'Legal Aspects of Underground Storage of Natural Gas' (1961)1 Alberta L Rev 543.

[48] N. J. Stewart, 'The Reservation or Exception of Mines and Minerals' (1962) 40 Canadian Bar Rev 329. The only questions I would ask about his analysis of these cases are whether he overemphasizes the intention of the parties separately from the reading of the documents as objectively understood at the time they were written; and whether his distinction between deep minerals and shallow ones is well grounded.

[49] E. Wilson, 'Managing the Risks of Geologic Carbon Sequestration: A Regulatory and Legal Analysis' (2004) PhD thesis, Carnegie Mellon University, 68; B. Metz, O. Davidson, H. de Coninck, M. Loos, and L. Meyer, *Carbon Dioxide Capture and Storage* (Intergovernmental Panel on Climate Change Special Report, 2005) 256; M. de Figueiredo, *Property Interests and Liability of Geologic Carbon Dioxide Storage* (Special Report to MIT Carbon Sequestration Initiative, 2005) 6; E. Wilson and M. de Figueiredo, 'Geologic Carbon Dioxide Sequestration: An Analysis of Subsurface Property Law' (2006) 36 ELR 10114 at 10121; M. de Figueiredo, 'Liability of Carbon Dioxide Storage' (2007) PhD thesis, Massachusetts Institute of Technology, 287; Campbell, James, and Hutchings (n 44); Interstate Oil and Gas Compact Commission, *Storage of Carbon Dioxide in Geologic Structures: A Legal and Regulatory Guide for States and Provinces* (2007) 19; G. Severinsen, 'Towards an Effective Legal Framework for the Geo-Sequestration of Carbon Dioxide in New Zealand' (2010) 16 Canterbury L Rev 130.

[50] N. Bankes, J. Poschwatta, and E. Shier, 'The Legal Framework for Carbon Capture and Storage in Alberta' (2008) 45 Alta L Rev 585 at 604 and I. Duncan, S. Anderson, and J.-P. Nicot, 'Pore Space Ownership Issues for CO2 Sequestration in the US' (2009) 1 Energy Procedia 4427.

extrapolation to include pore space. The term 'minerals' did not give their owner any right to subsurface chambers and passages except for the working of the minerals granted. 'Minerals' does not comprise the space occupied or formerly occupied by mineral substances. *Eardley v Granville* is entirely clear on that, in a gloss on *Bowser v Maclean*, which was subsequently accepted in *Batten Pooll v Kennedy*.[51] Indeed, there appears to be no case where a grant of 'minerals' has given such rights. Further, every case depended on the construction of the instrument of severance, the grant or demise in question. The courts never erected a rule independent of the facts and the instruments. In some cases they thought the grant to be odd[52] (all the more reason for not finding a general rule), but they construed them as they were. In *Proud v Bates*, for example, it seems entirely clear that mine passageways were meant to be included. Finally, one may observe that virtually all the cases concerned coal, or coal and limestone or ironstone.[53] The context of stratified mineral deposits may have lent itself more readily than others to the conclusion that a grant of a stratum was intended. Extrapolation to oil and gas seems unjustified. In addition, the cases are all about the use of the spaces in a conventional mine; extrapolation to microscopic pore spaces also seems unjustified.

Some related points need to be made. First, the construction of mineral instruments of severance changed with *North British Railway v Budhill* in 1914, and arguably more attention would now be given than in the *Bowser v Maclean* cases to the understanding of the words used in an instrument at the time it was made. A more flexible interpretation might emerge. Second, two cases seem to stand outside the *Bowser v Maclean* line of cases while dealing with the same issues. The first is *Pountney v Clayton*, quoted earlier, dealing with the Railway Clauses Consolidation Act 1845, and emphasizing the primacy of the land owner's rights. The second is *Mitchell v Mosley*, where the defendant's predecessors in title granted a mining lease in 1740, a demise of 'all and every the mines, veins, seams and beds of coal, and cannel' which might be found in the land. Subsequent conveyances had to be interpreted. The following quotation is long but it is valuable for showing what seems to be a modern approach to the operation of the *cuius est solum* principle in relation to the conveyances in question.[54]

> It seems to me quite clear that they are conveyances of everything—conveyances of the land which include (unless you can find something to the contrary) everything down to the centre of the earth. The grant of the land includes the surface and all that is supra—houses, trees, and the like—*cujus est solum ejus est usque ad caelum*—and all that is infra, i.e., mines, earth, clay, &c. It is, however, within the right of the lessees to get the coal and cannel during the term. Subject to that right, so far as it can be and is exercised by the lessees under the lease, it is to my mind quite clear as a matter of construction of the conveyances that not merely the surface rights but the whole substratum to the centre of the earth, even including

[51] *Eardley v Granville* at 834. This is also the position taken in 20 Halsbury, *Laws of England* (1st edn) 504.

[52] *Proud v Bates; Hamilton v Graham.*

[53] *Ballacorkish Silver* concerned a grant of mines and minerals but the company name suggests that it was not a coal case.

[54] [1914] 1 Ch 438 (CA) at 450 per Cozens-Hardy MR.

the vacant spaces from which during the term the coal may have been worked out by the lessees—all that passed by the conveyance to the Mitchells.

The decision meant that rights under the mining lease did not provide consequent rights to control the use of the vacant spaces left. Rights to them, not being held under the mining lease, are held by default by the owner of the land. The 'surface' proprietor is likely to hold rights to subsurface features if those rights do not fall into the mineral rights that have been excepted or reserved. *Mitchell v Mosley* and *Pountney v Clayton* are not easy to reconcile with the old authorities, but they were both referred to in *Bocardo v Star Energy*, and may be more compatible with a modern approach to subsurface ownership.

This analysis may have been lengthy, but it may be enough to explode the fallacy of a general rule of common law in England or anywhere else that a mineral owner has control of a mineral formation for purposes other than extracting minerals. The decisions all concerned coal and, like solid substances, they all depended on the interpretation of the instrument of severance, and the most recent case is from 1922. The key characteristic of the common law is that the ownership of the land owner includes everything downwards indefinitely, subject only to those rights, such as to minerals, that are vested in someone else. The generality of the soil and rock is in the hands of the land owner.

In particular, the cases do not justify any proposition that pore space has a legal status different from any other attribute of subsurface material, or of land ownership generally. If I have two sheds on my land with a gap between them, that space does not have any special legal status. Nor should the spaces between individual grains of rock. 'Pore space' is generally owned and possessed by the land owner, not the mineral owner. What we see is therefore another aspect of a confined role for the mineral owner.

This is the default position, of course. It is often changed, in order to make possible activities that are in the public interest. For example, legislation in several jurisdictions has vested the right to control pore space or storage capacity in the Crown as part of law reform to make geosequestration possible.[55]

VII. The reservation of minerals to the state in common law countries

There is another way that the role of private mineral ownership is confined in many common law countries. Legislation and public land management practices have often prevented mineral rights from falling into private hands, and have secured their return to public ownership or control. The result is that in many common law

[55] Examples from three loyally named jurisdictions are: Queensland, Greenhouse Gas Storage Act 2009, s 27 (greenhouse gas storage reservoirs are property of the state); Victoria, Greenhouse Gas Geological Sequestration Act 2008, s 14 (Crown owns underground geological storage formations below the surface of any land); Alberta Mines and Minerals Act RSA 2000, c M-17, s 15.1 (pore space is vested in the Crown).

countries, public ownership of minerals is much more significant than private mineral ownership. This may not be immediately apparent if one applies the common law principle of minerals as part of the land, in much the same way as the accession theory of the civil law.

In the early days of British colonization and settlement of Canada, Australia, and New Zealand, the basic rule that minerals were part of the land applied to grants of land made by the state to settlers. But in the late 1800s and early 1900s, there spread through such countries a policy of reserving all minerals to the state.[56] In western Canada, for example, grants of land were made subject to a reservation of minerals from 1887. Similar reservations had spread to all states in Australia by 1909.[57] In the United Kingdom, petroleum and coal are vested in public ownership. This policy of reserving or reclaiming mineral rights has led to a pattern that is more akin to the dominial theory than the accession theory. The policy is little studied, but it has been of the first importance to the economic and legal history of those countries.

In fact, the trend away from private mineral ownership continues, both in the common law world and elsewhere.[58] One reason is that it is easier to pursue the principle of permanent sovereignty over natural resources, espoused by many countries,[59] with public ownership than private. A second reason is social equity, if private mineral ownership reflects an unfair allocation of rights to natural resources.[60] A third is efficiency.[61] Private mineral rights are often divided and subdivided, making it difficult to assemble land for exploration. The documents that govern them may be out-of-date in the arrangements they allow. Title is often poorly recorded. Different legislatures have therefore enacted measures to transfer mineral ownership to the state. In some jurisdictions, such as Victoria and Quebec, legislation has simply abolished private mineral rights and vested them in the state. Another route, which Australian legislatures have followed, is to leave private mineral rights in private hands, but to grant the state the power under the mining code to

[56] Barton (n 43) at 65; T. Daintith, *Finders Keepers? How the Law of Capture Shaped the World Oil Industry* (2010) 318, 429. The United States was less affected by this policy than other common law countries (see chapter 3), but the conservation movement identified with Roosevelt and Pinchot led to many withdrawals of lands and minerals from sale. The United States administers 635–40 million acres of land, mainly in the west, about 28% of the land in the United States: R. W. Gorte et al, *Federal Land Ownership and Data* (Congressional Research Service, 2012). In some 63 million acres minerals are owned by the federal government, but the surface is privately owned: J. D. Leshy, *The Mining Law: A Study in Perpetual Motion* (1987) 243.

[57] J. P. Hamilton, 'Expropriation and Compensation in Relation to Mining' [1985] AMPLA Yearbook 242.

[58] J. Otto and J. Cordes, *The Regulation of Mineral Enterprises: A Global Perspective on Economics, Law and Policy* (2002) 2–7.

[59] Permanent Sovereignty over Natural Resources, GA res 1803 (XVII), 17 UN GAOR Supp (No 17) at 15, UN Doc A/5217 (1962).

[60] The Mineral and Petroleum Resources Development Act 2002 of South Africa is an example; see chapter 5.

[61] The classical statement of such objections is the argument by Mirabeau in the National Assembly of France in 1791, against the accession system and in favour of the regalian system. Daintith (n 56) at 312; N. J. Campbell, 'Principles of Mineral Ownership in the Civil Law and Common Law Systems' (1957) 31 Tulane L Rev 303 at 305.

grant rights to those minerals to others.[62] The third policy approach, used in several provinces in Canada, is a mineral land tax levied on privately owned mineral lands in order to induce land owners without any particular intention to explore for minerals to surrender the rights to the Crown.[63]

VIII. Conclusion

This chapter has sought to provide a general introduction to property rights to the subsurface and to minerals in common law countries other than the United States, addressing current legal problems. One of the contentious problems is the principle that the rights of the owner of land extend downwards vertically, with no definite limit. That principle has been shown to continue to be an accurate statement of the law. The mere fact that something is underground does not make it the province of a mineral owner. Nor is it *res nullius*. The generality and simplicity of the principle is not overthrown by the existence of multiple well-known exceptions, such as prerogative minerals, statutory and private reservations of minerals, and different rules for fugacious substances, oil, gas, and water. The second contentious point is the rights of a mineral owner—where mineral ownership exists separately from surface ownership—to workings, pore space, or other features associated with minerals. It has been shown that, generally, the mineral owner has no claim on such features except for the exploration and extraction of the minerals. There is no English rule to the contrary. Neither of these conclusions on contentious matters is normative; they are not arguments for suitable legal arrangements for subsurface resources. They are analyses of the default rules, which often need to be changed. A clear understanding of common law principle and authority makes it easier to ascertain the reforms that are desirable from a policy point of view for gas storage, carbon capture and storage, and emerging subsurface technologies.

What emerges generally is a clearer legal position for the land owner, both as to subsurface activity and as to use of the subsurface for non-mineral purposes. The corollary is a more restricted legal position for private mineral rights than some might argue for.[64] When we look more broadly, we find other restrictions on private mineral rights (whether severed or owned by the surface owner) in favour of the state. There is a significant long-term trend away from private ownership of minerals.

[62] J. Forbes and A. Lang, *Australian Mining and Petroleum Laws* (2nd edn, 1987) 5. See *Wade v New South Wales Rutile Mining Co Pty Ltd* (1960) 121 CLR 177.

[63] Barton (n 43) at 72–4.

[64] Anderson (n 35) at 100 observes that the concept of the dominant mineral estate is often overstated.

Tab “G”

Hearing of Consumers' Gas Company Application
for a Regulation Designating Crowland Pool
10 a.m. September 17, 1964.

Some Notes made by Secretary for portion of proceeding observed

Present - Board - Messrs. Crozier, MacTavish and Allcut.

Watching Briefs

Humberstone Township	J. H. Wilhelm - Clerk P. E. Pietz - Reeve
Crowland Township	G. R. Pearson - Reeve, also Warden of Welland County.
Michigan Central Railway	Mr. Finlayson.

Opposing

James Babirad - landowners in south-west corner of Pool

Following opening of the proceedings by the Chairman, the various persons present were asked to state their positions with respect to the application and all of those respondents present stated that at this time theirs was a watching brief.

However, Mr. James Babirad stated he opposed the application. He wants to have his property excluded from the Pool and also objected to having so little time in which to decide whether he required Counsel, etc. He was also concerned about his Mortgagee.
He requested an adjournment of the hearing for 90 days.

In reply to this Mr. Zimmerman stated that this did not come as any surprise to Mr. Babirad since they have been negotiating with him for a period of about two years and it appeared that the amount of money offered was the problem. He said Mr.Babirad should have gone to his lawyer to find out what his rights are, the same things he is asking the Board about now.
Mr. Zimmerman also stated that to exclude Mr. Babirad's property would damage the one edge of the Pool and objected to an adjournment of the hearing.

Mr. Babirad then stated he was not opposed to the amount of compensation and that he had been approached about 5 times.
He also stated he was really waiting for a letter from the Energy Board explaining who was on the Board and what it was all about.
He said that the real estate value of his property has changed as there is now a house on the property and when he was first approached there was no building on the land.
He said his Mortgagee was dearly opposed to him leasing the land out and he Babirad expressed concern as to hwat position his Mortgagee would take.

Mr. Zimmerman replied that the Mortgagee had been served with the Notice the same time as Mr. Babirad and that apparently he is not opposed or he would be present at the hearing.

Board then recessed to consider the request for adjournment. The request was denied and the Board Chairman suggested to Mr. Babirad that he follow the proceedings and at the conclusion of the evidence then put forward his case. On a number of occasions when Mr. Babirad repeated his unfamiliarity with the Energy Board, etc. and indicated he felt that the Board should have explained to him before the date was fixed just what the procedure was. The Chairman explained several times the various steps following designation, what was being dealt with at these proceedings, Mr. Babirad's rights regarding compensation at time of injection and indicated to him that he should be concerned with the subsequent hearings rather than the designation.

Mr. Zimmerman proceeded with the case and called his first witness, Mr. Girling.
Affidavits of service were filed as exhibits indicating that all but 4 of those served had been served by personal service; and the 4 were served by registered mail.
It was also pointed out that 3 landowners could not be found and consequently were not served. They are Messrs Bell, who can't be found; Mr. Patterson, deceased, whose interests were assigned and ultimately sold to Dell-Burn Gas which is now a wholly-owned subsidiary of the Applicant; Mr. Weiss, who can't be found.

The next witness called was Mr. Brian Wallace, P. Eng. He gave evidence respecting the history, studies, wells, etc. of the Pool and explained a number of exhibits filed regarding participating and non-participating areas, how and why the boundaries of the Pool were determined, the geological data, pressure studies, logging data of wells, etc.
Mr. Wallace stated that at the beginning 5 wells would be operated and possibly 7 later and that gas would be stored in and removed from the 5 operating wells.
Relevant questions were asked by the Board.
In connection with the matter of commercially recoverable gas, it was stated that 38 wells lie within the area and 21 of these lie outside and that there is no commercially recoverable gas.
Of the remaining 17 wells, one of these is abandoned.
The Applicnat will pay $100 per well for each of the 5 operative wells and for the remaining 16 in the participating area, the price is what the people have been receiving previously.

The matter of leases was developed with Mr. Girling as the Applicant's witness. An exhibit was filed of a map showing in colour the areas under lease. The green area represents the land leased under the new standard lease form which provides for storage rights. Company filed, on loan, the actual leases (Ex. 13) and stated that parcels 51, 46 (Knapper), 82 (Humberstone Township), Michigan Central has no lease nor has the C.N.R. Parcel is the property belonging to Mr. Babirad.

Amount of compensation and royalty payments were explained and discussed. It was stated that the first year provided a bonus and was at the rate of $1 per acre with a minimum of $50 to be paid to the landowner (regardless of acreage) and each succeeding year

it was 50¢ per acre with a minimum of $10.

The Applicant submitted exhibits as to estimated cost, feasibility study and the witness, Mr. Carpenter explained these and answered Board questions related thereto.

The hearing continued till about 5 p.m. but the balance of the proceedings were not observed by the Secretary.

Tab “H”

2001 CarswellOnt 1564
Ontario Court of Appeal

Perry, Farley & Onyschuk v. Outerbridge Management Ltd.

2001 CarswellOnt 1564, [2001] O.J. No. 1698, 104 A.C.W.S. (3d) 1130, 146 O.A.C. 144, 199 D.L.R. (4th) 279, 26 C.B.R. (4th) 64, 2 P.P.S.A.C. (3d) 242, 54 O.R. (3d) 131, 7 C.P.C. (5th) 300

Perry, Farley & Onyschuk (Plaintiff / Appellant) and Outerbridge Management Limited and Ian W. Outerbridge (Defendants / Respondents)

Abella, Charron, Sharpe J.A.

Heard: March 19, 2001
Judgment: May 7, 2001 *
Docket: CA C34942

Proceedings: reversing (2000), 20 C.B.R. (4th) 129 (Ont. S.C.J.); additional reasons at (2000), 20 C.B.R. (4th) 129 (Ont. S.C.J.); further additional reasons at (2000), 20 C.B.R. (4th) 141 (Ont. S.C.J.); and affirming on other grounds (November 21, 2000), Doc. 21435/91U (Ont. S.C.J.); further additional reasons to (2000), 20 C.B.R. (4th) 141 (Ont. S.C.J.); additional reasons to (2000), 20 C.B.R. (4th) 129 (Ont. S.C.J.)

Counsel: *Kevin McElcheran*, *Lisa Corne*, for Appellant
Miles O'Reilly, *Q.C.*, *Carene Smith*, *Q.C.*, for Respondents on appeal
Cynthia Sefton, for Respondents on cross-appeal

Subject: Insolvency; Civil Practice and Procedure; Corporate and Commercial; Contracts; Torts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Limitation of actions --- Actions in contract or debt — Statutory limitation periods — General principles

Certain assets of lawyer's practice were held by management firm — Management firm sold assets to financing company and leased them back for three years — Law firm and lawyer entered partnership — Law firm guaranteed management firm's line of credit with bank — After completion of lease, and without law firm's knowledge, management firm exercised option to repurchase assets and transferred them to company owned by lawyer's wife — Law firm paid guarantee to satisfy management firm's indebtedness to bank — Management firm made assignment into bankruptcy and law firm proved its claim as creditor — When assets were destroyed in fire, lawyer brought action for damages without knowledge of law firm or trustee in bankruptcy — Law firm brought action to set aside transfer of assets and to recover any proceeds — Law firm claimed transfer was void as fraudulent conveyance and brought motion for summary judgment — Lawyer and management firm brought cross-motion for summary judgment on grounds that action was barred by Limitations Act or in alternative was barred by laches — Cross-motion was granted and law firm's action was dismissed — Motions judge found claim under Fraudulent Conveyances Act was barred by six-year limitation period prescribed by s. 45(1)(g) of Limitations Act either as action on "simple contract" or as "action on the case" — Motions judge found in alternative that action was barred by laches — Law firm appealed — Appeal allowed — Since action attempted to set aside and nullify contract and did not assert rights acquired by contract, claim was not grounded upon simple contract — Statue was source of legal right asserted, not contract — Claim did not qualify as action upon the case — Fraudulent Conveyances Act gives neither right of damages nor compensation for loss — Claim did not fall under under s. 45(1)(b) of Limitations Act and law firm

was not barred from bringing action — Fraudulent Conveyances Act, R.S.O. 1990, c. F.29 — Limitations Act, R.S.O. 1990, c. L.15, s. 45(1)(b), (g).

Fraud and misrepresentation --- Fraudulent conveyances — Practice and procedure — Laches and delay

Certain assets of lawyer's practice were held by management firm — Management firm sold assets to financing company and leased them back for three years — Law firm and lawyer entered partnership — Law firm guaranteed management firm's line of credit with bank — After completion of lease, and without law firm's knowledge, management firm exercised option to repurchase assets and transferred them to company owned by lawyer's wife — Law firm paid guarantee to satisfy management firm's indebtedness to bank — Management firm made assignment into bankruptcy and law firm proved its claim as creditor — When assets were destroyed in fire, lawyer brought action for damages without knowledge of law firm or trustee in bankruptcy — Law firm brought action to set aside transfer of assets and to recover any proceeds — Law firm claimed transfer was void as fraudulent conveyance and brought motion for summary judgment — Lawyer and management firm brought cross-motion for summary judgment on grounds that action was barred by Limitations Act or in alternative was barred by laches — Cross-motion was granted and law firm's action was dismissed — Motions judge found claim under Fraudulent Conveyances Act was barred by six-year limitation period prescribed by s. 45(1)(g) of Limitations Act either as action on "simple contract" or as "action on the case" — Motions judge found in alternative that action was barred by laches — Law firm appealed — Appeal allowed — Fact that claim for relief arose under statute did not preclude court from considering equitable relief — Triable issue existed whether it would be inequitable for law firm's claim to proceed — Motions judge failed to specify nature of prejudice suffered by insurer that justified barring claim — Fraudulent Conveyances Act, R.S.O. 1990, c. F.29 — Limitations Act, R.S.O. 1990, c. L.15, s. 45(1)(b), (g).

Practice --- Costs — Effect of success of proceedings — Successful party deprived of costs — Grounds — General

Certain assets of lawyer's practice were held by management firm — Management firm sold assets to financing company and leased them back for three years — Law firm and lawyer entered partnership — Law firm guaranteed management firm's line of credit with bank — After completion of lease, and without law firm's knowledge, management firm exercised option to repurchase assets and transferred them to company owned by lawyer's wife — Law firm paid guarantee to satisfy management firm's indebtedness to bank — Management firm made assignment into bankruptcy and law firm proved its claim as creditor — When assets were destroyed in fire, lawyer brought action for damages without knowledge of law firm or trustee in bankruptcy — Law firm brought action to set aside transfer of assets and to recover any proceeds — Law firm claimed transfer was void as fraudulent conveyance and brought motion for summary judgment — Lawyer and management firm brought cross-motion for summary judgment on grounds that action was barred by Limitations Act or in alternative was barred by laches — Cross-motion was granted and law firm's action was dismissed — Wife's company sought costs on party and party scale — Wife's company was not awarded costs — Motions judge found law firm paid substantial amount to honour their guarantee of management firm's indebtedness — Motions judge found wife's company received solicitor and client costs in fire action and was indemnified in that action — Law firm appealed and company cross-appealed — Appeal allowed and cross-appeal dismissed — Since motions judged erred in awarding lawyer and wife's company summary judgment, cross-appeal as to costs was moot.

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Cases considered by *Sharpe J.A.*:

A.M. Smith & Co. v. R. (1981), [1982] 1 F.C. 153, 20 C.P.C. 126, 36 N.R. 206, 120 D.L.R. (3d) 345 (Fed. C.A.) — considered

Abco Asbestos Co., Re (1981), 40 C.B.R. (N.S.) 250 (B.C. S.C.) — considered

Chippewas of Sarnia Band v. Canada (Attorney General) (2000), 51 O.R. (3d) 641, 195 D.L.R. (4th) 135, 139 O.A.C. 201, 41 R.P.R. (3d) 1 (Ont. C.A.) — referred to

Lindsay Petroleum Co. v. Hurd (1874), L.R. 5 P.C. 221, 22 W.R. 492 (Ontario P.C.) — considered

M. (K.) v. M. (H.), 142 N.R. 321, *(*sub nom. *M. c. M.)* [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289, 57 O.A.C. 321, 14 C.C.L.T. (2d) 1 (S.C.C.) — considered

Manitoba Fisheries Ltd. v. R. (1978), [1979] 1 S.C.R. 101, [1978] 6 W.W.R. 496, 88 D.L.R. (3d) 462, *(*sub nom. *Manitoba Fisheries v. Government of Canada)* 23 N.R. 159 (S.C.C.) — considered

Peel (Regional Municipality) v. Canada (1986), 7 F.T.R. 213, [1987] 3 F.C. 103 (Fed. T.D.) — considered

Peel (Regional Municipality) v. Canada (1988), 41 M.P.L.R. 113, 21 F.T.R. 240n, 89 N.R. 308, 55 D.L.R. (4th) 618, [1989] 2 F.C. 562 (Fed. C.A.) — referred to

Peel (Regional Municipality) v. Canada, *(*sub nom. *Peel (Regional Municipality) v. Ontario)* 144 N.R. 1, 12 M.P.L.R. (2d) 229, 98 D.L.R. (4th) 140, [1992] 3 S.C.R. 762, 59 O.A.C. 81, 55 F.T.R. 277 (note) (S.C.C.) — referred to

Robert Simpson Co. v. Foundation Co. of Canada (1982), 36 O.R. (2d) 97, 20 C.C.L.T. 179, 26 C.P.C. 51, 134 D.L.R. (3d) 458 (Ont. C.A.) — considered

Thomson v. Lord Clanmorris, [1900] 1 Ch. 718, [1900-1903] All E.R. Rep. 804, 69 L.J. Ch. 337, 82 L.T. 277 (Eng. C.A.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 3 — referred to

s. 38 — referred to

Directors Liability Act, 1890, (U.K.), 53 & 54 Vict., c. 64
Generally — referred to

s. 3 — referred to

Fraudulent Conveyances Act, R.S.O. 1990, c. F.29
Generally — considered

Fraudulent Conveyances Act, 1571, (U.K.), 13 Eliz. 1, c. 5
s. 2 — considered

Limitations Act, R.S.O. 1990, c. L.15
Generally — referred to

s. 45(1)(b) — considered

s. 45(1)(g) — considered

Personal Property Security Act, R.S.O. 1990, c. P.10
Generally — pursuant to

Statute of Limitations, R.S.N.S. 1967, c. 168
s. 2 — referred to

APPEAL by law firm from judgment reported at 2000 CarswellOnt 2787, 20 C.B.R. (4th) 129, 2 P.P.S.A.C. (3d) 78 (Ont. S.C.J.)), granting motion for summary judgment; CROSS-APPEAL by lawyer and company from judgment reported at 2000 CarswellOnt 4272 (Ont. S.C.J.) with respect to costs.

The judgment of the court was delivered by *Sharpe J.A.*:

1 This appeal raises the issue of what limitation period, if any, applies to an action brought by a creditor pursuant to the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29 to attack a conveyance of assets as void.

FACTS

2 The appellant claims declaratory and related relief in an action brought pursuant to the *Fraudulent Conveyances Act*. The appellant alleges that the transfer of certain assets to the respondent Outerbridge Management Limited (OML) is void as a fraudulent conveyance and that, as a creditor of the transferor, it is entitled to immediate possession of the assets or the proceeds from the assets.

3 The appellant moved for summary judgment on its claim under the *Fraudulent Conveyances Act* and was met with the respondents' cross-motion for summary judgment, asking that the appellant's claim be dismissed on the ground that it was barred by the *Limitations Act*, R.S.O. 1990, c. L.15. The motions court judge accepted the respondents' limitations argument and gave summary judgment, dismissing the appellant's action.

4 In view of the narrow issues before this court, it is unnecessary to review the facts in detail. What follows appear to be the essential and undisputed facts.

5 The appellant carried on the practice of law in partnership with the respondent Ian W. Outerbridge during 1987 and 1988. Lexicom Systems Limited ("Lexicom") was the management firm for the Outerbridge practice.

6 Before the partnership was formed, in July 1985, Lexicom sold furniture, fixtures, equipment, and antiques used by Outerbridge in connection with his law practice (the "assets"), appraised at over $400,000, to First City Capital Limited ("First City") for a purchase price of $300,000. At the same time, First City leased the assets back to Lexicom, and granted Lexicom an option to repurchase the assets for $60,000 at the expiry of the three-year lease. This financing transaction provided Lexicom with working capital. In view of the value of the assets, the option clearly had a value in excess of the $60,000 required to redeem the assets.

7 In connection with its partnership with Outerbridge, the appellant guaranteed Lexicom's line of credit with the Toronto-Dominion Bank. On June 28, 1988, at a time when it owed the Toronto-Dominion Bank approximately $360,000 Lexicom advised First City that it was exercising the option and that title to the assets should be transferred to the respondent OML. OML is a company owned by Outerbridge's wife, and is related to both Lexicom and Outerbridge. On July 4, 1988, the assets were transferred to OML by First City, apparently for the stated purchase price of $64,815 equal to the option price plus tax and transfer fees. This transfer was not disclosed to the appellant.

8 The appellant was called upon to pay more than $350,000 pursuant to its guarantee to satisfy Lexicom's indebtedness to the Toronto-Dominion Bank. On December 1, 1989, Lexicom made an assignment for the general benefit of its creditors pursuant to the provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, (the "*BIA*"). The appellant proved its claim as a creditor of Lexicom for the amount it had paid to the Toronto-Dominion Bank on the guarantee.

9 Despite the transfer of the assets to OML, they remained in Lexicom's possession until Lexicom's bankruptcy. In the fall of 1990, some of the assets were destroyed in a fire in a warehouse where they were being stored. Lexicom's bankruptcy Trustee's inquiries revealed that there was no insurance to cover the loss and, in the absence of insurance or any other apparent source of recovery, the Trustee took no steps to challenge the transfer of the assets by Lexicom to OML.

10 Unbeknownst to the Trustee and the appellant, in May 1991 Outerbridge commenced an action for damages for the loss and destruction of the assets. The defendant in that action had been working on a vehicle stored near the assets. Although coverage was denied, the named defendant was eventually found to be covered under an insurance policy.

11 It was not until February 1996 that the Trustee and the appellant learned of the Outerbridge action. Inquiries revealed that the action was being vigorously defended. No steps were taken, either by the appellant or by the Trustee, with respect either to the action or to the 1988 transfer to OML. However, in July 1999, a tentative settlement of Outerbridge's claim was reached and, as it appeared there could be exigible proceeds, the appellant asked the Trustee to commence proceedings to attack the 1988 transfer. The Trustee refused, as there were no funds available in Lexicom's estate to commence the proceedings.

12 The appellant obtained an order pursuant to s. 38 of the *BIA*, authorizing it to commence proceedings in its own name. This action was commenced on February 22, 2000, claiming a declaration that the 1988 transfer was void as a fraudulent conveyance, a declaration that the respondents held the assets or the proceeds therefrom on trust for the appellant, and payment of $500,000 as compensation for the loss of the assets. Outerbridge subsequently was awarded damages in excess of $500,000 in the action for the fire loss.

PROCEEDINGS BEFORE THE MOTIONS COURT JUDGE

13 As indicated earlier, the appellant moved for summary judgment on its claim under the *Fraudulent Conveyances Act*. The appellant also moved to amend the statement of claim to include a claim for priority under the *Personal Property Security Act*, R.S.O. 1990, c. P.10 and for summary judgment on the claim as amended. The respondent brought a cross-motion to dismiss the claim on the grounds that it was barred by the *Limitations Act*, or in the alternative, that it was barred by laches.

14 The primary focus of the proceedings before the motions court judge was the limitations argument. She found that the claim under the *Fraudulent Conveyances Act* was barred by the six-year limitation period prescribed by s. 45(1)(g) of the *Limitations Act*, either as an action on a "simple contract" or as an "action on the case". She also concluded that even if the action were not barred by the statute, it would be barred by laches. She noted, however, that "[t]here is no question in my mind that, had [the appellant's] claims not been barred by the operation of the *Limitations Act*, [the appellant] would have been able to make out [its] claims under both the [*Fraudulent Conveyances Act*] and the [*Personal Property Security Act*]".

ISSUES

15 The appellant submits before this court that the motions court judge erred in finding that the claim is barred, either under the *Limitations Act* or by the doctrine of laches. The appellant further submits that it is entitled to summary judgment. The respondents seek leave to appeal the motions court judge's refusal to award them the costs of the motion. The issues may be summarized as follows:

1. Did the motions court judge err in finding that the claim pursuant to the *Fraudulent Conveyances Act* is barred by s. 45(1)(b) of the *Limitations Act*?

2. Did the motions court judge err in finding that the claim pursuant to the *Fraudulent Conveyances Act* is barred by laches?

3. If the claim is not barred, is the appellant entitled to summary judgment?

4. Did the motions court judge err in refusing to award the respondents costs?

ANALYSIS

Issue 1. Did the motions court judge err in finding that the claim pursuant to the Fraudulent Conveyances Act is barred by s. 45(1)(g) of the Limitations Act?

16 There is no limitation period prescribed by the *Fraudulent Conveyances Act*. The relevant provisions of the *Limitations Act* are the following:

> 45(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned,
>
> . . .
>
> (b) an action upon a bond, or other speciality . . .
>
> . . .
>
> within twenty years after the cause of action arose,
>
> . . .
>
> (g) an action for trespass to goods or land, simple contract or debt grounded upon any lending or contract without speciality, debt for arrears of rent, detinue, replevin or upon the case other than for slander,
>
> within six years after the cause of action arose,
>
> . . .

17 Ontario's *Limitations Act* does not apply to all civil actions, only to those that are specifically enumerated. As held by the Supreme Court of Canada in *M. (K.) v. M. (H.)* (1992), 96 D.L.R. (4th) 289 (S.C.C.) at p. 329, the *Act* "applies only to a closed list of enumerated causes of action". It follows that unless a claim for relief under the *Fraudulent Conveyances Act* can be identified as included within one of the causes of action enumerated in the *Limitations Act*, the appellant's action is not subject to any statutory limitation period.

18 If the appellant's action is to be caught by the *Act*, there are three possibilities: (1) an action on "a simple contract"; (2) an action "upon the case"; or (3) an action upon "a specialty". If the cause of action falls within either of the first two possibilities, it is barred as having been brought more than six years after it arose. If it falls within the third category, it is not barred. A fourth possibility is that the Act simply does not apply.

19 While there appears to be no decided case precisely on point, to the extent there is any authority dealing with the issue, it supports a finding that there is no limitation period. Bennett, *Creditors' and Debtors' Rights and Remedies*, 4th ed. (Scarborough: Carswell, 1994) at p. 124 states that there is no limitation period governing claims under the *Fraudulent Conveyances Act*. The very point at issue here did arise in *Re Abco Asbestos Co.* (1981), 40 C.B.R. (N.S.) 250 (B.C. S.C.) where it was held that the claim was caught by the residual, catch-all provision in the British Columbia limitations statute, governing claims not specifically provided for. As I have noted, there is no similar provision in Ontario.

(a) Action on "a simple contract"

20 I respectfully disagree with the conclusion of the motions court judge that the claim could be considered as being grounded upon "a simple contract". While the claim for relief under the *Fraudulent Conveyances Act* relates to a contract, it is an action to set aside and nullify the contract, the very opposite of asserting rights acquired by way of contract. The source of the legal right asserted is not the contract, but the statute. The object of the action is to void and defeat the rights and obligations the contract purports to confer.

(b) Action "upon the case"

21 It is perhaps trite to observe that this appeal provides twenty-first century Canadian proof of the truth of Maitland's famous observation in his classic work, *The Forms of Action at Common Law*, (Cambridge: Cambridge University Press, 1909) at p. 296: "The forms of action we have buried, but they still rule us from their graves." The archaic language and pigeon-hole approach of the *Limitations Act* replicates the long outmoded categories of the common law forms of action and drives back to obscure recesses of English legal history.

22 The action on the case was a derivation from the action of trespass. Maitland explained at p. 359 that all personal actions branched out from trespass. The writ of trespass contained the words "*vi et armis contra pacem*". The need to allege violence necessarily limited the scope of trespass, and gradually the clerks of Chancery allowed modified versions of the writ that omitted the words "*vi et armis*". In these instances, the plaintiff was said to bring an action "upon his case" or "upon the special case", the particular facts of which were set out in the writ. By the end of the fourteenth century, a new and very flexible form of action had evolved. It became what Maitland described at p. 361 as "a sort of general residuary action; much particularly, of the modern law of negligence developed within it." Blackstone, *Commentaries on the Laws of England*, vol. 3 (Philadelphia: Rees Welsh & Co., 1897), at p. 122, described the action on the case as "a universal remedy, given for all personal wrongs and injuries without force; so called because the plaintiff's whole case or cause of complaint is set forth at length in the original writ." The writ of trespass was available for immediate injury to person or property "but where there is no act done, but only a culpable omission, or where the act is not immediately injurious, but only by *consequence* and collaterally; there no action of trespass *vi et armis* will lie, but an action on the special case, for the damages consequent on such omission or act." Bacon's *Abridgment*, 7 th ed. (London: J. & W.T. Clarke Co., 1832) vol. 1 at p. 86 explained that "where the law has made no provision, or, rather, where no general action could be framed before-hand, (the ways of injuring, and methods of deceiving being so various,) every person is allowed . . . to bring a special action on his own case, which is liberal action."

23 The action on the case was general and flexible and it allowed for the evolution of new claims based upon unintended and consequential harm. Much of the modern law of torts derived from the action on the case. The actions for deceit and nuisance were developed as actions on the case, as were the more modern actions of defamation and negligence. The historical evolution of the action on the case is canvassed in J.G. Fleming, *The Law of Torts*, 8th ed. (Sydney: The Law Book Company, 1992) and L.N. Klar, *Tort Law*, 2nd ed. (Scarborough: Carswell, 1996). Both authors explain that the action on the case developed to provide a remedy for cases where the injury suffered was not "direct", but was due to an omission or an act only consequentially injurious to the plaintiff's interests.

24 There can be little doubt, then, that the action on the case served as a residual category. Indeed, the action on the case also produced two highly significant off-shoots that became independent actions, namely assumpsit, from which much of the modern law of contract and restitution is derived, and trover, from which the modern law of personal property evolved.

25 When used in the context of the *Limitations Act*, it would appear that the category of "action upon the case" does retain something of its traditional residual character. To some extent, it serves as a catch-all or short-hand expression to embrace personal actions for damages based upon breach of a legal duty not otherwise caught by the *Act*. Mew, *The Law of Limitations* (Butterworths: Toronto, 1991) at p. 92, describes the common law action as encompassing "all actions that did not amount to trespass, namely, those injuries that were neither forcible or direct, but only consequential." When used in modern limitations legislation, Mew states that the term "refers to actions that were included in these traditional definitions, and are still not otherwise described in the limitations statutes, and includes causes of action sounding in both contract and tort." This interpretation is supported by the dictum of Strayer J. in *Peel (Regional Municipality) v. Canada* (1986), [1987] 3 F.C. 103 (Fed. T.D.), rev'd on other grounds (1988), [1989] 2 F.C. 562 (Fed. C.A.), rev'd on other grounds [1992] 3 S.C.R. 762 (S.C.C.), holding that a restitutionary action was an action upon the case within s. 45(1)(g):

> It is perhaps anomalous that we should today be required to resort to distinctions having their origin in the fourteenth century and their significance in the forms of action which Anglo-Canadian law purportedly abandoned over a century ago. But the wording of the Ontario statute obliges me to do so. An "action upon the case" should in the context of a modern statute be viewed somewhat as a residual category of action, which is indeed a role not inconsistent with its original development.

26 On the other hand, it cannot be that the phrase "action upon the case" is a residual category broad enough the capture *all* personal actions not otherwise specified by the *Limitations Act*, for as I have already noted, it is established on the highest authority that the *Act* contains no residual provision. One significant limit that would seem to flow from the origins of the action on the case is that damages are a necessary element. The element of damages was referred to by Blackstone at p. 123, where it is stated that an action on the case could be brought for "any special consequential damage[s] . . . which could not be foreseen and provided for in the ordinary course of justice". Another essential element appears to be the allegation of a legal duty and a breach of that duty. In *Robert Simpson Co. v. Foundation Co. of Canada* (1982), 36 O.R. (2d) 97 (Ont. C.A.), Cory J.A., considered the interpretation of s. 45(1)(g) of the *Limitations Act*, and suggested at p. 101 that the "three fundamental aspects" of an action on the case were:

(a) duty owed by the defendant to the plaintiffs;

(b) a breach of that duty by the defendant; and

(c) damage suffered by the plaintiff as of a result of the breach of the duty owed to him by the defendant.

27 When one turns to the cases in which actions grounded on a statute have been classified as actions upon the case for limitation purposes, one finds that damages and the breach of a legal duty have been essential elements. *Thomson v. Lord Clanmorris*, [1900] 1 Ch. 718 (Eng. C.A.) involved an action brought under The *Director's Liability Act, 1890*, imposing liability on company directors for losses suffered by reason of an untrue statements in a prospectus. It was argued that the action was barred by a two-year limitation period for "all actions for penalties, damages, or sums of money given to a party grieved, by any statute." The English Court of Appeal rejected that argument on the ground that the statute created a legal duty, the breach of which gave rise to a right of action. Vaughan Williams L.J. held at p. 727 "what the section really does is to give a new action on the case. It creates a new negative duty."

28 *A.M. Smith & Co. v. R.* (1981), 20 C.P.C. 126 (Fed. C.A.) dealt with an action for compensation for the loss of the right to carry on a business flowing from the enactment of a statute. The plaintiff's claim was based on the principle established in *Manitoba Fisheries Ltd. v. R.* (1978), [1979] 1 S.C.R. 101 (S.C.C.) that a right of action arises where a statute puts a party out of business without compensation. The plaintiff commenced the action more than six years after the cause of action arose and was met with the defendant's argument that the claim was barred by the *Statute of Limitations*, R.S.N.S. 1967, c. 168, s. 2. In response, the plaintiff contended that the claim was for a "specialty" and that the applicable limitation period was twenty years. The plaintiff's argument was rejected by Ryan J.A. who characterized the action as one "upon the case". The plaintiff's claim was for an unliquidated sum and, in Ryan J.A.'s view, at p. 139 "actions for unliquidated sums based on causes of action provided by statute" are included in the category of actions upon the case.

29 These authorities do not assist the respondents as they plainly turn on the fact that the action sounded in damages. In my view, the respondents' attempt to fit an action brought pursuant to the *Fraudulent Conveyances Act* to set aside a conveyance stretches the admittedly elastic category of "action upon the case" beyond the breaking point. The operative provision of the *Act*, which traces its roots back to the *Statute of Elizabeth, 1570*, is s. 2:

> Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.

30 This provision neither creates a right of action that sounds in damages, nor does it create a legal duty, the breach of which gives rise to a cause of action. The plaintiff in a fraudulent conveyance action does not assert the breach of a legal duty, but rather asserts that the debtor has improperly placed assets beyond the reach of ordinary legal process. Any entitlement to the payment of money or damages in favour of plaintiff exists independently and apart from the action to set aside the fraudulent conveyance. The *Act* gives no right of damages nor compensation for loss. It provides for a declaratory type proceeding that has the effect of nullifying transfers and conveyances of the debtor's property so as to make possible execution of the creditor's debt. It follows, in my view, that the appellant's claim cannot be classified as an action on the case.

31 As the appellant's claim is neither an action on a "simple contract" nor an "action on the case", it is not caught by s. 45(1)(g) of the *Limitations Act*.

(c) Action upon a bond or other specialty

32 The only other provision of the *Limitations Act* that might govern the claim is s. 45(1)(b), providing for a twenty-year limitation period for actions "upon a bond, or other specialty". As the appellant's claim was brought within twenty years of the date the cause of action arose, it is unnecessary for me to decide whether the claim is or is not an action for a specialty.

(d) Conclusion - Limitations Act

33 I conclude, accordingly, that there is no provision of the *Limitations Act* that bars the appellant's claim.

Issue 2 Did the motions court judge err in finding that the claim pursuant to the Fraudulent Conveyances Act is barred by laches?

34 The appellant submits that the motions court judge erred in finding that the claim is barred by the doctrine of laches. The appellant submits, first, that as the claim arises under a statute, it is legal in nature, and the equitable doctrine has no application. Second, it is argued that even if the doctrine of laches could apply, the respondents have failed to show the necessary element of prejudice flowing from the delay.

35 I am not persuaded by the argument that a court entertaining a claim for relief under the *Fraudulent Conveyances Act* would be precluded from considering equitable defences merely because the claim arises under a statute. The elements of a claim to set aside a fraudulent conveyance have a distinctively equitable flavour and the argument is inconsistent with the modern approach to the significance of the intersection between law and equity: see *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (Ont. C.A.).

36 The appellant's second point, however, is a strong one. As noted by the motions court judge, without more, delay in asserting a claim does not give rise to the equitable defence of laches. A party relying on the defence must show a combination of delay and prejudice. As was stated in the often quoted passage from the leading English case, *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221 (Ontario P.C.) at p. 239-40:

> the doctrine of laches . . . is not an arbitrary or a technical doctrine . . . Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

The ingredients of an equitable defence based upon delay were recently discussed by the Supreme Court of Canada in *M.(K.) v. M.(H.)* supra at p. 333:

> 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, as is the case with any equitable doctrine.

37 I respectfully disagree with the conclusion of the motions court judge that the respondents have made out case for granting summary judgment on the basis of laches. It seems to me that, at the very least, there is a triable issue on whether it would be inequitable for the appellant's claim to proceed. While the motions court judge correctly stated that prejudice must be shown, she did not specify the nature of the prejudice suffered by the respondents that would justify barring the claim. It may perhaps be inferred from her reasons that she considered Outerbridge's pursuit of the claim for damages for the loss of the assets in the fire to be such a change of position giving rise to prejudice that made it inequitable for the appellant to pursue the fraudulent conveyance claim. If that is the basis for a finding of prejudice, I do not agree with it. It seems to me that the respondents' conduct vis-à-vis both the trustee and the appellant gives rise to a live issue as to whether it would be inequitable

for the appellant now to assert the claim. As I have concluded that on the present record, neither party is entitled to summary judgment, I need say no more.

Issue 3 If the claim is not barred, is the appellant entitled to summary judgment?

38 The appellant submits the motions court judge's statement in her reasons that but for the limitations defence, it would have made out its claim constitutes a finding in its favour, sufficient to support its claim for summary judgment. I do not agree. It was common ground on this appeal that the merits of the summary judgment motion were not fully argued or considered on the motion. As the limitations argument raised a discrete legal point capable of ending the litigation, the parties and the motions court judge focussed entirely on it as a preliminary point and the merits of the summary judgment motion were not considered. Accordingly, it would be inappropriate for this court on appeal to treat the quoted passage from the motions court judge's reasons as constituting a finding capable of supporting summary judgment in the appellant's favour. This, of course, is without prejudice to the right of the appellant to seek summary judgment if so advised.

Issue 4 Did the motions court judge err in refusing to award the respondents costs?

39 As I have concluded that the motions court judge erred in awarding the respondents summary judgment, the cross-appeal as to costs must be dismissed as moot.

CONCLUSION

40 Accordingly, I would allow the appeal and set aside the judgment of the motions court judge in its entirety. The appellant is entitled to its costs of the appeal and of the proceedings before the motions court judge. The cross-appeal as to costs is dismissed without costs.

Appeal allowed; cross-appeal dismissed.

Footnotes

* A corrigendum issued by the court has been incorporated herein.

Tab “I”

Manitoba Metis Federation Inc., Yvon Dumont, Billy Jo De La Ronde, Roy Chartrand, Ron Erickson, Claire Riddle, Jack Fleming, Jack McPherson, Don Roulette, Edgar Bruce Jr., Freda Lundmark, Miles Allarie, Celia Klassen, Alma Belhumeur, Stan Guiboche, Jeanne Perrault, Marie Banks Ducharme and Earl Henderson *Appellants*

v.

Attorney General of Canada and Attorney General of Manitoba *Respondents*

and

Attorney General for Saskatchewan, Attorney General of Alberta, Métis National Council, Métis Nation of Alberta, Métis Nation of Ontario, Treaty One First Nations and Assembly of First Nations *Interveners*

Indexed as: Manitoba Metis Federation Inc. *v.* Canada (Attorney General)

2013 SCC 14

File No.: 33880.

2011: December 13; 2013: March 8.

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

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

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

* Deschamps J. took no part in the judgment.

Manitoba Metis Federation Inc., Yvon Dumont, Billy Jo De La Ronde, Roy Chartrand, Ron Erickson, Claire Riddle, Jack Fleming, Jack McPherson, Don Roulette, Edgar Bruce Jr., Freda Lundmark, Miles Allarie, Celia Klassen, Alma Belhumeur, Stan Guiboche, Jeanne Perrault, Marie Banks Ducharme et Earl Henderson *Appelants*

c.

Procureur général du Canada et procureur général du Manitoba *Intimés*

et

Procureur général de la Saskatchewan, procureur général de l'Alberta, Ralliement national des Métis, Métis Nation of Alberta, Métis Nation of Ontario, Premières Nations du Traité nº 1 et Assemblée des Premières Nations *Intervenants*

Répertorié : Manitoba Metis Federation Inc. *c.* Canada (Procureur général)

2013 CSC 14

Nº du greffe : 33880.

2011 : 13 décembre; 2013 : 8 mars.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps*, Fish, Abella, Rothstein, Cromwell, Moldaver et Karakatsanis.

EN APPEL DE LA COUR D'APPEL DU MANITOBA

Droit des Autochtones — Métis — Droit de la Couronne — Honneur de la Couronne — Gouvernement canadien ayant convenu en 1870 de concéder aux enfants des Métis 1,4 million d'acres de terre et de reconnaître la propriété foncière existante des Métis — Promesses figurant aux art. 31 et 32 de la Loi de 1870 sur le Manitoba, un document constitutionnel — Division

* La juge Deschamps n'a pas pris part au jugement.

recipients — Whether Canada failing to comply with the honour of the Crown in the implementation of ss. 31 and 32 of the Manitoba Act, 1870.

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

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

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

After Confederation, the first government of Canada embarked on a policy aimed at bringing the western territories within the boundaries of Canada, and opening them up to settlement. Canada became the titular owner of Rupert's Land and the Red River Settlement; however, the French-speaking Roman Catholic Métis, the dominant demographic group in the Red River Settlement, viewed with alarm the prospect of Canadian control leading to a wave of English-speaking Protestant settlers that would threaten their traditional way of life. In the face of armed resistance, Canada had little choice but to adopt a diplomatic approach. The Red River settlers agreed to become part of Canada, and Canada agreed to grant 1.4 million acres of land to the Métis children (subsequently set out in s. 31 of the *Manitoba Act*) and to recognize existing landholdings (subsequently set out in s. 32 of the *Manitoba Act*). The Canadian government began the process of implementing s. 31 in early

des terres et concession aux bénéficiaires admissibles entravées par des erreurs et des retards — Le Canada a-t-il omis de respecter le principe de l'honneur de la Couronne dans la mise en œuvre des art. 31 et 32 de la Loi de 1870 sur le Manitoba?

Droit des Autochtones — Métis — Obligation fiduciaire — Gouvernement canadien ayant convenu en 1870 de concéder aux enfants des Métis 1,4 million d'acres de terre et de reconnaître la propriété foncière existante des Métis — Promesses figurant aux art. 31 et 32 de la Loi de 1870 sur le Manitoba, un document constitutionnel — Division des terres et concession aux bénéficiaires admissibles entravées par des erreurs et des retards — Le Canada a-t-il manqué à une obligation fiduciaire envers les Métis?

Prescription — Jugement déclaratoire — Pourvoi visant l'obtention d'un jugement qui déclare que le Canada a manqué à son obligation de mettre en œuvre les promesses faites au peuple métis contenues dans la Loi de 1870 sur le Manitoba — Les lois sur la prescription peuvent-elles faire obstacle au prononcé d'un jugement déclaratoire sur la constitutionnalité de la conduite de la Couronne? — La doctrine des « laches » (un principe d'equity souvent appelé « doctrine du manque de diligence ») rend-elle irrecevable la demande de jugement déclaratoire?

Procédure civile — Parties — Qualité pour agir — Qualité pour agir dans l'intérêt public — Loi de 1870 sur le Manitoba autorisant l'octroi de droits fonciers individuels — La fédération qui présente la demande collective au nom du peuple métis devrait-elle se voir reconnaître la qualité pour agir dans l'intérêt public?

Après la Confédération, le premier gouvernement du Canada a instauré une politique visant à intégrer les territoires de l'Ouest dans le Canada et à les ouvrir à la colonisation. Le Canada a acquis le titre de la Terre de Rupert et de la colonie de la rivière Rouge. Cependant, les Métis francophones de foi catholique romaine, le groupe démographique prédominant de la colonie de la rivière Rouge, craignaient que la prise de contrôle par le Canada se traduise par l'arrivée massive de colons protestants anglophones qui menaceraient leur style de vie traditionnel. Aux prises avec une résistance armée, le Canada n'avait guère d'autre choix que d'adopter une approche diplomatique. Les colons de la rivière Rouge ont accepté de faire partie du Canada, et celui-ci a convenu de concéder aux enfants des Métis 1,4 million d'acres de terres (ce qui a subséquemment été confirmé par l'art. 31 de la *Loi sur le Manitoba*) et de reconnaître leur propriété foncière existante (ce qui a subséquemment

1871. The land was set aside, but a series of errors and delays interfered with dividing the land among the eligible recipients. Initially, problems arose from errors in determining who had a right to a share of the land promised. As a result, two successive allotments were abandoned; the third and final allotment was not completed until 1880. The lands were distributed randomly to the eligible Métis children living within each parish.

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

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

The Métis sought a declaration that (1) in implementing the *Manitoba Act*, the federal Crown breached fiduciary obligations owed to the Métis; (2) the federal Crown failed to implement the *Manitoba Act* in a manner consistent with the honour of the Crown; and (3) certain legislation passed by Manitoba affecting the implementation of the *Manitoba Act* was *ultra vires*. The trial judge dismissed the claim for a declaration on the ground that ss. 31 and 32 of the *Manitoba Act* gave rise to neither a fiduciary duty nor a duty based on the honour of the Crown. He also found that the challenged Manitoba

été confirmé par l'art. 32 de la *Loi sur le Manitoba*). Le gouvernement canadien a entrepris la mise en œuvre de l'art. 31 au début de 1871. Les terres ont été mises de côté, mais une série d'erreurs et de retards en ont entravé la répartition entre les bénéficiaires admissibles. Ces problèmes ont initialement découlé d'erreurs dans la détermination des personnes qui avaient le droit de participer au partage des terres promises, de sorte que deux répartitions successives ont été abandonnées, et que la troisième et dernière n'a pris fin qu'en 1880. Les terres ont été attribuées par tirage au sort aux enfants des Métis de chaque paroisse.

Alors que le processus de répartition traînait en longueur, des spéculateurs ont commencé à acquérir les intérêts sur les terres visées à l'art. 31 non encore concédés aux enfants des Métis, recourant à cette fin à différents mécanismes juridiques. Au cours des décennies 1870 et 1880, le Manitoba a adopté cinq lois, aujourd'hui périmées et abrogées depuis longtemps, portant sur les modalités de transfert des intérêts sur les terres visées à l'art. 31. Au début, le Manitoba a pris des mesures pour freiner la spéculation et la vente inconsidérée des intérêts des enfants, mais en 1877, il a modifié sa position en permettant la vente d'intérêts sur les terres dont la concession était prévue à l'art. 31.

Il est finalement devenu évident que le nombre d'enfants des Métis admissibles avait été sous-estimé. Plutôt que de procéder à une quatrième répartition, le gouvernement canadien a décidé de remettre aux enfants admissibles restants des certificats échangeables contre une terre. La valeur des certificats se fondait sur le prix des terres en 1879. Or, lorsque les certificats ont été délivrés en 1885, le prix avait augmenté, de sorte que les enfants exclus n'ont pu acquérir la même superficie de terre que les autres enfants. Au cours des décennies qui ont suivi, la situation des Métis au sein de la colonie de la rivière Rouge s'est détériorée. Rapidement, les colons de race blanche ont constitué la majorité des habitants du territoire, et la communauté métisse a commencé à s'effriter.

Les Métis ont sollicité un jugement déclarant (1) que dans sa mise en œuvre de la *Loi sur le Manitoba*, la Couronne fédérale a manqué à ses obligations fiduciaires envers les Métis, (2) que dans sa mise en œuvre de la *Loi sur le Manitoba*, la Couronne fédérale n'a pas agi en conformité avec le principe de l'honneur de la Couronne et (3) que certaines lois manitobaines relatives à la mise en œuvre de la *Loi sur le Manitoba* étaient *ultra vires*. Le juge de première instance a rejeté leur demande au motif que les art. 31 et 32 de la *Loi sur le Manitoba* ne donnaient naissance ni à une obligation fiduciaire, ni à

statutes were constitutional, and, in any event, the claim was barred by limitations and the doctrine of laches. Finally, he found that the Manitoba Metis Federation Inc. ("MMF") should not be granted standing in the action, since the individual plaintiffs were capable of bringing the claims forward. A five-member panel of the Manitoba Court of Appeal dismissed the appeal.

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

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

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

une obligation fondée sur le principe de l'honneur de la Couronne. Il a également conclu que les lois manitobaines contestées étaient constitutionnelles et que, de toute façon, la prescription et la doctrine des *laches* faisaient obstacle à la demande. Enfin, il a refusé de reconnaître à la Manitoba Metis Federation Inc. (« MMF ») la qualité pour agir en l'instance, puisque les demandeurs pouvaient faire valoir leurs demandes individuellement. Une formation de cinq juges de la Cour d'appel du Manitoba a rejeté l'appel.

Arrêt (les juges Rothstein et Moldaver sont dissidents) : Le pourvoi est accueilli en partie. La Couronne fédérale n'a pas mis en œuvre de façon honorable la disposition prévoyant la concession de terres énoncée à l'art. 31 de la *Loi de 1870 sur le Manitoba*.

La juge en chef McLachlin et les juges LeBel, Fish, Abella, Cromwell et Karakatsanis : Il y a lieu de reconnaître que la MMF a qualité pour agir. L'action constitue une demande collective visant à obtenir un jugement déclaratoire à des fins de réconciliation entre les descendants des Métis de la vallée de la rivière Rouge et le Canada. Cette demande justifie que l'organisme représentant les droits collectifs des Métis soit autorisé à ester devant la Cour.

Les obligations consacrées aux art. 31 et 32 de la *Loi sur le Manitoba* n'imposaient aucune obligation fiduciaire au gouvernement. Dans le contexte autochtone, une obligation fiduciaire peut naître de deux façons. Premièrement, elle peut découler du fait que la Couronne assume des pouvoirs discrétionnaires à l'égard d'intérêts autochtones particuliers. Lorsque la Couronne administre des terres ou des biens sur lesquels un peuple autochtone a un intérêt, une obligation fiduciaire peut prendre naissance (1) s'il existe un intérêt autochtone particulier ou identifiable, et (2) si la Couronne exerce un pouvoir discrétionnaire à l'égard de cet intérêt. Il doit s'agir d'un intérêt autochtone collectif sur les terres qui fait partie intégrante du mode de vie distinctif des Métis et de leur rapport au territoire. Il doit reposer sur l'usage et l'occupation historiques et ne peut être établi par un traité ou par une loi. Deuxièmement, et plus généralement, une obligation fiduciaire peut également prendre naissance s'il existe (1) un engagement de la part du prétendu fiduciaire à agir au mieux des intérêts du prétendu bénéficiaire, (2) une personne ou un groupe de personnes définies qui sont vulnérables au contrôle d'un fiduciaire et (3) un intérêt juridique ou un intérêt pratique important du bénéficiaire sur lequel l'exercice, par le prétendu fiduciaire, de son pouvoir discrétionnaire ou de son contrôle pourrait avoir une incidence défavorable.

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

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

The honour of the Crown speaks to *how* obligations that attract it must be fulfilled, so the duties that flow from it vary with the situation. In the context of the implementation of a constitutional obligation to an Aboriginal people, the honour of the Crown requires that

Même si la Couronne a assumé le contrôle discrétionnaire de l'administration des concessions de terres conformément aux art. 31 et 32 de la *Loi sur le Manitoba*, les Métis sont des Autochtones et ceux-ci avaient un intérêt sur les terres, la première condition pour qu'il y ait obligation fiduciaire n'est pas établie, car l'existence d'un titre ancestral collectif préexistant ne ressort ni du libellé de l'art. 31, ni de la preuve offerte. Les intérêts des Métis sur les terres étaient liés à leur histoire personnelle, et non à leur identité métisse distinctive commune. Il n'existait pas non plus d'obligation fiduciaire fondée sur un engagement pris par la Couronne. Bien que l'art. 31 révèle une intention de procurer un avantage aux enfants des Métis, il ne démontre l'existence d'aucun engagement à agir au mieux de leurs intérêts qui aurait préséance sur toute autre préoccupation légitime. De fait, le pouvoir discrétionnaire de déterminer « le mode et [les] conditions d'établissement et autres conditions » conféré par l'art. 31 est incompatible avec l'obligation de loyauté et l'intention d'agir au mieux des intérêts du bénéficiaire en renonçant à tous les autres intérêts. L'article 32 confirmait simplement le maintien des divers modes de tenure qui existaient au moment de la création de la nouvelle province, ou peu avant. Il ne constituait pas un engagement de la Couronne à agir en qualité de fiduciaire en établissant les titres des propriétaires fonciers métis.

Les Métis ont cependant droit à un jugement qui déclare que la Couronne fédérale n'a pas honorablement mis en œuvre la disposition prévoyant la concession de terres énoncée à l'art. 31 de la *Loi sur le Manitoba*. L'objectif fondamental du principe de l'honneur de la Couronne est la réconciliation des sociétés autochtones préexistantes avec l'affirmation de la souveraineté de la Couronne. Lorsque cet objectif est en jeu, la Couronne doit agir honorablement dans ses négociations avec le peuple autochtone en cause. La garantie des droits ancestraux prévue au par. 35(1) de la Constitution l'exige. L'honneur de la Couronne est engagé par une obligation explicite envers un groupe autochtone consacrée par la Constitution. Celle-ci n'est pas une simple loi; c'est le document même par lequel la Couronne a affirmé sa souveraineté face à l'occupation antérieure des terres par les peuples autochtones. Une obligation envers un groupe autochtone que prévoit expressément la Constitution engage l'honneur de la Couronne.

L'honneur de la Couronne a trait aux *modalités* d'exécution des obligations dont il emporte l'application, de sorte que les obligations qui en découlent varient en fonction de la situation. Dans le contexte de la mise en œuvre d'une obligation constitutionnelle envers

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

Section 31 of the *Manitoba Act* is a solemn constitutional obligation to the Métis people of Manitoba, an Aboriginal people, and it engaged the honour of the Crown. Its immediate purpose was to give the Métis children a head start over the expected influx of settlers from the east. Its broader purpose was to reconcile the Métis' Aboriginal interests in the Manitoba territory with the assertion of Crown sovereignty over the area that was to become the province of Manitoba. By contrast, s. 32 was a benefit made generally available to all settlers and did not engage the honour of the Crown.

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

None of the government's other failures — failing to prevent Métis from selling their land to speculators, issuing scrip in place of land, and failing to cluster family allotments — were in themselves inconsistent with the honour of the Crown. That said, the impact of these measures was exacerbated by the delay inconsistent with

un peuple autochtone, le principe de l'honneur de la Couronne oblige la Couronne (1) à adopter une approche libérale et téléologique dans l'interprétation de la promesse et (2) à agir avec diligence dans l'exécution de celle-ci. La question est de savoir si, compte tenu de sa conduite considérée globalement, la Couronne a agi avec diligence pour atteindre les objectifs de l'obligation. L'obligation d'agir avec diligence ayant une portée restreinte et bien circonscrite, ce ne sont pas toutes les erreurs ni tous les actes de négligence dans la mise en œuvre d'une obligation constitutionnelle envers un peuple autochtone qui emportent le manquement à l'honneur de la Couronne, et il n'est pas garanti que les objectifs de la promesse se concrétiseront. Toutefois, une tendance persistante aux erreurs et à l'indifférence nuisant substantiellement à l'atteinte des objectifs d'une promesse solennelle peut emporter le manquement à l'obligation de la Couronne d'agir honorablement dans la mise en œuvre de sa promesse.

L'article 31 de la *Loi sur le Manitoba* constitue une obligation constitutionnelle solennelle envers le peuple autochtone que forment les Métis du Manitoba et il engageait l'honneur de la Couronne. Son objet immédiat était de donner aux enfants des Métis une longueur d'avance sur les colons de l'est que l'on attendait en grand nombre. Plus généralement, il s'agissait de concilier les intérêts autochtones des Métis sur le territoire du Manitoba avec l'affirmation de la souveraineté de la Couronne sur la région qui allait devenir la province du Manitoba. Par contre, l'art. 32 conférait de façon générale un avantage à tous les colons et n'engageait pas l'honneur de la Couronne.

Bien que l'honneur de la Couronne lui ait imposé l'obligation d'agir avec diligence pour mettre en œuvre l'art. 31, le gouvernement a fait preuve d'un manque persistant d'attention et n'a pas agi avec diligence pour réaliser les objectifs des concessions prévues par cet article. Il ne s'agissait pas d'une négligence passagère, mais plutôt d'une série d'erreurs et d'inactions qui ont persisté pendant plus d'une décennie, ce qui contrecarrait nettement un objectif de l'art. 31. Ce comportement ne correspondait pas à celui qu'exigeait l'honneur de la Couronne : un gouvernement sincèrement désireux de respecter l'obligation que lui commandait son honneur pouvait et aurait dû faire mieux.

Aucun autre manquement allégué — l'omission d'empêcher les enfants des Métis de vendre leurs terres à des spéculateurs, la remise de certificats au lieu de terres et l'omission de regrouper les terres par famille — n'était en soi incompatible avec l'honneur de la Couronne. Cela dit, les répercussions de ces mesures ont été exacerbées

the honour of the Crown: it increased improvident sales to speculators; it meant that when the children received scrip, they obtained significantly less than the 240 acres provided to those who took part in the initial distribution, because the price of land had increased in the interim; and it made it more difficult for Métis to trade grants amongst themselves to achieve contiguous parcels.

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

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

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

par le retard contraire à l'honneur de la Couronne : les ventes inconsidérées à des spéculateurs se sont accrues, de sorte que les enfants qui avaient reçu un certificat ont obtenu beaucoup moins que les 240 acres accordés à ceux qui avaient participé à la distribution initiale, le prix des terres ayant augmenté entre-temps, et l'échange de concessions entre Métis qui souhaitaient obtenir des parcelles contiguës a été rendu plus difficile.

Il n'est pas nécessaire d'examiner la constitutionnalité des lois de mise en œuvre, car la question est devenue théorique.

La demande des Métis fondée sur le principe de l'honneur de la Couronne n'est pas irrecevable par application des lois sur la prescription. Les délais de prescription s'appliquent à la demande de réparation personnelle fondée sur l'inconstitutionnalité d'une loi, mais les Métis ne sollicitent pas de réparation personnelle et ne réclament ni dommages-intérêts, ni terres. Puisque les lois sur la prescription ne peuvent empêcher un tribunal de rendre un jugement déclaratoire sur la constitutionnalité d'une loi, elles ne peuvent l'empêcher de rendre un jugement déclaratoire sur la constitutionnalité de la conduite de la Couronne. Aussi longtemps que le grief constitutionnel ne sera pas tranché, l'objectif de réconciliation et d'harmonie constitutionnelle n'aura pas été atteint. De plus, bon nombre des considérations de politique générale qui sous-tendent les lois sur la prescription ne s'appliquent pas dans un contexte autochtone. Le jugement déclaratoire est une réparation de portée restreinte qui, dans certains cas, peut être le seul moyen de donner effet au principe de l'honneur de la Couronne.

La demande n'est pas non plus irrecevable par application de la doctrine des *laches*. Vu le contexte considéré en l'espèce, y compris les injustices subies par les Métis dans le passé, l'inégalité du rapport de force qui a suivi la proclamation de la souveraineté de la Couronne et les conséquences négatives ayant découlé des retards dans la concession des terres, le retard des appelants ne peut en soi être interprété comme un acte manifeste d'acquiescement ou de renonciation. Il est irréaliste d'avancer que les Métis ont négligé de faire valoir leurs droits avant que les tribunaux ne soient prêts à les reconnaître. De plus, le Canada n'a pas changé sa position à cause du retard. Dès lors, la doctrine des *laches* ne fait pas obstacle à la demande. Qui plus est, il est difficile de voir comment un tribunal, dans son rôle de gardien de la Constitution, pourrait appliquer une doctrine d'equity pour refuser de rendre un jugement déclarant qu'une disposition de la Constitution n'a pas été respectée comme l'exigeait l'honneur de la Couronne.

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

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

Even if the honour of the Crown was engaged and required the diligent implementation of s. 31, and even if this duty was not fulfilled, any claims arising from such a cause of action have long been barred by statutes of limitations and the equitable doctrine of laches.

Les juges Rothstein et Moldaver (dissidents) : Il y a accord avec les juges majoritaires pour dire que nulle obligation fiduciaire n'existait en l'espèce, qu'il n'y a pas de prétention valable découlant de l'art. 32 de la *Loi sur le Manitoba*, que toute prétention qui aurait pu se fonder sur les dispositions manitobaines aujourd'hui abrogées sur la concession de terres est théorique, que la concession au hasard des terres constituait pour le Canada un moyen acceptable de mettre l'art. 31 en œuvre et que la MMF a qualité pour agir en l'espèce. Cependant, les juges majoritaires proposent une nouvelle obligation de common law découlant de l'honneur de la Couronne. Les juridictions inférieures n'ont pas examiné la question, et les parties n'ont pas présenté d'argumentation sur le sujet dans le cadre du présent pourvoi. La nouvelle obligation reconnue accroît de manière imprévisible la portée des obligations qui découlent de l'honneur de la Couronne. Tant la prescription que la doctrine des *laches* font obstacle à la demande fondée sur l'honneur de la Couronne.

Une obligation d'exécution diligente pourrait fort bien emporter un accroissement opportun des obligations de la Couronne et il aurait certes été préférable que les choses se déroulent plus rapidement, mais l'obligation que créent les juges majoritaires débouche sur une règle vague qui écarte la doctrine des *laches* et la prescription, et qui est insusceptible de correction par le législateur, de sorte que la portée et les conséquences des nouvelles obligations de la Couronne deviennent imprévisibles. Des zones d'ombre demeurent quant à savoir si un engagement est « solennel » et emporte l'application de l'obligation, quel type de document juridique peut renfermer un engagement solennel, si la portée d'une obligation issue d'un document apparenté à un traité est plus grande que celle découlant d'un autre document constitutionnel et s'il suffit que le créancier de l'obligation soit un groupe autochtone. L'idée que les modalités de mise en application d'une obligation constitutionnelle par le gouvernement dépendent du degré de ressemblance de celle-ci avec une obligation issue d'un traité devait être rejetée. Ce serait accroître sensiblement la responsabilité de la Couronne que de permettre qu'une demande de réparation suive son cours du moment que la promesse a été faite à un groupe autochtone, sans qu'un intérêt autochtone suffisant pour fonder une obligation fiduciaire n'ait été prouvé et sans que des actes n'emportent le manquement à une obligation fiduciaire.

À supposer même que l'honneur de la Couronne ait été engagé et qu'il ait exigé la mise en œuvre diligente de l'art. 31, et même, qu'il y ait eu manquement à cette obligation, les lois sur la prescription et la doctrine des *laches* reconnue en equity faisaient depuis longtemps

Limitations and laches cannot fulfill their purposes if they are not universally applicable. Limitations periods apply to the government as they do to all other litigants both generally and in the area of Aboriginal claims. This benefits the legal system by creating certainty and predictability, and serves to protect society at large by ensuring that claims against the Crown are made in a timely fashion so that the Crown is able to defend itself adequately.

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

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

These claims are also subject to laches. Laches can be used to defend against equitable claims that have

obstacle à toute demande découlant d'une telle cause d'action. La prescription et la doctrine des *laches* ne peuvent remplir leur fonction que si elles ont une application universelle. Les délais de prescription s'appliquent à l'État comme à toute autre partie à un litige, tant en général qu'en matière de droits des Autochtones. Leur application est bénéfique au système judiciaire car il en résulte certitude et prévisibilité. Elle protège également la société en général en faisant en sorte qu'un recours contre la Couronne soit exercé en temps utile de façon que cette dernière puisse se défendre convenablement.

Au Manitoba, des délais de prescription s'appliquent sans interruption depuis 1870 et, dès 1931, un délai de six ans s'est appliqué à toutes les causes d'action, qu'elles aient pris naissance avant ou après l'entrée en vigueur des dispositions sur la prescription. Un délai ultime de prescription de 30 ans s'applique également dans la province. Les délais de prescription s'appliquent au bénéfice de la Couronne. La raison d'être des délais de prescription ne milite pas en faveur de la création d'une exception à leur application en l'espèce. Les dispositions manitobaines ne soustraient pas la demande de jugement déclaratoire à l'application de la prescription, et il n'y a pas lieu que les tribunaux le fassent. Le risque qu'un jugement déclaratoire entraîne d'autres réparations se concrétise bel et bien en l'espèce. Les Métis entendent en effet se servir du jugement déclaratoire pour négocier avec la Couronne et obtenir une réparation extrajudiciaire, ce qui expose la Couronne à se voir reprocher l'inexécution d'une obligation bien après l'expiration du délai de prescription applicable.

En outre, la Cour n'a jamais reconnu l'existence d'une exception générale à l'application de la prescription dans le cas d'une demande prenant appui sur la Constitution. En fait, elle a conclu invariablement que la prescription vaut pour les allégations de nature factuelle comportant des éléments constitutionnels. La prescription ne saurait empêcher un tribunal de déclarer une loi inconstitutionnelle, mais les prétentions d'inconstitutionnalité formulées par les Métis sont théoriques. Le jugement déclaratoire demandé vise par ailleurs des questions d'ordre factuel et des manquements allégués à des obligations qui ont toujours été soumis à la prescription. En affirmant que l'objectif de la réconciliation doit être prioritaire dans le contexte autochtone, les juges majoritaires semblent rompre avec le principe selon lequel la raison d'être générale des délais de prescription doit aussi valoir pour les demandes des Autochtones.

La doctrine des *laches* fait également obstacle au recours. La Couronne peut l'invoquer à l'encontre d'une

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

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

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

demande en equity qui n'est pas présentée à temps. Puisque la doctrine peut être opposée à une allégation de manquement à l'obligation fiduciaire, il serait foncièrement illogique de permettre que certaines demandes prenant appui sur l'honneur de la Couronne échappent à son application. La doctrine peut être invoquée pour les deux motifs reconnus : les Métis ont, en connaissance de cause, attendu plus d'un siècle pour présenter leur demande et ils ont de ce fait acquiescé à la situation et incité le gouvernement à tenir cet acquiescement pour acquis, rendant ainsi l'actuel recours déraisonnable. Au sujet de l'acquiescement, le juge de première instance a conclu que les Métis avaient la connaissance requise dans les années 1870, et le caractère erroné de sa conclusion n'a pas été établi. L'affirmation selon laquelle il serait « irréaliste » d'exiger d'une personne qu'elle ait fait valoir ses droits avant que les tribunaux n'aient été disposés à les reconnaître va foncièrement à l'encontre de l'approche de common law en matière d'évolution du droit. Le retard à concéder les terres ne peut constituer à la fois le tort allégué et le motif pour lequel la Couronne ne peut invoquer la doctrine des *laches*, car celle-ci est toujours invoquée en défense par la partie qui aurait lésé l'autre. Si se prononcer sur le caractère équitable des actes du défendeur revient seulement à se demander si le demandeur a prouvé ses allégations, le moyen de défense offert par la doctrine devient illusoire. L'inégalité du rapport de force entre les Métis et le gouvernement n'était pas de nature à saper la connaissance, la capacité et la liberté des Métis de telle sorte qu'on ne puisse conclure à l'acquiescement. L'inférence selon laquelle les retards accusés dans la distribution des terres ont rendu les Métis vulnérables n'est pas tirée par le juge de première instance, ni étayée par la preuve. Quoi qu'il en soit, tout comme la prescription, la doctrine des *laches* est opposable aux personnes vulnérables.

En ce qui concerne la croyance, si le recours avait été exercé en temps utile, les retards inexpliqués qui sont censés attester le caractère déshonorable des actes de la Couronne auraient fort bien pu être expliqués ou le gouvernement aurait pu prendre des mesures pour donner satisfaction à la collectivité métisse.

Enfin, bien que ce ne soit pas fait expressément, les juges majoritaires s'écartent des conclusions de fait tirées en première instance sur deux points principaux, et ce, même s'ils n'y relèvent pas d'erreur manifeste et dominante : (1) l'ampleur du retard dans la distribution des terres et (2) les répercussions de ce retard sur les Métis. Le juge de première instance conclut clairement qu'il y a eu retard. Or, ni ses conclusions ni la preuve ne révèlent une tendance au manque d'attention ou un manquement à l'obligation de diligence, pas plus

derived from the honour of the Crown, assuming that any such duty exists.

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qu'elles n'indiquent que les objectifs de la concession des terres ont été contrecarrés. Ce seul élément prive de fondement toute prétention des Métis prenant appui sur le manquement à une obligation découlant de l'honneur de la Couronne, à supposer qu'une telle obligation existe.

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Thomas R. Berger, *Q.C.*, *James Aldridge*, *Q.C.*, *Harley Schachter* and *Guylaine Grenier*, for the appellants.

Mark Kindrachuk, *Q.C.*, *Mitchell R. Taylor*, *Q.C.*, and *Sharlene Telles-Langdon*, for the respondent the Attorney General of Canada.

Heather Leonoff, *Q.C.*, and *Michael Conner*, for the respondent the Attorney General of Manitoba.

P. Mitch McAdam, for the intervener the Attorney General for Saskatchewan.

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

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

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

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

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

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POURVOI contre un arrêt de la Cour d'appel du Manitoba (le juge en chef Scott et les juges Monnin, Steel, Hamilton et Freedman), 2010 MBCA 71, 255 Man. R. (2d) 167, 486 W.A.C. 167, [2010] 12 W.W.R. 599, [2010] 3 C.N.L.R. 233, 216 C.R.R. (2d) 144, 94 R.P.R. (4th) 161, [2010] M.J. No. 219 (QL), 2010 CarswellMan 322, qui a confirmé une décision du juge MacInnes, 2007 MBQB 293, 223 Man. R. (2d) 42, [2008] 4 W.W.R. 402, [2008] 2 C.N.L.R. 52, [2007] M.J. No. 448 (QL), 2007 CarswellMan 500. Pourvoi accueilli en partie, les juges Rothstein et Moldaver sont dissidents.

Thomas R. Berger, *c.r.*, *James Aldridge*, *c.r.*, *Harley Schachter* et *Guylaine Grenier*, pour les appelants.

Mark Kindrachuk, *c.r.*, *Mitchell R. Taylor*, *c.r.*, et *Sharlene Telles-Langdon*, pour l'intimé le procureur général du Canada.

Heather Leonoff, *c.r.*, et *Michael Conner*, pour l'intimé le procureur général du Manitoba.

P. Mitch McAdam, pour l'intervenant le procureur général de la Saskatchewan.

Argumentation écrite seulement par *Douglas B. Titosky*, pour l'intervenant le procureur général de l'Alberta.

Clement Chartier, *c.r.*, et *Marc LeClair*, pour l'intervenant le Ralliement national des Métis.

Jason Taylor Madden, pour l'intervenante Métis Nation of Alberta.

Jean Teillet et *Arthur Pape*, pour l'intervenante Métis Nation of Ontario.

Jeffrey R. W. Rath, pour l'intervenante les Premières Nations du Traité n^{o} 1.

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

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

THE CHIEF JUSTICE AND KARAKATSANIS J. —

I. Overview

[1] Canada is a young nation with ancient roots. The country was born in 1867, by the consensual union of three colonies — United Canada (now Ontario and Quebec), Nova Scotia and New Brunswick. Left unsettled was whether the new nation would be expanded to include the vast territories to the west, stretching from modern Manitoba to British Columbia. The Canadian government, led by Prime Minister John A. Macdonald, embarked on a policy aimed at bringing the western territories within the boundaries of Canada, and opening them up to settlement.

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

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

[4] The government policy with respect to the Métis population — which, in 1870, comprised 85 percent of the population of what is now Manitoba — was less clear. Settlers began pouring into the region, displacing the Métis' social and political

Argumentation écrite seulement par *Joseph J. Arvay*, *c.r.*, *David C. Nahwegahbow* et *Bruce Elwood*, pour l'intervenante l'Assemblée des Premières Nations.

Version française du jugement de la juge en chef McLachlin et des juges LeBel, Fish, Abella, Cromwell et Karakatsanis rendu par

LA JUGE EN CHEF ET LA JUGE KARAKATSANIS —

I. Aperçu

[1] Le Canada est une jeune nation aux racines anciennes. Le pays a été fondé en 1867 par l'union consensuelle de trois colonies — le Canada-Uni (devenu l'Ontario et le Québec), la Nouvelle-Écosse et le Nouveau-Brunswick. La question de l'expansion future de la nouvelle nation vers les vastes territoires de l'Ouest, qui s'étendent du Manitoba actuel jusqu'à la Colombie-Britannique, est alors demeurée en suspens. Le gouvernement canadien, dirigé par le premier ministre John A. Macdonald, a instauré une politique visant à intégrer les territoires de l'Ouest dans le Canada et à les ouvrir à la colonisation.

[2] Pour y arriver, il fallait traiter avec les peuples autochtones établis dans les territoires de l'Ouest. Dans les Prairies, ces peuples se divisaient principalement en deux groupes — les Premières Nations ainsi que les descendants issus des unions entre les négociants et explorateurs blancs et les femmes autochtones, maintenant connus sous le nom de Métis.

[3] La politique du gouvernement à l'égard des Premières Nations consistait à conclure avec les différentes bandes des traités dans lesquels celles-ci consentaient à la colonisation de leurs terres en échange de la mise en réserve de terres et d'autres promesses.

[4] La politique du gouvernement était moins claire à l'égard du peuple métis — qui composait, en 1870, 85 pour 100 de la population de ce qui est aujourd'hui le Manitoba. Des colons ont commencé à s'installer en grand nombre dans la région et à

control. This led to resistance and conflict. To resolve the conflict and assure peaceful annexation of the territory, the Canadian government entered into negotiations with representatives of the Métis-led provisional government of the territory. The result was the *Manitoba Act, 1870*, S.C. 1870, c. 3 ("*Manitoba Act*"), which made Manitoba a province of Canada.

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

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

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

[8] It is not disputed that there was considerable delay in implementing the constitutional provisions. The main issues are (1) whether Canada failed to act in accordance with its legal obligations, and (2) whether the Métis' claim is too late and thus barred by the doctrine of laches or by any

assumer le contrôle politique et social jusqu'alors exercé par les Métis, ce qui a entraîné de la résistance et des conflits. Cherchant à régler la situation et à assurer une annexion pacifique du territoire, le gouvernement canadien a entamé des négociations avec les représentants du gouvernement provisoire dirigé par des Métis. C'est ainsi qu'a été adoptée la *Loi de 1870 sur le Manitoba*, S.C. 1870, ch. 3 (« *Loi sur le Manitoba* »), pour faire entrer la province du Manitoba dans le Canada.

[5] Le pourvoi porte sur les obligations envers les Métis qui sont consacrées dans la *Loi sur le Manitoba*, un document constitutionnel. Il s'agit en fait des conditions auxquelles les Métis ont renoncé à revendiquer le pouvoir de se gouverner et de gouverner leur territoire et accepté de faire partie de la nouvelle nation du Canada. Ces promesses avaient pour but d'assurer aux Métis et à leurs descendants une place permanente dans la nouvelle province. Malheureusement, les Métis n'ont pas vu leurs attentes devenir réalité et ils se sont dispersés devant la colonisation massive qui a marqué les décennies suivantes.

[6] Aujourd'hui, plus d'un siècle plus tard, les descendants des Métis veulent obtenir un jugement déclarant que le Canada a manqué à son obligation de mettre en œuvre les promesses faites aux Métis dans la *Loi sur le Manitoba.*

[7] Plus particulièrement, les appelants sollicitent un jugement déclarant que : (1) dans sa mise en œuvre de la *Loi sur le Manitoba*, la Couronne fédérale a manqué à ses obligations fiduciaires envers les Métis; (2) dans sa mise en œuvre de la *Loi sur le Manitoba*, la Couronne fédérale n'a pas agi en conformité avec le principe de l'honneur de la Couronne; (3) certaines lois adoptées par le Manitoba relativement à la mise en œuvre de la *Loi sur le Manitoba* étaient *ultra vires.*

[8] Nul ne conteste le retard considérable avec lequel les dispositions constitutionnelles ont été mises en œuvre. Les principales questions en litige sont les suivantes : (1) Le Canada a-t-il manqué à ses obligations légales? (2) La demande des Métis est-elle tardive et, de ce fait, irrecevable par

limitations law, be it the English limitations law in force at the time the claims arose, or the subsequent limitations acts enacted by Manitoba: *The Limitation of Actions Act, 1931*, S.M. 1931, c. 30; *The Limitation of Actions Act, 1931*, R.S.M. 1940, c. 121; *The Limitation of Actions Act*, R.S.M. 1970, c. L150; collectively referred to as "*The Limitation of Actions Act*".

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

application de la doctrine des *laches* — un principe d'equity souvent désigné par l'expression « doctrine du manque de diligence » — ou par application des règles de la prescription, que celles-ci soient établies par le droit anglais en vigueur au moment où leur cause d'action a pris naissance ou par les lois sur la prescription adoptées subséquemment par le Manitoba (*The Limitation of Actions Act, 1931*, S.M. 1931, ch. 30; *The Limitation of Actions Act, 1931*, R.S.M. 1940, ch. 121; *The Limitation of Actions Act*, R.S.M. 1970, ch. L150; collectivement appelées la « *Loi sur la prescription* »)?

[9] Nous concluons que l'art. 31 de la *Loi sur le Manitoba* imposait à la Couronne une obligation constitutionnelle envers le peuple autochtone que constituent les Métis du Manitoba. Il s'agissait de l'obligation d'attribuer des terres aux enfants des Métis. L'objet immédiat de cette obligation était de donner aux enfants des Métis une longueur d'avance sur les colons de l'est que l'on attendait en grand nombre. Plus généralement, il s'agissait de concilier les intérêts autochtones des Métis sur le territoire du Manitoba avec l'affirmation de la souveraineté de la Couronne sur la région qui allait devenir la province du Manitoba. L'obligation consacrée par l'art. 31 de la *Loi sur le Manitoba* n'imposait au gouvernement aucune obligation fiduciaire de quelque nature que ce soit. Toutefois, comme il s'agissait d'une obligation constitutionnelle solennelle envers les Métis du Manitoba, dont le but était de concilier leurs intérêts autochtones avec la souveraineté de la Couronne, cette obligation engageait l'honneur de la Couronne. En conséquence, le gouvernement avait l'obligation d'agir avec diligence pour réaliser sa promesse. Il ressort des conclusions du juge du procès que la Couronne n'a pas agi ainsi et que son obligation envers les enfants des Métis est demeurée en grande partie inexécutée. La demande des Métis fondée sur le principe de l'honneur de la Couronne n'est pas irrecevable par application des règles de la prescription ni de la doctrine des *laches* reconnue en equity. Nous concluons donc que les Métis ont droit à un jugement déclarant que le Canada n'a pas mis en œuvre l'art. 31 comme l'exigeait le principe de l'honneur de la Couronne.

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

II. The Constitutional Promises and the Legislation

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

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

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

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

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

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

[10] Nous partageons l'avis des juridictions inférieures que le bien-fondé de la demande présentée en vertu de l'art. 32 n'a pas été établi et nous estimons qu'il n'est pas nécessaire d'examiner la constitutionnalité des lois de mise en œuvre.

II. Les promesses constitutionnelles et la loi

[11] L'article 31 de la *Loi sur le Manitoba*, la disposition prévoyant la concession de terres aux enfants, mettait en réserve 1,4 million d'acres de terres qui devaient être données aux enfants des Métis :

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

[12] L'article 32 de la *Loi sur le Manitoba* reconnaissait la propriété foncière existante des Métis dans le cas des personnes qui se disaient propriétaires sans avoir encore obtenu de titre :

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

(1) Toute concession de terre en franc-alleu (*freehold*) faite par la compagnie de la Baie d'Hudson jusqu'au huitième jour de mars de l'année 1869, sera, si le propriétaire le demande, confirmée par une concession de la couronne;

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

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

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

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

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

III. Judicial Decisions

[14] The trial judge, MacInnes J. (as he then was), engaged in a thorough review of the facts: 2007 MBQB 293, 223 Man. R. (2d) 42. He found that while dishonesty and bad faith were not established, government error and inaction led to lengthy delay in implementing ss. 31 and 32, and left 993 Métis children who were entitled to a grant with scrip instead of land. However, he dismissed the claim for a declaration on the ground that ss. 31 and 32 of the *Manitoba Act* gave rise to neither a fiduciary duty nor a duty based on the honour of the Crown.

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

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

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

[13] Au cours des années 1870 et 1880, le Manitoba a adopté cinq lois, maintenant périmées ou abrogées depuis longtemps, portant sur les modalités de transfert des intérêts sur les terres visées à l'art. 31. Les appelants demandent que ces lois soient déclarées *ultra vires* au regard de la *Loi constitutionnelle de 1867*. À titre subsidiaire, ils soutiennent que ces lois étaient inopérantes par application du principe de la prépondérance fédérale.

III. Les décisions judiciaires

[14] En première instance, le juge MacInnes (nommé depuis à la Cour d'appel) a procédé à un examen approfondi des faits (2007 MBQB 293, 223 Man. R. (2d) 42). Il a conclu que, bien qu'il n'ait pas été démontré que le gouvernement avait fait preuve de malhonnêteté ou de mauvaise foi, son erreur et son inaction avaient retardé considérablement la mise en œuvre des art. 31 et 32, de sorte que 993 enfants de Métis qui avaient droit à une concession avaient plutôt reçu un certificat. Le juge a cependant rejeté la demande de

The trial judge took the view that a fiduciary duty required proof that the Aboriginal people held the land collectively prior to 1870. Since the evidence established only individual landholdings by the Métis, their claim was "fundamentally flawed". He said of the action that "[i]t seeks relief that is in essence of a collective nature, but is underpinned by a factual reality that is individual": para. 1197.

[15] The trial judge concluded that, in any event, the claim was barred by *The Limitation of Actions Act* and the doctrine of laches. He also found that Manitoba's various legislative initiatives regarding the land grants were constitutional. Finally, he held that the Manitoba Metis Federation Inc. ("MMF") should not be granted standing in the action, since the individual plaintiffs were capable of bringing the claims forward.

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

[17] The Court of Appeal also rejected the assertion that the honour of the Crown had been breached. The honour of the Crown, in its view, was

jugement déclaratoire au motif que les art. 31 et 32 de la *Loi sur le Manitoba* ne donnaient naissance ni à une obligation fiduciaire ni à une obligation fondée sur le principe de l'honneur de la Couronne. Selon lui, pour conclure à l'existence d'une obligation fiduciaire, il devait être démontré que les Autochtones possédaient collectivement le territoire avant 1870. Puisque seule la possession individuelle de terres par les Métis avait été établie, leur demande comportait une [TRADUCTION] « faille fondamentale ». Le juge a dit que l'action « vis[ait] à obtenir une mesure de redressement de nature essentiellement collective, alors que son fondement factuel [était] individuel » (par. 1197).

[15] Le juge du procès a conclu que, de toute façon, la demande était irrecevable par application de la *Loi sur la prescription* et de la doctrine des *laches*. Il a également conclu que les différentes mesures législatives adoptées par le Manitoba concernant les concessions de terres étaient constitutionnelles. Enfin, il a jugé qu'il ne convenait pas de reconnaître à la Manitoba Metis Federation Inc. (la « MMF ») qualité pour agir dans la présente action, puisque les demandeurs pouvaient faire valoir leurs demandes individuellement.

[16] Sous la plume du juge en chef Scott, une formation de cinq juges de la Cour d'appel du Manitoba a rejeté l'appel (2010 MBCA 71, 255 Man. R. (2d) 167). La Cour d'appel ne partageait pas l'opinion du juge du procès suivant laquelle la possession collective d'un titre ancestral était essentielle pour qu'il puisse être allégué avec succès que la Couronne avait une obligation fiduciaire envers les Autochtones. La cour a cependant estimé qu'il n'était pas nécessaire de déterminer si la Couronne avait effectivement une obligation fiduciaire envers les Métis, puisque les conclusions de fait tirées par le juge du procès quant à la conduite de la Couronne ne permettaient pas de conclure à un manquement à une obligation fiduciaire.

[17] La Cour d'appel a également rejeté l'allégation selon laquelle il y avait eu manquement au principe de l'honneur de la Couronne. À son

subsidiary to the fiduciary claim and did not itself give rise to an independent duty in this situation.

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

IV. Facts

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

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

[21] The story begins with the Aboriginal peoples who inhabited what is now the province of Manitoba — the Cree and other less populous nations. In the late 17th century, European adventurers and explorers passed through. The lands were claimed nominally by England which granted the Hudson's Bay Company, a company of fur traders operating out of London, control over a vast territory called Rupert's Land, which included modern Manitoba. Aboriginal peoples continued to occupy the territory. In addition to the original First Nations, a new Aboriginal group, the Métis, arose — people

avis, l'honneur de la Couronne était accessoire à l'obligation fiduciaire et ne pouvait à lui seul donner naissance à une obligation distincte dans les circonstances.

[18] Enfin, la cour a conclu que la demande de jugement déclaratoire des Métis était de toute façon prescrite, et que la question de la validité constitutionnelle des lois du Manitoba était théorique. La cour a aussi refusé de modifier la décision discrétionnaire du juge du procès selon laquelle la MMF n'avait pas qualité pour agir.

IV. Les faits

[19] Le pourvoi porte sur des événements qui se sont produits il y a plus d'un siècle. Malgré les difficultés causées par l'absence de témoins directs et l'ancienneté des textes, le juge du procès a tiré des conclusions de fait détaillées et complètes sur tous les éléments pertinents pour résoudre les questions de droit. La Cour d'appel a examiné ces conclusions en détail et les a confirmées, à quelques exceptions près.

[20] L'exhaustivité de ces conclusions, dont la plupart ne sont pas contestées, nous dispense de faire un historique détaillé au sujet du peuple métis, de la colonie de la rivière Rouge et du conflit qui est à l'origine de la *Loi sur le Manitoba* et de l'entrée du Manitoba dans le Canada — événements qui ont inspiré un nombre incalculable d'ouvrages, et même un opéra. Nous nous contenterons d'une brève description des origines de la colonie de la rivière Rouge et des événements sur lesquels s'appuient les demandes des appelants.

[21] L'histoire commence avec les peuples autochtones qui occupaient ce qui est devenu la province du Manitoba — les Cris et d'autres nations moins populeuses. Vers la fin du dix-septième siècle, des aventuriers et explorateurs européens ont traversé le territoire sans s'y arrêter. L'Angleterre a revendiqué symboliquement les terres pour ensuite donner à la Compagnie de la Baie d'Hudson, une société de traite des fourrures basée à Londres, le contrôle d'un vaste territoire appelé Terre de Rupert, y compris ce qui est aujourd'hui le Manitoba. Les Autochtones ont continué d'occuper ce territoire.

descended from early unions between European adventurers and traders, and Aboriginal women. In the early days, the descendants of English-speaking parents were referred to as half-breeds, while those with French roots were called Métis.

[22] A large — by the standards of the time — settlement developed the forks of the Red and Assiniboine Rivers on land granted to Lord Selkirk by the Hudson's Bay Company in 1811. By 1869, the settlement consisted of 12,000 people, under the governance of the Hudson's Bay Company.

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

[24] In the meantime, Upper Canada (now Ontario), Lower Canada (now Quebec), Nova Scotia and New Brunswick united under the *British North America Act* of 1867 (now *Constitution Act, 1867*) to become the new country of Canada. The country's first government, led by Sir John A. Macdonald, was intent on westward expansion, driven by the dream of a nation that would extend from the Atlantic to the Pacific and provide vast new lands for settlement. England agreed to cede Rupert's Land to Canada. In recognition of the Hudson's Bay Company's interest, Canada paid it £300,000 and allowed it to retain some of the land around its trading posts in the Northwest. In 1868, the Imperial Parliament cemented the deal with *Rupert's Land Act, 1868* (U.K.), 31 & 32 Vict., c. 105.

Outre les Premières Nations, le territoire a vu naître un nouveau groupe autochtone, les Métis — issus des premières unions entre les explorateurs et négociants européens et les femmes autochtones. À l'origine, les descendants de parents anglophones étaient appelés les Sang-mêlé, alors que ceux ayant des racines françaises étaient appelés les Métis.

[22] Une colonie importante — selon les critères de l'époque — s'est développée au confluent de la rivière Rouge et de la rivière Assiniboine sur des terres cédées à Lord Selkirk par la Compagnie de la Baie d'Hudson en 1811. En 1869, la colonie comptait 12 000 personnes et était gouvernée par la Compagnie de la Baie d'Hudson.

[23] En 1869, la colonie de la rivière Rouge formait une collectivité dynamique dotée d'un système de libre entreprise et d'institutions judiciaires et civiles bien établies, et dont les activités étaient axées sur les commerces de détail, les hôtels, la traite et les saloons, là où se trouve maintenant le centre-ville de Winnipeg. Les Métis étaient le groupe démographique le plus important de la colonie, représentant environ 85 pour 100 de la population, et ils occupaient des postes de direction dans les entreprises, de même qu'au sein de l'Église et du gouvernement.

[24] Pendant ce temps, le Haut-Canada (maintenant l'Ontario), le Bas-Canada (maintenant le Québec), la Nouvelle-Écosse et le Nouveau-Brunswick s'unissaient par *l'Acte de l'Amérique du Nord britannique* de 1867 (maintenant la *Loi constitutionnelle de 1867*) pour former un nouveau pays, le Canada. Le premier gouvernement du pays, dirigé par Sir John A. Macdonald, entendait favoriser l'expansion vers l'ouest, motivé par le rêve d'une nation qui s'étendrait de l'Atlantique jusqu'au Pacifique et offrirait de vastes terres nouvelles propices à la colonisation. L'Angleterre a consenti à céder la Terre de Rupert au Canada. Reconnaissant l'intérêt de la Compagnie de la Baie d'Hudson, le Canada lui a versé 300 000 £ et lui a permis de conserver certaines terres entourant ses postes de traite dans le Nord-Ouest. En 1868, le Parlement impérial a parfait l'entente avec l'adoption de l'*Acte de la Terre de Rupert, 1868* (R.-U.), 31 & 32 Vict., ch. 105.

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

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

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

[28] The Canadian government adopted a conciliatory course. It invited a delegation of "at least two residents" to Ottawa to present the demands of the settlers and confer with Parliament. The provisional government responded by delegating

[25] En tant que successeur de la Compagnie de la Baie d'Hudson, le Canada a acquis le titre de la Terre de Rupert et de la colonie de la rivière Rouge. Sur le terrain, la réalité était cependant plus complexe. Les Métis francophones de foi catholique romaine craignaient que la prise de contrôle par le Canada se traduise par l'arrivée massive de colons protestants anglophones qui menaceraient leur style de vie traditionnel. Lorsque deux groupes d'arpenteurs se sont présentés en 1869 pour faire l'inventaire des terres, la situation a atteint un point critique.

[26] Les arpenteurs se sont heurtés à une résistance armée, dirigée par un Métis francophone, Louis Riel. Le 2 novembre 1869, William McDougall, le lieutenant-gouverneur du nouveau territoire proposé par le Canada, a été refoulé par une patrouille à cheval de Métis francophones. Le même jour, un groupe de Métis, dont Riel faisait partie, s'est emparé d'Upper Fort Garry (où se trouve maintenant le centre-ville de Winnipeg), la principale fortification de la colonie. Riel a convoqué la « Convention des 24 », composée de 12 représentants des paroisses anglophones et de 12 représentants des paroisses francophones. À leur deuxième réunion, il a annoncé que les Métis francophones avaient l'intention de former un gouvernement provisoire et demandé aux anglophones de les appuyer. Les représentants des Anglais ont demandé du temps pour discuter de cette demande avec les habitants de leurs paroisses. La réunion a été ajournée jusqu'au 1er décembre 1869.

[27] À la reprise de la réunion, les Métis se sont retrouvés devant une proclamation transférant la région sous l'autorité du Canada, lue par McDougall plus tôt dans la journée. Le groupe a rejeté cette proclamation. Les Métis francophones ont dressé une liste des demandes auxquelles le Canada devait répondre pour que les colons de la rivière Rouge acceptent le contrôle canadien.

[28] Le gouvernement canadien a décidé de se montrer conciliant. Il a invité à Ottawa une délégation composée d'[TRADUCTION] « au moins deux résidents » pour y présenter les demandes des colons et en discuter avec le Parlement. Le

a priest, Father Ritchot, a judge, Judge Black, and a local businessman named Alfred Scott to go to Ottawa. The delegates — none of whom were Métis, although Riel nominated them — set out for Ottawa on March 24, 1870.

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

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

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

[31] The delegates returned to the Red River Settlement with the proposal, and, on June 24, 1870, Father Ritchot addressed the Convention of 40, now called the Legislative Assembly of Assiniboia, to

gouvernement provisoire a répondu à cette invitation en désignant un prêtre, le père Ritchot, un juge, le juge Black, et un homme d'affaires de la région, Alfred Scott, pour aller à Ottawa. Les délégués — dont aucun n'était Métis, bien qu'ils aient été désignés par Riel — sont partis pour Ottawa le 24 mars 1870.

[29] Le Canada n'avait guère d'autre choix que d'adopter une approche diplomatique envers les colons de la rivière Rouge. Comme l'a conclu le juge MacInnes au procès :

> [TRADUCTION] Le Canada n'avait pas le pouvoir d'envoyer des troupes dans la colonie pour réprimer l'insurrection des Métis francophones. Il ne disposait pas non plus des troupes nécessaires. De plus, à cette période de l'année, il était impossible d'accéder à la colonie autrement que par les États-Unis. Or, à l'époque, le Canada craignait une éventuelle annexion du territoire par les États-Unis, d'où sa réticence à demander aux États-Unis l'autorisation de faire passer ses troupes sur leur territoire pour aller réprimer l'insurrection et rétablir l'autorité. [par. 78]

[30] Les délégués sont arrivés à Ottawa le 11 avril 1870. Ils ont rencontré le premier ministre Macdonald et le ministre de la Milice et de la Défense, George-Étienne Cartier, avec lesquels ils ont négocié. Ces négociations faisaient partie d'une série de négociations plus générales sur les conditions d'entrée du Manitoba dans le Canada à titre de province. Il s'est révélé que le Canada souhaitait conserver la propriété de terres publiques situées dans la nouvelle province, d'où l'idée d'attribuer des terres aux enfants des Métis. Les parties se sont entendues sur la concession aux enfants des Métis de 1,4 million d'acres de terres (art. 31) et la confirmation des tenures foncières existantes (art. 32). Après d'âpres débats et l'échec d'une motion visant à rayer l'article prévoyant la concession de terres aux enfants, le Parlement a adopté la *Loi sur le Manitoba*, le 10 mai 1870.

[31] Les délégués sont revenus dans la colonie de la rivière Rouge avec cette proposition et, le 24 juin 1870, le père Ritchot s'est adressé à la Convention des 40, maintenant appelée l'Assemblée législative

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

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

[33] The first problem was the erroneous inclusion of all Métis, including heads of families, in the allotment, contrary to the terms of s. 31, which clearly provided the lands were to be divided among the children of the Métis heads of families. On March 1, 1871, Parliament passed an Order in Council declaring that all Métis had a right to a share in the 1.4 million acres promised in s. 31 of the *Manitoba Act*. This order, which would have created more grants of smaller acreage, was made over the objections raised by McDougall, then the former Lieutenant Governor of Rupert's Land, in the House of Commons. Nevertheless, the federal government began planning townships based on 140-acre lots, dividing the 1.4 million acres among approximately 10,000 recipients. This was the first allotment.

d'Assiniboia, pour plaider en faveur de l'adoption de la *Loi sur le Manitoba.* Il a lu à l'Assemblée une lettre du ministre Cartier, dans laquelle ce dernier promettait que tout intérêt foncier existant visé par l'art. 32 de la *Loi sur le Manitoba* pourrait être converti en titre sans aucun paiement. Le ministre Cartier garantissait que les concessions aux enfants promises à l'art. 31 [TRADUCTION] « seraient de nature à répondre aux attentes des Sang-mêlé résidants », et que le partage des concessions serait fait « *de la façon la plus efficace et équitable possible* » : d.a., vol. XI, p. 196 (italiques ajoutés). Sur ce fondement, l'Assemblée a voté en faveur de la *Loi sur le Manitoba* et de l'entrée de la province dans le Dominion du Canada. Le Manitoba a intégré le Canada par décret du Parlement impérial en date du 15 juillet 1870.

[32] Le gouvernement du Canada a entrepris le processus de mise en œuvre de l'art. 31 au début de l'année 1871. Il devait en premier lieu mettre de côté 1,4 million d'acres et, en deuxième lieu, diviser les terres entre les bénéficiaires admissibles. La deuxième étape a été ponctuée d'une série d'erreurs et de retards qui en ont entravé le déroulement « efficace » promis par le ministre Cartier.

[33] Le premier problème a été l'inclusion par erreur de tous les Métis, y compris les chefs de famille, parmi les bénéficiaires de la répartition des terres, contrairement au libellé de l'art. 31 qui prévoyait expressément qu'elles devaient être partagées entre les enfants des chefs de famille métis. Le 1er mars 1871, le Parlement a pris un décret déclarant que tous les Métis avaient le droit de participer au partage des 1,4 million d'acres de terres promis à l'art. 31 de la *Loi sur le Manitoba*. Ce décret, qui aurait eu pour effet de créer un nombre accru de concessions, mais de superficie moindre, a été pris malgré les objections soulevées à la Chambre des communes par McDougall, alors ancien lieutenant-gouverneur de la Terre de Rupert. Le gouvernement fédéral a néanmoins commencé à planifier la formation de cantons, composés de lots de 140 acres, partageant ainsi les 1,4 million d'acres entre 10 000 bénéficiaires environ. Il s'agissait de la première répartition.

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

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

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

[37] While the allotment process lagged, speculators began acquiring the Métis children's yet-to-be granted interests in the s. 31 lands, aided by a range of legal devices. Initially, the Manitoba legislature moved to block sales of the children's interests to speculators, but, in 1877, it passed legislation

[34] En 1873, le gouvernement fédéral a changé d'idée et a décidé que seuls les enfants des Métis auraient droit aux concessions prévues à l'art. 31. Le gouvernement a également décidé que les terres que les colons de la rivière Rouge utilisaient habituellement pour la fenaison ne pouvaient faire partie des terres concédées aux enfants, contrairement à ce qui avait été prévu au départ, de sorte que d'autres terres ont dû être mises de côté afin d'atteindre la cible de 1,4 million d'acres. La décision de 1873 était manifestement la bonne. Malheureusement, le gouvernement a mis plus de trois ans à adopter cette position. On a alors procédé à la deuxième répartition.

[35] En novembre 1873, le gouvernement de Sir John A. Macdonald a été défait et un nouveau gouvernement libéral a été formé au début de l'année 1874. Sans que l'on sache pourquoi, le nouveau gouvernement n'a pris aucune mesure pour attribuer les terres avant le début de 1875. Pressé de questions au Parlement au sujet des retards, et sur requête de plusieurs paroisses, le gouvernement libéral a finalement confié à John Machar et Matthew Ryan la tâche de vérifier qui avait droit aux concessions prévues par l'art. 31. Ce processus de vérification de l'admissibilité aux concessions a commencé cinq ans après l'adoption de la *Loi sur le Manitoba.*

[36] Une deuxième série de problèmes avait trait à l'évaluation faite par la commission Machar/Ryan du nombre d'enfants des Métis admissibles. Malgré un recensement fait en 1870, qui estimait à 7 000 le nombre d'enfants des Métis, John Machar et Matthew Ryan ont conclu qu'il y en avait moins, soit 5 088, et ils ont finalement arrondi ce nombre à 5 833 pour obtenir des lots d'une superficie de 240 acres. Une troisième et dernière répartition a donc débuté en 1876, mais elle ne s'est pas terminée avant 1880.

[37] Alors que le processus de répartition traînait en longueur, des spéculateurs ont commencé à acquérir les intérêts des enfants des Métis qui ne leur avaient pas encore été concédés sur les terres visées à l'art. 31, utilisant à cette fin toute une série de mécanismes juridiques. Initialement,

authorizing sales of s. 31 interests once the child obtained the age of majority, whether or not the child had received his or her allotment, or even knew of its location. In 1878, Manitoba adopted further legislation which allowed children between 18 and 21 to sell their interests, so long as the transaction was approved by a judicial officer and the child's parents. Dr. Thomas Flanagan, an expert who testified at trial, found returns on judicial sales were the poorest of any type of s. 31 sale: C.A., at para. 152.

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

[39] The position of the Métis in the Red River Settlement deteriorated in the decades following Manitoba's entry into Confederation. White settlers soon constituted a majority in the territory and the Métis community began to unravel. Many Métis sold their promised interests in land and moved further west. Those left amounted to a small remnant of the original community.

V. Issues

[40] The appellants seek numerous declarations, including: (1) in implementing the *Manitoba Act*, the federal Crown breached fiduciary obligations owed to the Métis; (2) the federal Crown failed to implement the *Manitoba Act* in a manner

l'Assemblée législative du Manitoba a pris des mesures pour empêcher la vente des droits des enfants à des spéculateurs. En 1877, elle a toutefois adopté une loi autorisant, une fois que l'enfant avait atteint l'âge de la majorité, la vente des intérêts que lui conférait l'art. 31, peu importe que l'enfant ait reçu ou non sa concession, ou même qu'il en connaisse l'emplacement. En 1878, le Manitoba a adopté une nouvelle loi autorisant les enfants de 18 à 21 ans à vendre leurs intérêts pourvu que la vente soit approuvée par un officier de justice et par les père et mère de l'enfant. M. Thomas Flanagan, un expert ayant témoigné au procès, a conclu que les ventes sous surveillance judiciaire étaient celles qui avaient rapporté le moins parmi tous les types de vente des intérêts conférés par l'art. 31 (C.A., par. 152).

[38] Il est finalement devenu évident que Donald Codd, agent des terres du Dominion par intérim, avait sous-estimé le nombre d'enfants des Métis admissibles — 993 enfants métis de plus avaient droit à des terres. En 1885, plutôt que de procéder à une quatrième répartition, le gouvernement canadien a prévu par décret que les enfants pour lesquels aucune terre n'était disponible recevraient un certificat d'une valeur de 240 $, échangeable contre une terre. Quinze ans après l'adoption de la *Loi sur le Manitoba*, le processus était enfin terminé.

[39] La situation des Métis au sein de la colonie de la rivière Rouge s'est détériorée au cours des décennies qui ont suivi l'entrée du Manitoba dans la Confédération. Rapidement, les colons de race blanche ont constitué la majorité des habitants du territoire et la communauté métisse a commencé à s'effriter. De nombreux Métis ont aliéné les intérêts sur les terres qui leur avaient été promis et ont migré vers l'ouest. Ceux qui sont restés ne représentaient qu'une fraction de la communauté d'origine.

V. Les questions en litige

[40] Les appelants sollicitent un jugement déclarant notamment que : (1) dans sa mise en œuvre de la *Loi sur le Manitoba*, la Couronne fédérale a manqué à ses obligations fiduciaires envers les Métis; (2) dans sa mise en œuvre de la *Loi sur*

consistent with the honour of the Crown; and (3) certain legislation passed by Manitoba affecting the implementation of the *Manitoba Act* was *ultra vires*. These claims give rise to the following issues:

A. Does the Manitoba Metis Federation have standing in the action?

B. Is Canada in breach of a fiduciary duty to the Métis?

C. Did Canada fail to comply with the honour of the Crown in the implementation of ss. 31 and 32 of the *Manitoba Act*?

D. Were the Manitoba statutes related to implementation unconstitutional?

E. Is the claim for a declaration barred by limitations?

F. Is the claim for a declaration barred by laches?

VI. Discussion

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

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

le Manitoba, la Couronne fédérale n'a pas agi en conformité avec l'honneur de la Couronne; (3) certaines lois touchant la mise en œuvre de la *Loi sur le Manitoba*, adoptées par le Manitoba, étaient *ultra vires*. Ces prétentions soulèvent les questions litigieuses suivantes :

A. La Manitoba Metis Federation a-t-elle qualité pour agir dans l'action?

B. Le Canada a-t-il manqué à une obligation fiduciaire envers les Métis?

C. Le Canada a-t-il respecté le principe de l'honneur de la Couronne dans la mise en œuvre des art. 31 et 32 de la *Loi sur le Manitoba*?

D. Les lois de mise en œuvre adoptées par le Manitoba étaient-elles inconstitutionnelles?

E. La demande de jugement déclaratoire est-elle irrecevable par application des règles de la prescription?

F. La demande de jugement déclaratoire est-elle irrecevable par application de la doctrine des *laches*?

VI. Analyse

A. *La Manitoba Metis Federation a-t-elle qualité pour agir dans la présente action?*

[41] Le Canada et le Manitoba ne contestent aucunement que les appelants individuels ont qualité pour agir à titre personnel. Ils soutiennent toutefois que la MMF n'a aucun intérêt personnel dans le litige et qu'elle ne satisfait pas au troisième volet du test relatif à la qualité pour agir dans l'intérêt public énoncé dans *Conseil canadien des Églises c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1992] 1 R.C.S. 236, étant donné que la participation des demandeurs individuels démontre de façon évidente qu'il existe une autre manière raisonnable et efficace de soumettre la question à la Cour.

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

[43] The courts below did not have the benefit of this Court's decision in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524. In that case, the Court rejected a strict approach to the third requirement for standing. The presence of other claimants does not necessarily preclude public interest standing; the question is whether this litigation is a reasonable and effective means to bring a challenge to court. The requirements for public interest standing should be addressed in a flexible and generous manner, and considered in light of the underlying purposes of setting limits on who has standing to bring an action before a court. Even if there are other plaintiffs with a direct interest in the issue, a court may consider whether the public interest plaintiff will bring any particularly useful or distinct perspective to the resolution of the issue at hand.

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

[42] Les juridictions inférieures n'ont pas reconnu que la MMF avait qualité pour intenter l'action. Au procès, le juge MacInnes a conclu que la MMF ne satisfaisait pas au troisième volet du test énoncé dans *Conseil canadien des Églises*, parce que la participation des demandeurs individuels démontrait qu'il existait une autre manière raisonnable et efficace de soumettre la question à la cour. La Cour d'appel a refusé d'intervenir dans la décision discrétionnaire du juge MacInnes au sujet de la qualité pour agir.

[43] Les juridictions inférieures ne disposaient pas de la décision de notre Cour dans *Canada (Procureur général) c. Downtown Eastside Sex Workers United Against Violence Society*, 2012 CSC 45, [2012] 2 R.C.S. 524. Dans cet arrêt, la Cour a rejeté l'application stricte de la troisième condition relative à la qualité pour agir. Le fait qu'il y ait d'autres demandeurs n'exclut pas nécessairement la qualité pour agir dans l'intérêt public; il s'agit de savoir si la présente instance constitue un moyen raisonnable et efficace de soumettre la question à la cour. Les conditions à remplir pour se voir reconnaître la qualité pour agir dans l'intérêt public doivent être appréciées de façon souple et libérale, au regard des objectifs sous-jacents des restrictions quant aux personnes à qui il convient de reconnaître la qualité pour intenter une action devant les tribunaux. Même en présence d'autres demandeurs ayant un intérêt direct dans le litige, il est permis au tribunal de se demander si le demandeur d'intérêt public offrira une perspective particulièrement utile ou distincte sur la question à trancher.

[44] Comme nous le verrons, l'action n'est pas constituée d'une série de demandes de réparations personnelles. Il s'agit plutôt d'une demande collective visant à obtenir un jugement déclaratoire à des fins de réconciliation entre les descendants des Métis de la vallée de la rivière Rouge et le Canada. Certes, la *Loi sur le Manitoba* établissait des droits individuels, mais il n'en demeure pas moins que les appelants ont présenté, au nom du peuple métis, une demande collective fondée sur une promesse qui leur a été faite en contrepartie de la reconnaissance par les Métis de la souveraineté du Canada. Cette

interest to come before the Court. We would grant the MMF standing.

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

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

(1) When a Fiduciary Duty May Arise

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

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

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

[49] In the Aboriginal context, a fiduciary duty may arise as a result of the "Crown [assuming] discretionary control over specific Aboriginal interests": *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 18. The focus is on the particular interest that

demande collective justifie que la Cour autorise l'organisme représentant les droits collectifs des Métis à ester devant la Cour. Nous sommes d'avis de reconnaître que la MMF a qualité pour agir.

[45] Par souci de commodité, dans la suite des présents motifs, nous utiliserons l'expression « les Métis » pour désigner collectivement les demandeurs individuels et la MMF.

B. *Le Canada a-t-il manqué à une obligation fiduciaire envers les Métis?*

(1) Circonstances dans lesquelles une obligation fiduciaire peut exister

[46] Les Métis disent que le Canada avait à leur égard l'obligation fiduciaire de mettre en œuvre les art. 31 et 32 de la *Loi sur le Manitoba*, puisqu'il était leur fiduciaire. Selon eux, cette obligation découlait de leur intérêt autochtone sur les terres du Manitoba ou directement des promesses faites aux art. 31 et 32.

[47] L'obligation fiduciaire est une notion d'equity issue du droit des fiducies. En règle générale, le fiduciaire est tenu d'agir dans le meilleur intérêt de la personne pour le compte de laquelle il agit, d'éviter tout conflit d'intérêts et de rendre compte de façon rigoureuse des biens qu'il détient ou administre pour le compte de cette personne. Voir *Lac Minerals Ltd. c. International Corona Resources Ltd.*, [1989] 2 R.C.S. 574, p. 646-647.

[48] La relation entre les Métis et la Couronne est généralement considérée comme une relation de nature fiduciaire. Dans le cadre d'une relation de cette nature, ce ne sont toutefois pas tous les rapports entre les parties qui sont assujettis à une obligation fiduciaire.

[49] Dans le contexte autochtone, une obligation fiduciaire peut naître du fait que la « Couronne assume des pouvoirs discrétionnaires à l'égard d'intérêts autochtones particuliers » (*Nation haïda c. Colombie-Britannique (Ministre des Forêts)*, 2004 CSC 73, [2004] 3 R.C.S. 511, par. 18). Il est alors

is the subject matter of the dispute: *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 83. The content of the Crown's fiduciary duty towards Aboriginal peoples varies with the nature and importance of the interest sought to be protected: *Wewaykum*, at para. 86.

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

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

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

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

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

[52] There is little dispute that the Crown undertook discretionary control of the administration of the land grants under ss. 31 and 32 of the *Manitoba Act*, meeting the second requirement. The issue is whether the first condition is met — is there a "specific or cognizable Aboriginal interest"? The trial judge held that the Métis failed to establish a specific, cognizable interest in land. The Court of Appeal found it unnecessary to decide the point, in

nécessaire de s'attacher à l'intérêt particulier qui est l'objet du différend (*Bande indienne Wewaykum c. Canada*, 2002 CSC 79, [2002] 4 R.C.S. 245, par. 83). Le contenu de l'obligation fiduciaire de la Couronne envers les peuples autochtones varie selon la nature et l'importance des intérêts à protéger (*Wewaykum*, par. 86).

[50] Une obligation fiduciaire peut également découler d'un engagement si les trois éléments suivants sont réunis :

(1) un engagement de la part du fiduciaire à agir au mieux des intérêts du bénéficiaire ou des bénéficiaires; (2) l'existence d'une personne ou d'un groupe de personnes définies vulnérables au contrôle du fiduciaire (le bénéficiaire ou les bénéficiaires); et (3) un intérêt juridique ou un intérêt pratique important du bénéficiaire ou des bénéficiaires sur lequel l'exercice, par le fiduciaire, de son pouvoir discrétionnaire ou de son contrôle pourrait avoir une incidence défavorable.

(*Alberta c. Elder Advocates of Alberta Society*, 2011 CSC 24, [2011] 2 R.C.S. 261, par. 36)

(2) Les Métis avaient-ils sur les terres un intérêt autochtone particulier ayant fait naître une obligation fiduciaire?

[51] Comme nous l'avons vu, la première façon dont une obligation fiduciaire peut prendre naissance est le fait que la Couronne administre des terres ou des biens sur lesquels les Autochtones ont un intérêt (*Guerin c. La Reine*, [1984] 2 R.C.S. 335, p. 384). L'obligation prend naissance (1) s'il existe un intérêt autochtone particulier ou identifiable, et (2) si la Couronne exerce un pouvoir discrétionnaire à l'égard de cet intérêt (*Wewaykum*, par. 79-83; *Nation haïda*, par. 18).

[52] Il n'est guère contesté que la Couronne a rempli la deuxième condition en assumant le contrôle discrétionnaire de l'administration des concessions de terres prévues aux art. 31 et 32 de la *Loi sur le Manitoba*. Il s'agit de savoir si la première condition est remplie — existe-t-il un « intérêt autochtone particulier ou identifiable »? Le juge du procès a conclu que les Métis n'avaient pas prouvé qu'ils avaient un intérêt particulier ou

view of its conclusion that in any event, no breach was established.

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

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

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

identifiable sur les terres. La Cour d'appel n'a pas jugé nécessaire de trancher la question, vu sa conclusion que, de toute façon, aucun manquement n'avait été établi.

[53] Le fait que les Métis soient des Autochtones et qu'ils aient un intérêt sur les terres ne suffit pas à établir l'existence d'un intérêt autochtone sur les terres. L'intérêt (qu'il s'agisse d'un titre ou de tout autre droit) en question doit être distinctement autochtone; il doit s'agir d'un intérêt autochtone collectif sur les terres qui fait partie intégrante du mode de vie distinctif des Métis et de leurs rapports avec le territoire : voir *R. c. Powley*, 2003 CSC 43, [2003] 2 R.C.S. 207, par. 37. La principale question à trancher est donc celle de savoir si, *en tant que collectivité,* les Métis avaient un intérêt *autochtone* particulier ou identifiable sur les terres visées aux art. 31 ou 32.

[54] Les Métis plaident que l'art. 31 de la *Loi sur le Manitoba* confirme qu'ils détenaient un intérêt autochtone préexistant particulier sur les terres visées à l'art. 31. Selon l'art. 31, les concessions visaient à « *éteindre les titres des Indiens aux terres de la province* » et le partage des concessions devait se faire « *au bénéfice des familles des Métis résidants* ». Les Métis prétendent que ces termes confirment qu'ils ont cédé à la Couronne le contrôle de leur terre natale dans la colonie de la rivière Rouge en contrepartie d'un certain nombre de dispositions dans la *Loi sur le Manitoba*, qui est un document constitutionnel. Ils soutiennent que les discours prononcés à la Chambre des communes par les rédacteurs de la *Loi sur le Manitoba*, le premier ministre Macdonald et George-Étienne Cartier confirment que l'objectif de l'art. 31 était d'éteindre les « titres des Indiens » des Métis. Ils demandent que la *Loi sur le Manitoba* reçoive une interprétation libérale qui tienne compte du fait qu'elle visait à permettre l'entrée pacifique du Manitoba dans la Confédération et à assurer aux Métis un avenir en tant que propriétaires fonciers et colonisateurs dans la nouvelle province : voir *R. c. Blais*, 2003 CSC 44, [2003] 2 R.C.S. 236, par. 17.

[55] Le Canada rétorque que l'art. 31 n'établit pas un intérêt autochtone préexistant sur les terres.

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

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

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

[58] Even if this was the Crown's practice (a doubtful assumption in the absence of supporting evidence), it does not establish that the Métis held either Aboriginal title or some other Aboriginal interest in specific lands as a group. An Aboriginal interest in land giving rise to a fiduciary duty cannot be established by treaty, or, by extension,

À son avis, il s'agissait d'un instrument destiné à répondre aux griefs des Métis, et l'allusion aux « titres des Indiens » ne permet pas de conclure à l'existence de ces titres. Il appartenait aux Métis de prouver qu'ils détenaient un intérêt autochtone sur les terres avant l'adoption de la *Loi sur le Manitoba*, ce qu'ils n'ont pas réussi à faire selon lui. Le Canada admet que certains Métis détenaient individuellement des parcelles de terre, mais il nie qu'ils détenaient l'intérêt autochtone collectif requis pour engendrer une obligation fiduciaire.

[56] Les conclusions de fait du juge du procès sont fatales pour l'argument des Métis. En effet, le juge a conclu que les Métis détenaient et utilisaient des terres individuellement, plutôt que collectivement, et qu'ils en permettaient l'aliénation. Selon lui, rien ne permettait de conclure que les Métis affirmaient détenir un « titre des Indiens » lorsque les dirigeants britanniques ont voulu éteindre ces titres d'abord dans la zone de colonisation, puis dans toute la province. Il a conclu que les Métis de la rivière Rouge étaient issus de plusieurs bandes. Si certains d'entre eux détenaient des intérêts sur les terres, ces intérêts étaient liés à leur histoire personnelle, et non à leur identité métisse distinctive commune. D'ailleurs, le juge du procès a conclu que les pratiques des Métis en matière de propriété étaient incompatibles avec l'intérêt autochtone revendiqué à l'égard des terres.

[57] Les Métis soutiennent que le juge du procès et la Cour d'appel ont commis une erreur en allant au-delà du libellé de l'art. 31 et en exigeant la preuve d'un intérêt autochtone collectif sur les terres. Ils font valoir que la notion de titre ancestral a toujours été incertaine et que la pratique de la Couronne était de reconnaître que tout groupe autochtone organisé avait un titre et d'éteindre ce titre par traité ou, comme en l'espèce, par l'art. 31 de la *Loi sur le Manitoba*.

[58] Même si c'était là la façon de faire de la Couronne (une hypothèse douteuse en l'absence de preuve à l'appui), elle ne permet pas d'établir que les Métis détenaient, en tant que groupe, un titre ancestral ou tout autre intérêt autochtone sur des terres en particulier. L'existence d'un intérêt autochtone donnant naissance à une obligation

legislation. Rather, it is predicated on historic use and occupation. As Dickson J. stated in *Guerin*:

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

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

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

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

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

fiduciaire ne saurait être établie par un traité ou, par extension, par une loi. Un droit ancestral repose plutôt sur l'usage et l'occupation historiques. Comme l'a dit le juge Dickson dans l'arrêt *Guerin* :

> La jurisprudence en matière de « fiducies politiques » porte essentiellement sur la distribution de deniers publics ou d'autres biens détenus par le gouvernement. Dans chaque cas, la partie qui revendiquait le statut de bénéficiaire d'une fiducie s'appuyait entièrement sur une loi, une ordonnance ou un traité pour réclamer un droit sur les deniers en question. La situation des Indiens est tout à fait différente. Le droit qu'ils ont sur leurs terres est un droit, en *common law*, qui existait déjà et qui n'a été créé ni par la Proclamation royale, ni par le par. 18(1) de la *Loi sur les Indiens*, ni par aucune autre disposition législative ou ordonnance du pouvoir exécutif. [Nous soulignons; p. 379.]

[59] En somme, les termes utilisés à l'art. 31 n'établissent pas que les Métis détenaient un titre ancestral collectif préexistant, pas plus d'ailleurs que les éléments de preuve présentés. Les conclusions de fait tirées par le juge du procès suivant lesquelles les Métis n'avaient pas d'intérêt autochtone collectif sur les terres sont fatales pour cet argument. En conséquence, la prétention que le Canada était tenu à une obligation fiduciaire en gérant les terres des enfants parce que les Métis possédaient un intérêt autochtone sur ces terres doit être rejetée. Le même raisonnement s'applique à l'art. 32 de la *Loi sur le Manitoba*.

(3) La Couronne a-t-elle pris l'engagement d'agir au mieux des intérêts des Métis, ce qui donnerait naissance à une obligation fiduciaire?

[60] Il reste à déterminer si l'on peut conclure à l'existence d'une obligation fiduciaire en raison d'un engagement pris par la Couronne. En résumé, voici les conditions requises pour répondre par l'affirmative :

> (1) un engagement de la part du fiduciaire à agir au mieux des intérêts du bénéficiaire ou des bénéficiaires; (2) l'existence d'une personne ou d'un groupe de personnes définies vulnérables au contrôle du fiduciaire (le bénéficiaire ou les bénéficiaires); et (3) un intérêt juridique ou un intérêt pratique important du bénéficiaire

affected by the alleged fiduciary's exercise of discretion or control.

(*Elder Advocates*, at para. 36)

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

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

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

ou des bénéficiaires sur lequel l'exercice, par le fiduciaire, de son pouvoir discrétionnaire ou de son contrôle pourrait avoir une incidence défavorable.

(*Elder Advocates*, par. 36)

[61] Il s'agit en premier lieu de déterminer si un engagement a été établi. Pour que les obligations de la Couronne acquièrent le statut d'obligations fiduciaires, le pouvoir assumé par la Couronne doit être assorti d'un engagement à agir avec loyauté au mieux des intérêts des bénéficiaires, qui est de la nature d'une obligation de droit privé (*Guerin*, p. 383-384). De plus, « [l]a partie invoquant l'obligation doit pouvoir démontrer que, relativement à l'intérêt juridique particulier en jeu, le fiduciaire a renoncé aux intérêts de toutes les autres parties en faveur de ceux du bénéficiaire » (*Elder Advocates*, par. 31).

[62] Bien que l'art. 31 révèle une intention de procurer un avantage aux enfants des Métis, il ne démontre l'existence d'aucun engagement à agir au mieux de leurs intérêts, qui aurait préséance sur toute autre préoccupation légitime — telle que la préoccupation de disposer des terres nécessaires pour la construction d'un chemin de fer et celle d'ouvrir davantage le Manitoba à la colonisation. De fait, le pouvoir discrétionnaire de déterminer « le mode et [les] conditions d'établissement et autres conditions » conféré par l'art. 31 est incompatible avec l'obligation de loyauté et l'intention d'agir au mieux des intérêts du bénéficiaire en renonçant à tous les autres intérêts.

[63] L'article 32 ne constituait pas non plus un engagement de la part de la Couronne à agir en qualité de fiduciaire en établissant les titres des Métis sur les terres qu'ils détenaient. Il confirmait le maintien des divers modes de tenure qui existaient au moment de la création de la nouvelle province, ou peu avant (C.A., par. 673 et 717), et s'appliquait à tous les propriétaires (C.A., par. 717; voir aussi par. 674 et 677).

(4) Conclusion on Fiduciary Duty

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

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

(1) The Principle of the Honour of the Crown

[65] The appellants argue that Canada breached a duty owed to the Métis based on the honour of the Crown. The phrase "honour of the Crown" refers to the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign.

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

The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a "weaker" or "primitive" people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities,

(4) Conclusion relativement à l'obligation fiduciaire

[64] Nous sommes d'avis que le Canada n'était pas tenu à une obligation fiduciaire envers les Métis dans la mise en œuvre des art. 31 et 32 de la *Loi sur le Manitoba.*

C. *Le Canada a-t-il respecté le principe de l'honneur de la Couronne dans la mise en œuvre des art. 31 et 32 de la Loi sur le Manitoba?*

(1) Le principe de l'honneur de la Couronne

[65] Les appelants soutiennent que le Canada a manqué à une obligation fondée sur l'honneur de la Couronne qui lui incombait envers les Métis. L'expression « honneur de la Couronne » renvoie au principe que les fonctionnaires de la Couronne doivent se comporter honorablement lorsqu'ils agissent au nom du souverain.

[66] L'obligation de la Couronne de se conduire honorablement tire son origine « de l'affirmation par la Couronne de sa souveraineté sur un peuple autochtone et [de] l'exercice de fait de son autorité sur des terres et ressources qui étaient jusque-là sous l'autorité de ce peuple » (*Nation haïda*, par. 32). En droit des Autochtones, le principe de l'honneur de la Couronne remonte à la *Proclamation royale* de 1763, qui renvoie aux « nations ou tribus sauvages qui sont en relations avec Nous et qui vivent sous Notre protection » : voir *Beckman c. Première nation Little Salmon/Carmacks*, 2010 CSC 53, [2010] 3 R.C.S. 103, par. 42. Cette « protection », toutefois, ne procédait pas d'un désir paternaliste de protéger les peuples autochtones; elle traduisait plutôt une reconnaissance de leur force. L'honneur de la Couronne n'est pas non plus un concept paternaliste. Les commentaires de Brian Slattery à propos de l'obligation fiduciaire vont dans le même sens :

[TRADUCTION] L'obligation fiduciaire générale ne tire donc pas ses origines d'un souci paternaliste de protéger un peuple « primitif » ou « plus faible », comme on l'a parfois laissé entendre, mais plutôt de la nécessité de convaincre des peuples autochtones, à une époque où ils

that their rights would be better protected by reliance on the Crown than by self-help.

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

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

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

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

. . . when the Crown claimed sovereignty over Canadian territories and ultimately gained factual control

avaient encore un potentiel militaire considérable, que l'État protégerait mieux leurs droits qu'ils ne sauraient le faire eux-mêmes.

(« Understanding Aboriginal Rights » (1987), 66 *R. du B. can.* 727, p. 753)

L'objectif fondamental du principe de l'honneur de la Couronne est la réconciliation des sociétés autochtones préexistantes avec l'affirmation de la souveraineté de la Couronne. Comme il est dit dans l'arrêt *Première nation Tlingit de Taku River c. Colombie-Britannique (Directeur d'évaluation de projet)*, 2004 CSC 74, [2004] 3 R.C.S. 550, par. 24 :

L'obligation d'agir honorablement découle de l'affirmation de la souveraineté de la Couronne face à l'occupation antérieure des terres par les peuples autochtones. Ce principe a été consacré au par. 35(1) de la *Loi constitutionnelle de 1982*, qui reconnaît et confirme les droits et titres ancestraux existants des peuples autochtones. Un des objectifs visés par le par. 35(1) est la négociation de règlements équitables des revendications autochtones. Dans toutes ses négociations avec les Autochtones, la Couronne doit agir honorablement, dans le respect de ses relations passées et futures avec le peuple autochtone concerné.

[67] Le principe de l'honneur de la Couronne reconnaît ainsi les effets, sur les sociétés autochtones préexistantes, de la surimposition des lois et coutumes européennes (*R. c. Van der Peet*, [1996] 2 R.C.S. 507, par. 248, la juge McLachlin, dissidente). Les peuples autochtones vivaient ici avant les Européens et ils n'ont jamais été conquis (*Nation haïda*, par. 25); ils ont néanmoins été assujettis à un système juridique qu'ils ne partageaient pas. Les traités historiques ont été élaborés dans ce cadre juridique étranger, en plus d'être négociés et rédigés dans une langue étrangère (*R. c. Badger*, [1996] 1 R.C.S. 771, par. 52; *Mitchell c. Bande indienne Peguis*, [1990] 2 R.C.S. 85, p. 142-143, le juge La Forest). L'honneur de la Couronne vient caractériser la « relation spéciale » qui découle de cette pratique coloniale (*Little Salmon*, par. 62). Comme l'a expliqué Brian Slattery :

[TRADUCTION] . . . lorsque la Couronne a revendiqué la souveraineté sur les territoires canadiens et fini par

over them, it did so in the face of pre-existing Aboriginal sovereignty and territorial rights. The tension between these conflicting claims gave rise to a special relationship between the Crown and Aboriginal peoples, which requires the Crown to deal honourably with Aboriginal peoples.

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

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

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

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

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

[70] The application of these precedents to this case indicates that the honour of the Crown is also engaged by an explicit obligation to an Aboriginal group that is enshrined in the Constitution. The

exercer sur eux un contrôle de fait, elle l'a fait en dépit de la souveraineté et des droits territoriaux préexistants des Autochtones. La tension entre ces revendications contradictoires a donné naissance à une relation spéciale entre la Couronne et les peuples autochtones, d'où l'obligation pour la Couronne d'agir honorablement envers eux.

(« Aboriginal Rights and the Honour of the Crown » (2005), 29 *S.C.L.R.* (2d) 433, p. 436)

(2) Quand l'honneur de la Couronne est-il engagé?

[68] L'honneur de la Couronne impose une lourde obligation et n'entre pas en jeu dans toutes les interactions entre la Couronne et les peuples autochtones. Dans le passé, il a été reconnu que l'honneur de la Couronne est engagé lorsqu'il s'agit de concilier les droits ancestraux et la souveraineté de la Couronne. Comme la Cour l'a dit dans l'arrêt *Badger* :

> . . . l'honneur de la Couronne est toujours en jeu lorsqu'elle transige avec les Indiens. Les traités et les dispositions législatives qui ont une incidence sur les droits ancestraux ou issus de traités doivent être interprétés de manière à préserver l'intégrité de la Couronne. [par. 41]

[69] Notre Cour a également reconnu que l'honneur de la Couronne est engagé par le par. 35(1) de la *Loi constitutionnelle de 1982*. Dans *R. c. Sparrow*, [1990] 1 R.C.S. 1075, la Cour a conclu que le par. 35(1) limite le pouvoir législatif conféré par le par. 91(24), dans le respect d'une « norme élevée — celle d'agir honorablement » (p. 1109). Dans *Nation haïda*, notre Cour a expliqué que « [l]'article 35 a pour corollaire que la Couronne doit agir honorablement lorsqu'il s'agit de définir les droits garantis par celui-ci » (par. 20). En raison de son lien avec l'art. 35, l'honneur de la Couronne a été qualifié de « principe constitutionnel » (*Little Salmon,* par. 42).

[70] L'application de ces précédents au présent dossier indique que l'honneur de la Couronne est également engagé par une obligation explicite envers un groupe autochtone qui est consacrée

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

par la Constitution. La Constitution n'est pas une simple loi; c'est le document même par lequel la Couronne a affirmé « [s]a souveraineté [. . .] face à l'occupation antérieure des terres par les peuples autochtones » : *Taku River*, par. 24. Voir aussi *Mitchell c. M.R.N.*, 2001 CSC 33, [2001] 1 R.C.S. 911, par. 9. L'honneur de la Couronne prend sa source dans la Constitution, et une obligation explicite incluse dans la Constitution engage fondamentalement l'honneur de la Couronne. Comme la Cour l'a dit dans *Nation haïda*, « [d]ans tous ses rapports avec les peuples autochtones, qu'il s'agisse de l'affirmation de sa souveraineté, du règlement de revendications ou de la mise en œuvre de traités, la Couronne doit agir honorablement » : par. 17 (nous soulignons).

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

[71] Il est possible d'établir une analogie entre une telle obligation constitutionnelle et une promesse faite par traité. Une « intention de créer des obligations » et un « certain élément de solennité » devraient s'attacher autant à l'une qu'à l'autre (*R. c. Sioui*, [1990] 1 R.C.S. 1025, p. 1044; *R. c. Sundown*, [1999] 1 R.C.S. 393, par. 24-25). Qui plus est, ces deux sortes de promesses sont faites essentiellement dans le but de concilier les intérêts autochtones et la souveraineté de la Couronne. On peut même conclure à l'existence d'obligations constitutionnelles à l'issue d'une consultation s'apparentant à la négociation d'un traité.

[72] The last element under this rubric is that the obligation must be explicitly owed to an Aboriginal group. The honour of the Crown will not be engaged by a constitutional obligation in which Aboriginal peoples simply have a strong interest. Nor will it be engaged by a constitutional obligation owed to a group partially composed of Aboriginal peoples. Aboriginal peoples are part of Canada, and they do not have special status with respect to constitutional obligations owed to Canadians as a whole. But a constitutional obligation explicitly directed at an Aboriginal group invokes its "special relationship" with the Crown: *Little Salmon*, at para. 62.

[72] Enfin, il doit être explicite que le créancier de l'obligation est un groupe autochtone. L'honneur de la Couronne ne saurait être engagé par une obligation constitutionnelle ayant simplement une grande importance pour les peuples autochtones. Il ne saurait non plus être engagé par une obligation constitutionnelle de la Couronne à l'égard d'un groupe composé partiellement d'Autochtones. Les Autochtones font partie du Canada et ne jouissent pas d'un statut particulier pour ce qui est des obligations constitutionnelles imposées à l'égard de l'ensemble des Canadiens. Cependant, l'obligation constitutionnelle qui vise explicitement un groupe autochtone s'appuie sur la « relation spéciale » de ce groupe avec la Couronne : *Little Salmon*, par. 62.

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

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

(1) The honour of the Crown gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest (*Wewaykum*, at paras. 79 and 81; *Haida Nation*, at para. 18);

(2) The honour of the Crown informs the purposive interpretation of s. 35 of the *Constitution Act, 1982*, and gives rise to a duty to consult when the Crown contemplates an action that will affect a claimed but as of yet unproven Aboriginal interest: *Haida Nation*, at para. 25;

(3) The honour of the Crown governs treaty-making and implementation: *Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434, at p. 512, *per* Gwynne J., dissenting; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, at para. 51, leading to requirements such as honourable negotiation and the avoidance of the appearance of sharp dealing (*Badger*, at para. 41); and

(4) The honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples: *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 43, referring to *The Case of The Churchwardens of St. Saviour in Southwark* (1613), 10 Co. Rep. 66b, 77 E.R.

(3) Quelles sont les obligations imposées par l'honneur de la Couronne?

[73] L'honneur de la Couronne n'est « pas simplement [. . .] une belle formule, mais [. . .] un précepte fondamental qui peut s'appliquer dans des situations concrètes », et il « fait naître différentes obligations selon les circonstances » (*Nation haïda*, par. 16 et 18). Il ne s'agit pas d'une cause d'action en soi, mais d'un principe qui a trait aux *modalités* d'exécution des obligations dont il emporte l'application. Jusqu'à ce jour, le principe de l'honneur de la Couronne a été appliqué dans au moins quatre cas :

(1) Le principe de l'honneur de la Couronne fait naître une obligation fiduciaire lorsque la Couronne assume des pouvoirs discrétionnaires à l'égard d'un intérêt autochtone particulier (*Wewaykum*, par. 79 et 81; *Nation haïda*, par. 18);

(2) Le principe de l'honneur de la Couronne guide l'interprétation téléologique de l'art. 35 de la *Loi constitutionnelle de 1982* et fait naître une obligation de consultation lorsque la Couronne envisage des mesures qui auront une incidence sur un intérêt autochtone revendiqué, mais non encore établi (*Nation haïda*, par. 25);

(3) Le principe de l'honneur de la Couronne régit la conclusion des traités et leur mise en œuvre (*Province of Ontario c. Dominion of Canada* (1895), 25 R.C.S. 434, p. 512, le juge Gwynne, dissident; *Première nation crie Mikisew c. Canada (Ministre du Patrimoine canadien)*, 2005 CSC 69, [2005] 3 R.C.S. 388, par. 51), et commande le respect d'exigences telles que s'en tenir à une négociation honnête et éviter l'apparence de manœuvres malhonnêtes (*Badger*, par. 41);

(4) Le principe de l'honneur de la Couronne exige qu'elle agisse de manière à ce que les traités conclus avec les Autochtones et les concessions prévues par la loi en leur faveur atteignent leur but (*R. c. Marshall*, [1999] 3 R.C.S. 456, par. 43, citant les arrêts *The Case of The Churchwardens of St. Saviour in Southwark*

1025, and *Roger Earl of Rutland's Case* (1608), 8 Co. Rep. 55a, 77 E.R. 555; *Mikisew Cree First Nation*, at para. 51; *Badger*, at para. 47.

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

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

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

(1613), 10 Co. Rep. 66b, 77 E.R. 1025, et *Roger Earl of Rutland's Case* (1608), 8 Co. Rep. 55a, 77 E.R. 555; *Première nation crie Mikisew*, par. 51; *Badger*, par. 47).

[74] Ainsi, l'obligation découlant du principe de l'honneur de la Couronne varie en fonction de la situation. Ce en quoi consiste un comportement honorable variera selon les circonstances.

[75] En appliquant les précédents et les principes qui encadrent le comportement honorable, nous estimons que, lorsqu'il est question de la mise en œuvre d'une obligation constitutionnelle envers un peuple autochtone, le principe de l'honneur de la Couronne oblige la Couronne : (1) à adopter une approche libérale et téléologique dans l'interprétation de la promesse; (2) à agir avec diligence pour s'acquitter de la promesse.

[76] Le premier volet, une interprétation téléologique de l'obligation, est reconnu depuis longtemps comme une exigence liée à l'honneur de la Couronne. Dans le contexte constitutionnel, notre Cour a reconnu que l'honneur de la Couronne exige que le par. 35(1) soit interprété de façon libérale, en accord avec son objet. Ainsi, dans *Nation haïda*, la Cour a conclu qu'à moins que la reconnaissance et l'affirmation des droits ancestraux à l'art. 35 de la *Loi constitutionnelle de 1982* ne s'étendent aux revendications de droits non encore prouvés sur des terres, l'art. 35 ne pouvait remplir son objectif de conciliation honorable (par. 27). Au paragraphe 33, la Cour mentionne qu'« il est possible que, lorsque les Autochtones parviennent finalement à établir le bien-fondé de leur revendication, ils trouvent leurs terres changées et leurs ressources épuisées. Ce n'est pas de la conciliation, ni un comportement honorable. » La méthode d'interprétation téléologique guidée par le principe de l'honneur de la Couronne s'applique tout autant aux obligations issues d'un traité. Par exemple, dans l'arrêt *Marshall*, le juge Binnie a rejeté l'interprétation proposée d'un traité au motif qu'elle était « incompatible avec l'honneur et l'intégrité de la Couronne [. . .] L'arrangement commercial doit être interprété de manière à donner sens et substance aux promesses faites par la Couronne » (par. 52).

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

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

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

[77] Cette jurisprudence démontre qu'une interprétation fondée sur l'honneur attribuée à une obligation ne saurait être une interprétation formaliste qui dissocie les mots de leur objet. Ainsi, l'honneur de la Couronne exige que les obligations constitutionnelles envers les peuples autochtones reçoivent une interprétation libérale, téléologique.

[78] Deuxièmement, l'honneur de la Couronne commande qu'elle agisse avec diligence dans l'exécution de ses obligations solennelles et la conciliation de ses intérêts avec ceux des Autochtones.

[79] Cette obligation a surgi principalement dans le contexte des traités, où l'honneur de la Couronne garantit l'exécution diligente de ses promesses : *Première nation crie Mikisew*, par. 51; *Little Salmon*, par. 12; voir aussi *Nation haïda*, par. 19. Dans son expression la plus fondamentale, le droit tient pour acquis que la Couronne entend toujours respecter ses promesses solennelles, notamment ses obligations constitutionnelles (*Badger*; *Nation haïda*, par. 20). À tout le moins, les manœuvres malhonnêtes ne sont pas tolérées (*Badger*). Ou, comme l'a dit notre Cour dans l'arrêt *Première nation crie Mikisew*, « l'honneur de la Couronne garanti[t] l'exécution de ses obligations envers les Indiens » (par. 51). Toutefois, cette obligation va plus loin : si l'honneur de la Couronne garantit l'exécution de ses obligations, il s'ensuit que l'honneur de la Couronne exige qu'elle prenne des mesures pour faire en sorte que ses obligations soient exécutées. Ainsi, dans le cadre du processus d'examen prévu à la *Convention de la Baie-James et du Nord québécois*, on s'attend à ce que les participants « s'acquittent de leur tâche avec la diligence voulue » (*Québec (Procureur général) c. Moses*, 2010 CSC 17, [2010] 1 R.C.S. 557, par. 23). Comme l'a déclaré le juge Binnie dans *Little Salmon*, par. 12, « [i]l appartient aux parties, lorsque l'application des traités suscite des difficultés, d'agir de façon diligente pour faire valoir leurs intérêts respectifs. Une bonne gouvernance suppose que les décisions soient prises en temps opportun. » Cela vaut, que l'obligation découle d'un traité, comme dans les précédents mentionnés plus tôt, ou de la Constitution, comme en l'espèce.

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

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

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

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

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

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

[80] Pour s'acquitter de ce devoir, les fonctionnaires de la Couronne doivent veiller à exécuter l'obligation de façon à réaliser l'objet de la promesse. Il ne faut pas laisser au groupe autochtone « une promesse — issue de traité — vide de contenu » (*Marshall*, par. 52).

[81] Ce devoir, d'une portée restreinte et bien circonscrite, résulte des faits exceptionnels dont nous sommes saisis. Reconnu dans nombre de sources, il ne constitue pas un ajout inédit aux règles de droit.

[82] Ce ne sont pas toutes les erreurs ni tous les actes de négligence dans la mise en œuvre d'une obligation constitutionnelle envers un peuple autochtone qui porteront atteinte à l'honneur de la Couronne. La mise en œuvre étant une entreprise humaine, elle peut être imparfaite. Toutefois, une tendance persistante aux erreurs et à l'indifférence nuisant substantiellement à l'atteinte des objectifs d'une promesse solennelle pourrait constituer un manquement à l'obligation de la Couronne d'agir honorablement dans la mise en œuvre de sa promesse. L'honneur de la Couronne ne garantit pas non plus que les objectifs de la promesse se concrétiseront, des circonstances et des événements pouvant en empêcher la réalisation en dépit des efforts diligents de la Couronne.

[83] En l'espèce, la question se résume à savoir si, compte tenu de la conduite de la Couronne dans son ensemble, la Couronne a agi avec diligence pour atteindre les objectifs de l'obligation?

(4) L'argument selon lequel notre Cour ne devrait pas tenir compte du défaut d'agir avec diligence dans la mise en œuvre de l'art. 31

[84] Notre collègue, le juge Rothstein, affirme que les parties n'ont pas plaidé que le défaut d'agir avec diligence dans la mise en œuvre de l'art. 31 était contraire au principe de l'honneur de la Couronne et que, par conséquent, la Cour ne devrait pas examiner cette possibilité.

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

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

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

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

[85] À l'instar de notre collègue, nous convenons que les nouveaux développements en droit doivent être abordés avec prudence lorsqu'ils n'ont pas été traités à fond par les parties au litige. Toutefois, nous sommes d'avis que le problème ne se pose pas dans le cas qui nous occupe.

[86] Le principe de l'honneur de la Couronne est au cœur du présent litige depuis le début. Devant les juridictions inférieures et devant notre Cour, les Métis ont fait valoir que, dans sa mise en œuvre de l'art. 31 de la *Loi sur le Manitoba*, le gouvernement a manqué à son obligation découlant de l'honneur de la Couronne. Ils ont reçu l'appui d'un certain nombre d'intervenants à cet égard. À l'audience, le procureur général de la Saskatchewan, intervenant, a affirmé que le principe de l'honneur de la Couronne exige une [TRADUCTION] « interprétation large, libérale et généreuse » et joue le rôle d'un « guide d'interprétation des obligations de droit public [. . .] relativement à la mise en œuvre de l'article 31 » (transcription, p. 67). La Métis Nation of Alberta, intervenante, a fait valoir que l'art. 31 est une promesse non tenue en l'espèce, mais qui, conformément au principe de l'honneur de la Couronne, devrait être remplie par la réconciliation au moyen de la négociation. L'intervenante Métis Nation of Ontario a soutenu que l'art. 31 [TRADUCTION] « ne pouvait être honoré par un processus qui allait finalement empêcher la réalisation de l'objectif de cette disposition » (transcription, p. 28).

[87] Ces observations allaient au-delà de l'argument selon lequel le principe de l'honneur de la Couronne avait engendré une obligation fiduciaire, soulevant la question plus large de savoir si la conduite du gouvernement en général respectait le principe de l'honneur de la Couronne. Le Canada l'a compris : il a fait valoir dans son mémoire que, bien que la Couronne ait l'intention de tenir ses promesses, en l'espèce, le principe de l'honneur de la Couronne ne lui imposait pas l'obligation substantielle de les tenir.

[88] En résumé, toutes les parties ont compris que la question de savoir quelles obligations peuvent

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

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

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

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

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

[92] To understand the nature of s. 31 as a solemn obligation, it may be helpful to consider its

découler du principe de l'honneur de la Couronne, hormis une obligation fiduciaire, restait à trancher, et toutes les parties ont présenté des observations à cet égard.

[89] Il est vrai que les Métis et les intervenants qui les appuient n'ont pas formulé leur argument exactement dans les mêmes termes que ceux utilisés dans les présents motifs. Bien qu'ils aient soutenu que la conduite du gouvernement dans la mise en œuvre de l'art. 31 ne respectait pas le principe de l'honneur de la Couronne, ils n'ont pas formulé cette allégation en termes de manquement à l'obligation de diligence dans la mise en œuvre. Toutefois, pareil manquement était implicite dans leur argumentation, étant donné que le défaut d'agir avec diligence dans la mise en œuvre de l'art. 31 est au cœur de leur grief.

[90] Pour ces motifs, nous sommes d'avis qu'il n'est pas inapproprié d'examiner et de régler la question de savoir quelles obligations découlent du principe de l'honneur de la Couronne relativement à l'art. 31 de la *Loi sur le Manitoba*, non seulement quant à leur incidence sur la prétention que le gouvernement a une obligation fiduciaire envers les Métis, mais également de façon plus générale.

(5) La promesse solennelle faite à l'art. 31 de la *Loi sur le Manitoba* engageait-elle l'honneur de la Couronne?

[91] Comme nous l'avons déjà dit, l'honneur de la Couronne se trouve engagé par les obligations constitutionnelles de la Couronne envers les groupes autochtones. L'article 31 de la *Loi sur le Manitoba* constitue justement l'une de ces obligations constitutionnelles. L'article 31 conférait des droits fonciers à des personnes non encore identifiées, soit les enfants des Métis. Le dossier ne laisse cependant planer aucun doute sur le fait qu'il s'agissait d'une promesse faite au peuple métis collectivement, parce que reconnu comme une communauté distincte. L'honneur de la Couronne est donc engagé en l'espèce.

[92] Pour comprendre la nature de l'art. 31 à titre d'obligation solennelle, il peut être utile d'examiner

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

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

[93] Section 31, though, is not a treaty. The trial judge correctly described s. 31 as a constitutional provision crafted for the purpose of resolving Aboriginal concerns and permitting the creation of the province of Manitoba. When the *Manitoba Act* was passed, the Métis dominated the Red River provisional government, and controlled a significant military force. Canada had good reason to take the steps necessary to secure peace between the Métis and the settlers. Justice MacInnes wrote:

> Canada, to the knowledge of Macdonald and Cartier, was in a difficult position having to complete the steps necessary for the entry of Rupert's Land into Canada. An insurrection had occurred at Red River such that, in the view of both Canada and Britain, a void in the lawful governance of the territory existed. Canada, as a result

l'historique et les caractéristiques de cette disposition qui s'apparente à un traité. L'article 31 énonce des promesses solennelles — des promesses qui sont tout aussi fondamentales que celles faites par traité. À l'instar d'un traité, l'art. 31 a été adopté avec « l'intention de créer des obligations [. . .] et [. . .] un certain élément de solennité » : *Sioui*, p. 1044; *Sundown*. Il visait à créer des obligations juridiques de la plus haute importance : peut-on imaginer plus solennel qu'une insertion dans la Constitution du Canada? L'article 31 a été rédigé dans le contexte des négociations entourant la création de la nouvelle province du Manitoba. Le tout, dans le but de concilier les intérêts autochtones des Métis avec l'affirmation de la souveraineté par la Couronne. Comme l'a conclu le juge du procès :

> [TRADUCTION] . . . la preuve démontre que cette concession [visée à l'art. 31] devant être faite sur une base individuelle au profit des familles, bien qu'elle ait été destinée aux enfants, visait à reconnaître le rôle joué par le passé et jusqu'alors par les Métis dans la colonie, à assurer l'entrée harmonieuse du territoire dans la Confédération, en tenant compte de la condition de la Grande-Bretagne sur le traitement des colons et de la situation alors incertaine dans la colonie, et à conférer aux enfants des Métis et à leur famille, à cette occasion, un avantage dans la vie de la nouvelle province par rapport aux immigrants attendus. [Nous soulignons; par. 544.]

[93] Par contre, l'art. 31 n'est pas un traité. Le juge du procès a correctement défini l'art. 31 comme une disposition constitutionnelle destinée à répondre aux préoccupations des Autochtones et à permettre la création de la province du Manitoba. Lorsque la *Loi sur le Manitoba* a été adoptée, les Métis dominaient le gouvernement provisoire de la rivière Rouge, et ils contrôlaient une force militaire d'importance. Le Canada avait de bonnes raisons de prendre les mesures nécessaires pour maintenir la paix entre les Métis et les colons. Le juge MacInnes a écrit :

> [TRADUCTION] Macdonald et Cartier savaient que le Canada était dans la situation difficile où il devait prendre les mesures nécessaires pour assurer l'entrée de la Terre de Rupert dans le Canada. Comme la rivière Rouge avait été le théâtre d'une insurrection, le Canada et la Grande-Bretagne estimaient que le territoire se trouvait

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

dans un vide juridique quant à sa gouvernance. Par suite des agissements de McDougall le 1er décembre 1869, le Canada avait revendiqué le territoire, en pratique, mais la transmission du territoire par la Grande-Bretagne n'avait pas encore eu lieu, d'un point de vue juridique. Par conséquent, le Canada n'était pas légalement autorisé à gouverner la région. Qui plus est, ni le Canada ni le gouvernement impérial n'avaient concrètement la possibilité ou la volonté d'imposer le respect de l'autorité et, en ce sens, les discussions et les négociations entre les délégués de la rivière Rouge et Macdonald et Cartier avaient pour but d'assurer l'entrée pacifique du territoire dans le Canada, de façon à ce que le Canada puisse prendre possession et assumer la gouvernance du territoire pacifiquement, ce qui lui permettrait de faire progresser son objectif de créer une nation. [par. 649]

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

[94] L'article 31 crée une obligation constitutionnelle envers un groupe autochtone. Suivant les principes exposés ci-dessus, l'art. 31 engage l'honneur de la Couronne et engendre une obligation de réalisation diligente de l'objectif visé.

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

(6) L'article 32 de la Loi sur le Manitoba engageait-il l'honneur de la Couronne?

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

[95] À l'instar de la Cour d'appel, nous sommes d'avis que l'art. 32 de la *Loi sur le Manitoba* n'engageait pas l'honneur de la Couronne. Contrairement à l'art. 31, il ne s'agissait pas d'une promesse faite précisément à un groupe autochtone, mais plutôt d'un avantage conféré de façon générale à tous les colons, qu'ils soient Métis ou non. L'honneur de la Couronne n'est pas engagé chaque fois qu'un avantage est accordé à un Autochtone.

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

(7) La Couronne a-t-elle agi de façon honorable dans la mise en œuvre de l'art. 31 de la *Loi sur le Manitoba*?

[96] The trial judge indicated that, although they did not act in bad faith, the government servants may have been negligent in administering the s. 31 grant. He held that the implementation of the obligation was within the Crown's discretion and that it had a discretion to act negligently: "Mistakes, even negligence, on the part of those responsible for implementation of the grant are not sufficient to successfully attack Canada's exercise of discretion

[96] Le juge du procès a indiqué que, bien que les fonctionnaires n'aient pas agi de mauvaise foi, ils avaient peut-être été négligents dans la mise en œuvre de l'art. 31. Il a conclu que la mise en œuvre de l'obligation relevait du pouvoir discrétionnaire de la Couronne et que celle-ci avait même le pouvoir discrétionnaire d'agir de façon négligente : [TRADUCTION] « Des erreurs, voire de la négligence, de la part de ceux qui étaient chargés de

in its implementation of the grant" (para. 943 (emphasis added)). The Court of Appeal took a similar view: see para. 656.

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

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

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

la mise en œuvre de la concession ne suffisent pas pour attaquer avec succès l'exercice par le Canada de son pouvoir discrétionnaire de mettre en œuvre la concession » : par. 943 (nous soulignons). La Cour d'appel était du même avis : voir le par. 656.

[97] Compte tenu des arguments qui leur ont été soumis et de la jurisprudence applicable, le juge du procès et la Cour d'appel ne se sont pas attardés sur la question que nous considérons être au cœur de la présente affaire : la mise en œuvre de l'art. 31 par le gouvernement respectait-elle l'obligation de la Couronne de mettre en œuvre cette disposition avec diligence de façon à en réaliser les objectifs? Il s'agit de déterminer si la conduite de la Couronne, considérée dans son ensemble et en contexte, répondait à ce critère. Nous estimons qu'elle n'y répondait pas.

[98] L'objectif général de l'art. 31 de la *Loi sur le Manitoba* était de réconcilier la communauté des Métis et la souveraineté de la Couronne et de permettre la création de la province du Manitoba. Cette réconciliation devait être réalisée par la prise d'une mesure plus concrète, soit le transfert rapide et équitable des terres aux enfants des Métis.

[99] La mise en œuvre rapide et équitable de l'art. 31 était essentielle au projet de réconciliation et à l'entrée du Manitoba dans le Canada. Comme l'a constaté le juge du procès, l'art. 31 avait été conçu pour donner aux Métis une longueur d'avance dans la course à l'établissement sur des terres dans la province. Il était donc nécessaire que les concessions soient faites pendant qu'il était encore possible de procurer cet avantage aux Métis. Toutes les parties concernées savaient que la vague de colonisation de l'est en provenance de l'Europe et du Canada allait bientôt balayer la province. Bien conscient que la mise en œuvre devait être réalisée en temps opportun, le ministre Cartier a transmis une lettre à l'Assemblée législative du Manitoba, qui devait se prononcer sur l'acceptation ou le rejet de la *Loi sur le Manitoba*, dans laquelle il assurait aux Métis que les concessions visées à l'art. 31 seraient [TRADUCTION] « de nature à répondre aux besoins des Sang-mêlé résidents » et que le partage des terres serait fait « de la façon la plus efficace et équitable possible ».

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

(a) *Delay*

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

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

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

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

[100] Les Métis soutiennent que le Canada a manqué à ses obligations envers eux relativement à la concession de terres aux enfants de quatre façons : (1) en retardant de façon inexcusable la distribution des terres visées à l'art. 31; (2) en distribuant des terres selon une sélection aléatoire plutôt qu'en veillant à ce que les membres d'une même famille reçoivent des lots contigus; (3) en ne veillant pas à ce que les bénéficiaires des concessions promises à l'art. 31 soient à l'abri des spéculateurs fonciers; et (4) en donnant à certains enfants métis admissibles des certificats d'une valeur de 240 $, échangeables au bureau des titres fonciers, plutôt que de leur concéder directement des terres. Nous examinerons chacune de ces allégations.

a) *Retard*

[101] Contrairement aux attentes des parties, il aura fallu plus de 10 ans pour attribuer aux enfants des Métis les terres promises à l'art. 31. En effet, ce n'est pas avant 1885 qu'un règlement final est intervenu, par la remise de certificats plutôt que de terres. Ce retard a nettement contrecarré l'un des objectifs de l'art. 31.

[102] Comme l'a conclu le juge MacInnes, l'un des principaux objectifs de l'art. 31 était de procurer aux [TRADUCTION] « familles des Métis, par l'intermédiaire de leurs enfants, une longueur d'avance pour s'établir dans le nouveau pays en prévision de la vague d'immigrants probable et attendue » (par. 655). Le facteur temps était de toute évidence un élément essentiel, dans la mesure où le gouvernement voulait atteindre son objectif d'accorder un avantage réel aux enfants des Métis, compte tenu de la vague imminente de colons en provenance de l'est.

[103] Le gouvernement comprenait la situation. Le 2 mai 1870, le premier ministre Macdonald, juste avant de s'adresser au Parlement, a écrit que les terres devaient

[TRADUCTION] être distribuées, aussitôt que possible, entre les différents chefs des familles de Sang-mêlé en fonction du nombre d'enfants des deux sexes alors en vie,

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

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

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

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

conformément aux mesures législatives qu'il conviendra d'adopter afin d'assurer la transmission et la possession de ces terres aux familles de Sang-mêlé. — D'éteindre les titres des Indiens — . . . [Nous soulignons.]

Et le ministre Cartier, comme nous le savons, a confirmé que cette « garantie » serait honorée [TRADUCTION] « de la façon la plus efficace et équitable possible ».

[104] Ce n'est cependant pas ce qui s'est produit. Comme nous l'avons vu précédemment, la mise en œuvre a été retardée par de nombreuses actions et inactions du gouvernement, notamment : (1) le choix de la mauvaise catégorie de bénéficiaires en début de processus, contrairement au libellé de l'art. 31 et aux objections soulevées à la Chambre des communes; (2) le délai de trois ans pour corriger cette erreur; (3) le rapport de 1875 qui réduisait par erreur le nombre de bénéficiaires admissibles et qui a nécessité une troisième répartition; (4) l'achèvement de la mise en œuvre seulement en 1885 par la remise de certificats à des Métis admissibles à qui des terres avaient été refusées en raison d'erreurs commises dans le processus lors des trois répartitions précédentes; (5) les longs retards dans la délivrance des lettres patentes; et (6) les périodes d'inaction inexpliquées. Pendant ce temps, des colons arrivaient en grand nombre et l'Assemblée législative du Manitoba adoptait diverses lois établissant par des voies différentes et contradictoires la manière dont les Métis pourraient aliéner leurs intérêts non encore concrétisés dans les terres.

[105] Toutes les parties concernées ont souligné ces retards. Le conseil législatif et l'Assemblée législative du Manitoba se sont plaints du retard le 8 février 1872, soulignant que de nouveaux colons avaient été autorisés à prendre possession de terres dans la région. Au début de 1875, un certain nombre de paroisses métisses ont envoyé des pétitions à Ottawa pour se plaindre du retard, affirmant qu'il avait des [TRADUCTION] « effets néfastes sur la prospérité de la province » (C.A., par. 123). Au cours de la même année, le gouvernement provincial a également demandé au gouverneur général d'accélérer le processus. En 1883,

think of the disgraceful delay . . . .": A.R., vol. XXI, at pp. 123-24; see also C.A., at para. 160.

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

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

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

[108] The record and findings of the courts below suggest a persistent pattern of inattention. The government was warned of the initial error of including all Métis, yet took three years to cancel the first faulty allotment and start a second. An inexplicable delay lies between the first and second allotments, from 1873 to 1875. The government had changed, to be sure. But as the Court of Appeal found, there is no explanation in the record as to "why it took the new government over a year to address the continuing delays in moving ahead with the allotments": para. 126. The Crown's obligations cannot be suspended simply because there is a change in government. The second allotment, when

le sous-ministre de l'Intérieur, A. M. Burgess, a dit ceci : [TRADUCTION] « Chaque jour, je suis accablé et j'ai des nausées lorsque je pense au retard scandaleux . . . » (d.a., vol. XXI, p. 123-124; voir aussi C.A., par. 160).

[106] Cela nous amène à nous interroger sur la possible incompatibilité entre ce retard et l'obligation qu'impose l'honneur de la Couronne d'agir avec diligence pour atteindre les objectifs de l'obligation créée à l'art. 31. La Cour d'appel n'a pas examiné cette question. Comme le juge du procès cependant, elle a conclu que le manque d'attention et l'insouciance constituaient sans doute des facteurs à prendre en compte :

> [TRADUCTION] En ce qui a trait aux événements connus qui ont contribué au retard (notamment l'annulation des deux premières répartitions, la lenteur du processus de répartition dans la troisième et dernière phase, l'inclusion par erreur d'adultes en tant que bénéficiaires des concessions prévues à l'art. 31 ainsi que les longs retards dans la délivrance des lettres patentes), des erreurs ont été commises et il est difficile de ne pas conclure que le manque d'attention et l'insouciance ont pu constituer des facteurs contributifs. [par. 656]

[107] Comme nous l'avons vu, un acte négligent ne suffit pas, à lui seul, à établir le défaut de mettre en œuvre une obligation comme le commande l'honneur de la Couronne. Par contre, une tendance persistante au manque d'attention peut l'établir si cette pratique va à l'encontre des objectifs de l'obligation constitutionnelle, particulièrement en l'absence d'explications satisfaisantes.

[108] Le dossier et les conclusions des juridictions inférieures donnent à croire à une tendance persistante au manque d'attention. Même si le gouvernement a été prévenu de l'erreur initiale d'inclure tous les Métis, il a tout de même pris trois ans pour annuler la première répartition fautive et commencer la deuxième. De 1873 à 1875, un retard inexplicable s'est produit entre la première répartition et la deuxième. Certes, le gouvernement avait changé. Mais comme l'a conclu la Cour d'appel, rien dans le dossier n'explique [TRADUCTION] « pourquoi il aura fallu au nouveau gouvernement plus d'une année pour s'attaquer aux retards incessants à poursuivre les répartitions »

it finally took place, was aborted in 1876 because of a report that underestimated eligible recipients. But there is no satisfactory explanation why a third and final allotment was not completed until 1880. The explanation offered is simply that those in charge did not have adequate time to devote to the task because of other government priorities, and they did not wish to delegate the task because information about the grants might fall into the hands of speculators.

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

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

(par. 126). Les obligations de la Couronne ne peuvent être suspendues simplement parce qu'il y a changement de gouvernement. Après avoir été finalement mise en branle, la deuxième répartition a été annulée en 1876 en raison d'un rapport qui sous-estimait le nombre de bénéficiaires admissibles. Il n'y a cependant rien pour expliquer de façon satisfaisante pourquoi une troisième et dernière répartition n'a pas été terminée avant 1880. La seule explication offerte est que les responsables ne disposaient pas du temps requis pour s'acquitter de cette tâche en raison d'autres priorités gouvernementales, et qu'ils ne voulaient pas la déléguer parce que des renseignements concernant les concessions auraient pu tomber entre les mains de spéculateurs.

[109] Nous ne contestons pas la conclusion du juge du procès selon laquelle, à une exception près, il n'y a pas eu mauvaise foi ni inconduite de la part des employés de la Couronne (par. 1208-1209). Cependant, la diligence exige plus qu'une simple absence de mauvaise foi. Le juge du procès a indiqué que les concessions aux enfants [TRADUCTION] « n'ont pas été mises en œuvre ou administrées sans erreur ni insatisfaction » (par. 1207). Après avoir examiné la question dans l'optique d'une obligation fiduciaire, le juge du procès a estimé que cela ne posait pas vraiment problème. Nous ne sommes pas de cet avis. Les conclusions du juge du procès révèlent un manque constant d'attention et, partant, un manquement à l'obligation de diligence.

[110] Après avoir examiné la conduite de la Couronne dans son ensemble et dans le contexte de la situation, y compris la nécessité d'une mise en œuvre rapide, nous sommes d'avis que la Couronne a fait preuve d'un manque persistant d'attention et qu'elle n'a pas agi avec diligence pour réaliser les objectifs des concessions promises à l'art. 31. L'argument du Canada suivant lequel le retard a, dans certains cas, permis aux Métis d'obtenir un meilleur prix de vente est affaibli par la preuve que de nombreux Métis ont reçu trop peu en échange de leurs intérêts potentiels et, de toute façon, cet argument n'absout pas la Couronne de son défaut d'agir honorablement. Le retard dans l'achèvement de la distribution prévue à l'art. 31 était incompatible avec le comportement que commandait l'honneur de la Couronne.

(b) *Sales to Speculators*

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

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

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

[114] We see no basis to interfere with the finding that many eligible Métis were determined to sell their lots or the conclusion that a prohibition on sales would have been unacceptable. This said, we note that the 10-year delay in implementation of the land grants increased sales to speculators. Persons concerned at the time urged that information about

b) *Ventes à des spéculateurs*

[111] Les Métis soutiennent que le Canada a manqué à son obligation envers les enfants admissibles aux concessions promises à l'art. 31 en ne les protégeant pas contre les spéculateurs fonciers. Ils déclarent que le Canada n'aurait pas dû autoriser les ventes avant que les terres n'aient été concédées aux enfants ou avant que les bénéficiaires n'aient atteint l'âge de la majorité.

[112] Le Canada répond que la Couronne n'était pas tenue d'imposer des restrictions à l'aliénabilité, et qu'elle aurait en fait été critiquée si elle l'avait fait. Il ajoute que les Métis avaient déjà détenu des terres privées, notamment qu'ils en avaient déjà achetées et vendues. La Couronne affirme que la volonté de nombreux Métis de vendre ne résultait pas d'un manquement à une obligation de la Couronne, mais plutôt du fait que la superficie des terres concédées excédait de beaucoup les besoins des Métis, et que nombre d'entre eux ne désiraient pas s'installer au Manitoba.

[113] Le juge du procès a estimé que l'imposition de restrictions à l'aliénabilité des terres des Métis aurait été jugée condescendante et aurait été mal accueillie par les Métis. La Cour d'appel partageait cet avis, ajoutant que [TRADUCTION] « d'un point de vue pratique, à peu près rien ne pouvait être fait pour empêcher la vente des terres visées à l'art. 31 et la spéculation à leur endroit sans interdire absolument toute forme d'aliénation » (par. 631). La cour a ajouté que certains Métis avaient reçu une superficie de terre plus grande que celle dont ils avaient besoin, et que beaucoup quittaient la colonie pour poursuivre la chasse aux bisons, de sorte qu'ils attachaient de la valeur à leur capacité de vendre leurs intérêts.

[114] Nous ne voyons aucune raison d'écarter la conclusion selon laquelle de nombreux Métis admissibles étaient résolus à vendre leurs lots ou celle selon laquelle une interdiction de vendre aurait été inacceptable. Cela dit, nous soulignons que les 10 ans de retard dans la mise en œuvre du processus de concession des terres ont fait croître les

the location of each child's individual allotment be made public as early as possible to give potential claimants a sense of ownership and avert speculative sell-offs. This did not happen: evidence of Dr. Thomas Flanagan, A.R., vol. XXVI, at p. 53. Dr. Flanagan concluded "[t]he Metis were already selling their claims to participate in the grant, and being able to sell the right to a particular piece of land rather than a mere right to participate in a lottery would indeed have enhanced the prices they received": p. 54. Until the Métis acquired their s. 31 grants, they provided no benefit to the children, and a cash offer from a speculator would appear attractive. Moreover, as time passed, the possibility grew that the land was becoming less valuable, as the Métis could not effectively protect any timber or other resources that might exist on the plots they might someday receive from exploitation by others.

ventes aux spéculateurs. Certains intervenants ont insisté à l'époque pour rendre publiques, aussitôt que possible, les informations relatives à l'emplacement de chacun des lots attribués aux enfants afin de donner un sentiment de propriété aux éventuels bénéficiaires et ainsi empêcher les ventes aux spéculateurs. Cela n'a pas été fait : témoignage de M. Thomas Flanagan, d.a., vol. XXVI, p. 53. M. Flanagan était d'avis que [TRADUCTION] « [l]es Métis vendaient déjà leurs droits de participer aux concessions, et s'ils avaient pu aliéner leur droit sur une parcelle de terre précise plutôt qu'un simple droit de participation à un tirage au sort, ils auraient pu recevoir un prix plus élevé » (p. 54). Jusqu'à ce que les Métis aient acquis leurs concessions promises à l'art. 31, les enfants n'ont obtenu aucun avantage et une offre d'argent comptant présentée par un spéculateur pouvait sembler attrayante. De plus, la possibilité d'une diminution de la valeur des terres augmentait au fil du temps, car les Métis ne pouvaient protéger efficacement contre l'exploitation par des tiers ni le bois, ni aucune autre ressource exploitable sur les lots qu'ils pourraient un jour recevoir.

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

[115] En 1873, conscient des ventes conclues inconsidérément, le gouvernement du Manitoba a pris des mesures pour freiner la spéculation en adoptant l'*Acte concernant la protection de l'octroi des terres aux Métis*, S.M. 1873, ch. 44, qui permettait aux vendeurs d'annuler les ventes. Il était reconnu dans le préambule de cette loi que « nombre de personnes ayant droit à une part dans ledit octroi, mais ignorant évidemment la valeur de leurs parts individuelles, ont consenti à céder leurs droits aux spéculateurs pour une insignifiante considération ». Toutefois, avec l'adoption de l'*Acte pour amender l'Acte passé dans la trente-septième année du Règne de Sa Majesté, intitulé : « Acte concernant la protection de l'octroi des terres aux Métis »*, S.M. 1877, ch. 5 (« l'*Acte de 1877* »), le Manitoba a modifié sa position, de sorte que les enfants des Métis qui avaient conclu une mauvaise affaire ne pouvaient plus revenir en arrière. L'*Acte pour permettre à certains enfants de chefs de famille métis de vendre leurs terres*, S.M. 1878, ch. 20 (« l'*Acte de 1878* »), qui a suivi autorisait

consent, so long as they appeared in front of one judge or two justices of the peace.

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

[117] The honour of the Crown did not demand that the grant lands be made inalienable. However, the facts on the ground, known to all, made it all the more important to complete the allotment without delay and, in the interim, to advise Métis of what holdings they would receive. By 1874, in their recommendations as to how the allotment process should be carried out, both Codd and Lieutenant Governor Alexander Morris implicitly recognized that delay was encouraging sales at lower prices; nevertheless, allotment would not be complete for six more years. Until allotments were known and completed, delay inconsistent with the honour of the Crown was perpetuating a situation where children were receiving artificially diminished value for their land grants.

(c) *Scrip*

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

les enfants Métis âgés de 18 à 21 ans à aliéner leurs droits sur les terres visées à l'art. 31 avec le consentement de leurs père et mère, pourvu qu'ils comparaissent devant un juge ou devant deux juges de paix.

[116] M. Flanagan a établi que, dans 11 pour 100 des cas analysés, les enfants avaient vendu leurs terres avant de connaître l'emplacement de leur concession et qu'ils avaient reçu en conséquence un [TRADUCTION] « prix nettement inférieur » (« Metis Family Study », d.a., vol. XXVII, p. 53). La Cour d'appel a conclu que les Métis qui avaient vendu leur intérêt après l'attribution de leur concession avaient reçu le double du prix reçu par ceux qui l'avaient vendu avant (par. 168).

[117] L'honneur de la Couronne n'exigeait pas que les terres concédées soient déclarées inaliénables. Cependant, la situation telle qu'elle se présentait, et qui était connue de tous, faisait qu'il était important d'attribuer les concessions dans les meilleurs délais et, dans l'intervalle, d'aviser les Métis de l'emplacement des lots qu'ils recevraient. En 1874, dans leurs recommandations sur le processus d'attribution des terres, M. Codd et le lieutenant-gouverneur Alexander Morris ont tous deux reconnu implicitement que le retard encourageait les ventes à moindre prix; pourtant, six autres années se sont écoulées avant que l'attribution soit terminée. Jusqu'à ce que la répartition des lots soit connue et achevée, le retard incompatible avec l'honneur de la Couronne a fait en sorte que les enfants recevaient une valeur artificiellement réduite pour leurs concessions.

c) *Certificat*

[118] En raison de la sous-estimation du nombre d'enfants admissibles par M. Codd, 993 Métis n'ont finalement pas pu recevoir une parcelle des 1,4 million d'acres concédés. Ils ont plutôt reçu un certificat échangeable contre des terres au bureau des titres fonciers. Les certificats pouvaient également être vendus pour de l'argent comptant sur le marché libre, où ils se négociaient pour la moitié de leur valeur nominale (C.A., par 168).

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

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

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

[122] The most serious complaint regarding scrip is that Canada took too long to issue it. The process was marred by the delay and mismanagement that typified the overall implementation of the s. 31 grants. Canada recognized in 1884 that a significant number of eligible children would not receive the

[119] Les Métis soutiennent que le Canada a manqué à ses obligations envers les enfants qui ont reçu des certificats parce que l'art. 31 exigeait la distribution de terres et non de certificats et parce que les certificats n'ont pas été distribués avant 1885, alors que les prix pratiqués ne permettaient plus aux Métis ayant reçu des certificats d'acquérir les 240 acres concédés aux autres enfants.

[120] Nous n'acceptons pas le premier argument des Métis, suivant lequel la remise de certificats plutôt que la distribution de terres constituait un manquement à l'art. 31 de la *Loi sur le Manitoba.* Dans la mesure où les 1,4 million d'acres ont été réservés et distribués de façon raisonnablement équitable, le régime de la *Loi sur le Manitoba* a été respecté. Il était inévitable que la distribution des terres soit fondée sur une estimation plus ou moins précise du nombre d'enfants métis admissibles. La délivrance de certificats constituait un mécanisme raisonnable pour procurer aux enfants exclus l'avantage auquel ils avaient droit.

[121] Le deuxième argument des Métis est que la valeur des certificats délivrés était inadéquate. Le gouvernement a décidé d'accorder à chaque enfant exclu un certificat d'une valeur de 240 $, fondée sur une valeur de 1 $ l'acre. Bien que le prix d'un acre prévu dans le décret ait été de 1 $ en 1879, la plupart des terres étaient évaluées à 2 $ ou 2,50 $ l'acre au bureau des titres fonciers en 1885, l'année où les certificats ont commencé à être délivrés (d.a., vol. XXIV, p. 8). Les enfants qui ont reçu un certificat ont donc obtenu l'équivalent d'une terre de 96 à 120 acres, soit beaucoup moins que les 240 acres accordés à ceux qui ont participé à la distribution initiale. En raison du retard, les enfants exclus ont reçu une superficie moindre que les autres, contrairement à la promesse faite à l'art. 31 que les terres seraient divisées de façon à peu près égale entre les enfants admissibles.

[122] La critique la plus importante formulée à l'égard des certificats est que le Canada a mis trop de temps à les délivrer. Le processus a été entaché par le retard et la gestion déficiente qui ont caractérisé l'ensemble de la mise en œuvre des concessions visées à l'art. 31. Si le Canada

land to which they were entitled, yet it did nothing to provide a remedy to the excluded beneficiaries for almost a year. The trial judge observed:

> By memorandum to the Minister of the Interior dated May 1884, Deputy Minister A.M. Burgess wrote that there were about 500 claimants whose applications had been approved but whose claims were unsatisfied because the land had been "exhausted". He was unable to explain the error, but recommended that scrip be issued to the children.
>
> For whatever reason action was postponed until April 1885 when Burgess submitted another report in which he explained how this shortage occurred. Burgess recommended as equitable that the issue of scrip to each half-breed child who has since proved his or her claim should be for $240.00, the same to be accepted as in full satisfaction of such claim. The $240.00 was based upon 240 acres (being the size of the individual grant) at the rate of $1.00 per acre. [paras. 255-56]

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

(d) *Random Allotment*

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

a reconnu, en 1884, qu'un nombre important d'enfants admissibles ne recevraient pas les terres auxquelles ils avaient droit, il n'a pourtant rien fait pendant près d'un an pour accorder une réparation aux bénéficiaires exclus. Voici ce que le juge du procès a fait observer :

> [TRADUCTION] Par note de service adressée au ministre de l'Intérieur en mai 1884, le sous-ministre A.M. Burgess a écrit qu'il y avait environ 500 demandeurs dont les requêtes avaient été approuvées, mais auxquelles il n'avait pas été donné suite parce que les terres avaient été « épuisées ». Il était incapable d'expliquer l'erreur, mais recommandait que des certificats soient délivrés aux enfants.
>
> Pour une raison quelconque, la prise de mesures a été reportée jusqu'en avril 1885, alors que A.M. Burgess a présenté un autre rapport dans lequel il expliquait comment cette pénurie s'était produite. A.M. Burgess a recommandé d'appliquer comme mesure équitable la délivrance de certificats d'une valeur de 240 $ à chaque enfant Sang-mêlé qui avait depuis prouvé sa réclamation, le tout devant être accepté en paiement intégral de cette réclamation. La somme de 240 $ était fondée sur 240 acres (soit la superficie des concessions individuelles) au prix de 1 $ l'acre. [par. 255-256]

[123] Nous sommes d'avis que la délivrance tardive de certificats échangeables contre un lot d'une superficie bien moindre que celle offerte aux autres bénéficiaires illustre encore davantage la tendance persistante au manque d'attention incompatible avec l'honneur de la Couronne qui a caractérisé l'octroi des concessions promises à l'art. 31.

d) *Distribution aléatoire*

[124] Les Métis déclarent que les terres visées par l'art. 31 auraient dû être distribuées de façon à ce que les lots des enfants soient contigus aux lots de leurs père et mère, ou à proximité de ceux-ci. Ils affirment qu'à tout le moins les terres des frères et sœurs auraient dû être regroupées. Ils soutiennent que cette façon de faire était nécessaire pour favoriser une véritable colonisation des terres visées par l'art. 31, plutôt que leur simple vente, de façon à ce que les Métis puissent créer un territoire métis.

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

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

[127] Given the finding at trial that the grant was intended to benefit the individual children, not establish a Métis land base, we accept that random selection within each parish was an acceptable way to distribute the land consistent with the purpose of the s. 31 obligation. This said, the delay in

[125] Le Canada répond qu'il aurait été impossible d'établir tous les enfants des Métis sur des lots contigus à ceux de leurs père et mère. Beaucoup de familles avaient de très nombreux enfants, et chaque enfant avait droit à un lot de 240 acres. Le Canada soutient que, dans ces circonstances, une distribution aléatoire était raisonnable.

[126] Le juge du procès a conclu qu'il n'y avait pas accord sur la distribution des terres regroupées par famille. Il a fait observer que si les Métis francophones voulaient habituellement des concessions contiguës à leur lieu de résidence et qu'ils ne se souciaient pas particulièrement de la valeur des terres, les Métis anglophones étaient au contraire intéressés par les lots dont la valeur était la plus élevée, même s'ils ne jouxtaient pas leurs lots familiaux. Il a également souligné que le tirage au sort ne se faisait pas parmi toutes les terres peu importe où elles étaient situées dans la province; chaque paroisse recevait, en tant que collectivité, un lotissement situé dans le territoire de la paroisse et distribuait aléatoirement les terres comprises dans ce lotissement aux enfants métis résidant dans la paroisse. Il a conclu qu'il était difficile d'imaginer comment les terres auraient pu être gérées autrement que par tirage au sort, sans créer des injustices et des dissensions dans chaque paroisse. De plus, vu la dimension des concessions, il aurait été difficile d'offrir à une famille une suite de parcelles contiguës de 240 acres sans limiter la capacité des familles voisines de recevoir la même chose. De plus, le tirage au sort donnait à chaque enfant de la paroisse une chance égale de recevoir la meilleure parcelle. Enfin, à l'époque, les intéressés ne se sont que peu ou pas plaints du tirage au sort. La Cour d'appel a conclu dans le même sens, soulignant que le lieutenant-gouverneur Archibald avait tenté de répondre aux souhaits des Métis en ce qui concerne l'emplacement des lotissements paroissiaux.

[127] Étant donné qu'il a été établi au procès que les concessions visaient à procurer un avantage aux enfants, individuellement, et non à établir un territoire métis, nous convenons que le tirage au sort pratiqué dans chaque paroisse était une façon acceptable de distribuer les terres et qu'il

distributing land, and the consequential sales prior to patent, may well have made it more difficult for Métis to trade grants amongst themselves to achieve contiguous parcels.

(8) Conclusion on the Honour of the Crown

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

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

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

[130] Between 1877 and 1885, Manitoba passed five statutes that regulated the means by which sales of s. 31 lands could take place by private contract or court order. They dealt with the technical requirements to transfer interests in s. 31 lands. These included: permitting sales by a s. 31 allottee who was over 21 years of age (*The Half-Breed Land Grant Amendment Act, 1877*); allowing sales of grants by Métis between 18 and 21 years of age with parental consent and consent of the child supervised

était compatible avec les objectifs de l'obligation imposée par l'art. 31. Cela dit, le retard dans la distribution des terres, et les ventes qui en ont découlé avant l'obtention des lettres patentes, ont fort bien pu compliquer les échanges de concessions entre Métis qui souhaitaient obtenir des parcelles contiguës.

(8) Conclusion concernant l'honneur de la Couronne

[128] L'obligation imposée à l'art. 31 envers les Métis fait partie de notre Constitution et engage l'honneur de la Couronne. Le principe de l'honneur de la Couronne exigeait que la Couronne donne une interprétation téléologique de l'art. 31 et qu'elle poursuive de façon diligente l'atteinte des objectifs de cette obligation. Elle ne l'a pas fait. Les Métis s'étaient vu promettre la mise en œuvre des concessions [TRADUCTION] « de la façon la plus efficace et la plus équitable possible ». Or, cette mise en œuvre a été inefficace et inéquitable. Cela n'est pas dû à une négligence passagère, mais plutôt à une série d'erreurs et d'inactions qui ont persisté pendant plus d'une décennie. Un gouvernement ayant l'intention sincère de respecter l'obligation que lui commandait son honneur pouvait et aurait dû faire mieux.

D. *Les lois de mise en œuvre adoptées par le Manitoba étaient-elles inconstitutionnelles?*

[129] Les Métis demandent un jugement déclarant que les huit lois contestées adoptées par le Manitoba étaient *ultra vires* et, par conséquent, inconstitutionnelles ou par ailleurs inopérantes en raison de la doctrine de la prépondérance fédérale.

[130] Entre 1877 et 1885, le Manitoba a adopté cinq lois réglementant la vente des terres visées par l'art. 31 par contrat privé ou ordonnance judiciaire. Ces lois portaient sur les modalités de transfert des terres visées. Entre autres, elles autorisaient le bénéficiaire d'une concession à en disposer s'il était âgé de plus de 21 ans (l'*Acte de 1877*); permettaient aux Métis âgés de 18 à 21 ans de vendre une concession avec le consentement de leurs père et mère, sous la surveillance d'un

by a judge or two justices of the peace (*The Half-Breed Land Grant Act, 1878*); and settling issues as to the sufficiency of documentation necessary to pass good title in anticipation of the introduction of the Torrens system (*An Act relating to the Titles of Half-Breed Lands*, S.M. 1885, c. 30). The Manitoba statutes were consolidated in the *Half-Breed Lands Act*, R.S.M. 1891, c. 67, and eventually repealed by *The Statute Law Revision and Statute Law Amendment Act, 1969*, S.M. 1969 (2nd Sess.), c. 34, s. 31.

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

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

This statement is not a ruling or a pre-determination on whether the review of the repealed statutes in this action is moot. The *Dumont* decision recognizes that a declaration *may* be granted — in the discretion of the court — in aid of extra-judicial relief in an appropriate case. The Court simply decided that it was not "plain and obvious" or "beyond doubt" that the case would fail: p. 280.

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

juge ou de deux juges de paix (l'*Acte de 1878*); et fixaient les conditions relatives aux documents nécessaires pour concéder un titre valable en prévision de l'introduction du régime Torrens (*Un Acte concernant les Titres des Terres des Métis*, S.M. 1885, ch. 30). Les lois du Manitoba ont été refondues dans la loi intitulée *Half-Breed Lands Act*, R.S.M. 1891, ch. 67, et finalement abrogées en 1969 par *The Statute Law Revision and Statute Law Amendment Act, 1969*, S.M. 1969 (2e sess.), ch. 34, art. 31.

[131] Dans l'affaire *Dumont c. Canada (Procureur général)*, [1990] 1 R.C.S. 279, une requête préliminaire en radiation avait été présentée par le Canada dans le cadre du présent litige. Voici ce que la juge Wilson a déclaré :

> La Cour est également d'avis que l'objet du litige, dans la mesure où il comporte la constitutionnalité de la mesure législative accessoire à la *Loi de 1870 sur le Manitoba*, peut être réglé devant les tribunaux judiciaires et qu'un jugement déclaratoire peut être accordé à la discrétion de la cour à l'appui de revendications extrajudiciaires dans un cas qui se prête à cela. [Nous soulignons; p. 280.]

Cet énoncé ne doit pas être interprété comme une décision ou une prédétermination quant à savoir si l'examen des lois abrogées est une question théorique dans le cadre de la présente action. L'arrêt *Dumont* reconnaît qu'un jugement déclaratoire *peut* être accordé — à la discrétion de la cour — à l'appui d'une réparation extrajudiciaire dans un cas qui s'y prête. La Cour a simplement décidé que l'échec de la demande n'était pas « éviden[t] » ou « au-delà de tout doute » (p. 280).

[132] Ces lois sont depuis longtemps sans effet. Elles ne peuvent avoir de répercussions futures et elles n'importent que dans la mesure où elles s'inscrivent dans la trame historique des revendications des Métis. En somme, elles sont devenues théoriques. La Cour ferait mauvais usage de son temps en examinant leur constitutionnalité. Nous n'avons donc pas à nous prononcer sur ce point.

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

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

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

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

E. *La demande de jugement déclaratoire est-elle irrecevable par application des règles de la prescription?*

[133] Nous avons conclu que le Canada n'a pas agi avec diligence pour s'acquitter de l'obligation particulière que l'art. 31 de la *Loi sur le Manitoba* lui imposait envers les Métis, comme l'exigeait l'honneur de la Couronne. Pour les motifs qui suivent, nous sommes d'avis que les règles de la prescription n'empêchent pas la Cour de le confirmer dans un jugement déclaratoire.

[134] Notre Cour a statué que, bien que les délais de prescription s'appliquent aux demandes de réparations personnelles découlant de l'annulation d'une loi inconstitutionnelle, les tribunaux conservent le pouvoir de statuer sur la constitutionnalité de la loi sous-jacente (*Kingstreet Investments Ltd. c. Nouveau-Brunswick (Finances)*, 2007 CSC 1, [2007] 1 R.C.S. 3; *Ravndahl c. Saskatchewan*, 2009 CSC 7, [2009] 1 R.C.S. 181). La constitutionnalité d'une loi a toujours été une question justiciable (*Thorson c. Procureur général du Canada*, [1975] 1 R.C.S. 138, p. 151). Une atteinte au « droit des citoyens au respect de la *constitution* par le Parlement » peut être réprimée par un jugement déclarant qu'une loi est invalide ou qu'un acte public est *ultra vires* (*Canadian Bar Assn. c. British Columbia*, 2006 BCSC 1342, 59 B.C.L.R. (4th) 38, par. 23 et 91, citant *Thorson*, p. 163 (italiques ajoutés)). « Une question [. . .] constitutionnelle est toujours justiciable » (*Waddell c. Schreyer* (1981), 126 D.L.R. (3d) 431 (C.S.C.-B.), p. 437, conf. par (1982), 142 D.L.R. (3d) 177 (C.A.C.-B.), autorisation d'appel refusée, [1982] 2 R.C.S. vii (*sub nom. Foothills Pipe Lines (Yukon) Ltd. c. Waddell*)).

[135] Par conséquent, notre Cour a conclu que les lois sur la prescription des actions ne peuvent empêcher les tribunaux, à titre de gardiens de la Constitution, de rendre des jugements déclaratoires sur la constitutionnalité d'une loi. Par extension, les lois sur la prescription des actions ne peuvent empêcher les tribunaux de rendre un jugement déclaratoire sur la constitutionnalité de la conduite de la Couronne.

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

[137] Furthermore, the Métis seek no personal relief and make no claim for damages or for land. Nor do they seek restoration of the title their descendants might have inherited had the Crown acted honourably. Rather, they seek a declaration that a specific obligation set out in the Constitution was not fulfilled in the manner demanded by the Crown's honour. They seek this declaratory relief in order to assist them in extra-judicial negotiations with the Crown in pursuit of the overarching constitutional goal of reconciliation that is reflected in s. 35 of the *Constitution Act, 1982*.

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

[139] However, at this point we are not concerned with an action for breach of fiduciary duty, but with a claim for a declaration that the Crown did not

[136] En l'espèce, les Métis sollicitent un jugement déclarant qu'une disposition de la *Loi sur le Manitoba* — à laquelle la *Loi constitutionnelle de 1871* confère un statut constitutionnel — n'a pas été mise en œuvre conformément au principe de l'honneur de la Couronne, ayant lui aussi le statut de « principe constitutionnel » (*Little Salmon*, par. 42).

[137] En outre, les Métis ne sollicitent pas de réparation personnelle, ne réclament pas de dommages-intérêts et ne font aucune revendication territoriale. Ils ne demandent pas non plus le rétablissement du titre dont leurs descendants auraient pu hériter si la Couronne avait agi honorablement. Ils demandent plutôt que soit rendu un jugement déclarant qu'une obligation constitutionnelle précise n'a pas été remplie comme l'exigeait l'honneur de la Couronne. Ils sollicitent ce jugement déclaratoire pour faciliter leurs négociations extrajudiciaires avec la Couronne en vue de réaliser l'objectif constitutionnel global de réconciliation inscrit dans l'art. 35 de la *Loi constitutionnelle de 1982*.

[138] Les défendeurs prétendent que cette demande est irrecevable en vertu des lois manitobaines sur la prescription dont toutes les versions contenaient des dispositions semblables à la disposition actuelle prévoyant qu'une « action fondée sur un accident, une erreur ou un autre motif de recours reconnu en Équité » se prescrit par six ans à compter de la découverte de la cause d'action (*Loi sur la prescription*, C.P.L.M. ch. L150, al. 2(1)k)). Le manquement à une obligation fiduciaire constitue « un motif de recours reconnu en Équité ». Nous sommes d'accord avec la Cour d'appel que ce délai de prescription s'applique aux demandes des Autochtones pour manquement à une obligation fiduciaire relative à la gestion de leurs biens (*Wewaykum,* par. 121, et *Canada (Procureur général) c. Lameman*, 2008 CSC 14, [2008] 1 R.C.S. 372, par. 13).

[139] Toutefois, à ce stade, nous ne statuons pas sur une action pour manquement à une obligation fiduciaire, mais sur une demande de jugement

act honourably in implementing the constitutional obligation in s. 31 of the *Manitoba Act*. Limitations acts cannot bar claims of this nature.

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

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

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

déclarant que la Couronne n'a pas agi honorablement dans la mise en œuvre de l'obligation constitutionnelle imposée à l'art. 31 de la *Loi sur le Manitoba.* Les lois sur la prescription ne peuvent faire obstacle à une demande de cette nature.

[140] Nous sommes saisis d'un grief constitutionnel qui a pris naissance il y a près d'un siècle et demi. Aussi longtemps que la question ne sera pas tranchée, l'objectif de réconciliation et d'harmonie constitutionnelle, reconnu à l'art. 35 de la *Loi constitutionnelle de 1982* et qui sous-tend l'art. 31 de la *Loi sur le Manitoba*, n'aura pas été atteint. Le clivage persistant dans notre tissu national auquel l'adoption de l'art. 31 devait remédier demeure entier. La tâche inachevée de réconciliation des Métis avec la souveraineté du Canada est une question d'importance nationale et constitutionnelle. Les tribunaux sont les gardiens de la Constitution et, comme le précisent les arrêts *Ravndahl* et *Kingstreet*, ils ne peuvent être empêchés par une simple loi de rendre un jugement déclaratoire sur une question constitutionnelle fondamentale. Les principes fondamentaux de légalité, de constitutionnalité et de primauté du droit n'exigent rien de moins : voir *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217, par. 72.

[141] De plus, bon nombre des considérations de politique générale qui sous-tendent les lois en matière de prescription ne s'appliquent tout simplement pas dans un contexte autochtone comme celui-ci. Les lois contemporaines sur la prescription des actions visent à établir un équilibre entre la protection du défendeur et l'équité envers le demandeur (*Novak c. Bond*, [1999] 1 R.C.S. 808, par. 66, la juge McLachlin). Dans le contexte autochtone, la réconciliation doit peser lourd dans la balance. Comme l'a souligné Harley Schachter :

> [TRADUCTION] Les diverses justifications des délais de prescription sont toujours manifestement pertinentes, mais l'auteur est d'avis que l'objectif de la réconciliation est un facteur beaucoup plus important, auquel il faut accorder plus de poids dans l'analyse. L'argument qu'une loi provinciale sur la prescription s'applique *ex proprio vigore* ou peut être incorporée à titre de loi fédérale ne

real analysis that ought to be undertaken, which is one of reconciliation and justification.

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

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

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

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

vaut pas lorsque les droits ancestraux et issus de traités sont en cause. Il ne tient pas compte de la véritable analyse qui doit être effectuée et qui vise la réconciliation et la justification.

(« Selected Current Issues in Aboriginal Rights Cases : Evidence, Limitations and Fiduciary Obligations », dans *The 2001 Isaac Pitblado Lectures : Practising Law In An Aboriginal Reality* (2001), 203, p. 232-233)

Schachter écrivait dans le contexte des droits ancestraux, mais ses propos s'appliquent avec autant de force en l'espèce. Leonard I. Rotman va encore plus loin lorsqu'il affirme que permettre à la Couronne de protéger ses actes inconstitutionnels par le pouvoir de ses propres lois semble fondamentalement injuste (« *Wewaykum* : A New Spin on the Crown's Fiduciary Obligations to Aboriginal Peoples? » (2004), *U.B.C. L. Rev.* 219, p. 241-242). En fait, malgré les considérations de politique générale légitimes favorables aux délais de prescription fixés par la loi, dans le contexte autochtone, il existe des principes uniques qui doivent parfois prévaloir.

[142] En l'espèce, la demande n'est pas tardive : elle est en grande partie fondée sur des éléments de preuve documentaire contemporains et aucun intérêt juridique d'un tiers n'est en jeu. Comme l'a indiqué le Canada, la preuve a fourni au juge du procès [TRADUCTION] « une occasion inégalée d'examiner le contexte entourant l'édiction et la mise en œuvre des art. 31 et 32 de la *Loi sur le Manitoba* » (m.i., par. 7).

[143] De plus, la réparation pouvant être accordée suivant cette analyse est limitée. Un jugement déclaratoire est une réparation d'une portée restreinte. Il peut être obtenu sans cause d'action, et les tribunaux rendent des jugements déclaratoires, peu importe si une mesure de redressement consécutive peut être accordée. Comme l'a fait valoir l'Assemblée des Premières Nations, intervenante, il n'est pas obtenu contre le défendeur au même sens qu'une mesure de redressement coercitive (mémoire, par. 29, citant *Cheslatta Carrier Nation c. British Columbia*, 2000 BCCA 539, 193 D.L.R. (4th) 344, par. 11-16). Dans certains cas, le jugement déclaratoire peut être le seul

reasoning set out here would not be available. However, as acknowledged by Canada, the remedy sought here is clearly not a personal one: R.F., at para. 82. The principle of reconciliation demands that such declarations not be barred.

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

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

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

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

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

moyen de donner effet au principe de l'honneur de la Couronne : mémoire de l'Assemblée des Premières Nations, par. 31. Dans la présente action, si les Métis avaient sollicité des réparations personnelles, le raisonnement adopté en l'espèce ne pourrait s'appliquer. Toutefois, comme l'a reconnu le Canada, la mesure de redressement sollicitée en l'espèce n'est manifestement pas de nature personnelle (m.i., par. 82). Le principe de la réconciliation commande que ce type de déclaration puisse être accordé.

[144] Nous concluons que la demande qui nous est soumise en l'espèce est une demande de déclaration sur la constitutionnalité de la conduite de la Couronne envers les Métis dans l'application de l'art. 31 de la *Loi sur le Manitoba*. Il s'ensuit que la *Loi sur la prescription* ne s'applique pas et que la demande n'est pas prescrite.

F. *La demande de jugement déclaratoire est-elle irrecevable par application de la doctrine des « laches »?*

[145] La doctrine des *laches* reconnue en equity exige qu'une procédure judiciaire fondée sur l'equity soit engagée sans retard injustifié. Elle ne fixe aucune limite précise, mais prend en compte les circonstances de chaque affaire. Pour déterminer si un retard peut être considéré comme donnant application à la doctrine des *laches*, il faut principalement considérer s'il y a eu : (1) acquiescement de la part du demandeur; et (2) changement de position de la part du défendeur parce qu'il croyait raisonnablement que le demandeur acceptait le statu quo (*M. (K.) c. M. (H.)*, [1992] 3 R.C.S. 6, p. 76-80).

[146] Comme l'a dit le juge La Forest dans l'arrêt *M. (K.)*, p. 76 et 77, citant l'arrêt *Lindsay Petroleum Co. c. Hurd* (1874), L.R. 5 P.C. 221, p. 239-240 :

> Deux circonstances, toujours importantes en pareils cas, sont la longueur du retard et la nature des actes accomplis dans l'intervalle, éléments qui peuvent avoir des conséquences pour l'une ou l'autre partie et faire pencher la balance du côté de la justice ou de l'injustice selon qu'on adopte une solution ou l'autre, ce qui a trait au redressement.

La Forest J. concluded as follows:

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

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

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

Le juge La Forest a ainsi conclu :

> Il ressort immédiatement de l'ensemble de la jurisprudence que le simple retard ne suffit pas à déclencher l'application de l'un ou l'autre des éléments de la règle du manque de diligence. Il s'agit plutôt de déterminer si le retard du demandeur constitue un acquiescement ou crée des circonstances qui rendent déraisonnables les poursuites. En fin de compte, le manque de diligence doit être réglé comme une question de justice entre les parties, comme c'est le cas de toute règle d'equity. [Nous soulignons; p. 77-78.]

[147] L'acquiescement repose sur la connaissance, la capacité et la liberté (*Halsbury's Laws of England* (4e éd. 2003), vol. 16(2), par. 912). Dans le contexte de l'espèce — y compris les injustices subies par les Métis dans le passé, le déséquilibre des pouvoirs qui a suivi la proclamation de la souveraineté de la Couronne et les conséquences négatives découlant des retards dans l'attribution des concessions —, le retard en soi ne peut être interprété comme un acte manifeste d'acquiescement ou de renonciation de la part des appelants. Comme nous l'expliquerons, le premier volet du critère énoncé dans *Lindsay* n'est pas respecté en l'espèce.

[148] Le juge du procès a estimé que le retard à engager l'action demeurait inexpliqué, en partie parce que d'autres litiges constitutionnels ont été engagés dans les années 1890 (par. 456-457). Deux lois du Manitoba ont été contestées, d'abord devant les tribunaux, puis par pétition au gouverneur général en conseil (par. 431-437). Le juge de procès a déduit que beaucoup de signataires de la pétition devaient être des Métis (par. 435). Bien que nous ne contestions pas cette conclusion de fait, nous remettons en cause l'inférence de droit que le juge du procès en a tirée. Même si nombre des signataires étaient des Métis, les requérants constituaient, dans les faits, un groupe plus large, comprenant un nombre important de signataires et de dirigeants de la communauté qui n'étaient pas Métis. Par exemple, comme l'a indiqué le juge du procès, ni l'archevêque Taché ni le père Ritchot — des personnalités influentes de [TRADUCTION] « la collectivité catholique française/

establish acquiescence by the Métis community in the existing legal state of affairs.

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

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

> . . . it will require a considerable management to keep those wild people quiet. In another year the present residents will be altogether swamped by the influx of strangers who will go in with the idea of becoming industrious and peaceable settlers.
>
> (October 14, 1869, A.R., vol. VII, at p. 65)

Métis » — n'étaient Métis (par. 435). Les actes de cette importante collectivité nous apprennent peu de choses, en droit, sur la capacité des Métis à demander un jugement déclaratoire fondé sur l'honneur de la Couronne. Ils ne démontrent pas l'acquiescement de la communauté des Métis à la situation juridique qui existait à l'époque.

[149] En outre, dans ce domaine du droit qui évolue rapidement, il est plutôt irréaliste d'avancer que les Métis ont négligé de faire valoir leurs droits avant que les tribunaux ne soient prêts à reconnaître ces droits. En réalité, les Métis ont amorcé leur demande avant même que l'art. 35 ne soit inscrit dans la Constitution, et bien avant que le principe de l'honneur de la Couronne ne soit expliqué dans *Nation haïda*. Il est difficile de voir comment il pourrait y avoir eu ainsi acquiescement en equity.

[150] De plus, dans l'exercice de sa compétence en equity, le tribunal doit toujours prendre en compte le caractère équitable du comportement des deux parties : voir *Pro Swing Inc. c. Elta Golf Inc.*, 2006 CSC 52, [2006] 2 R.C.S. 612, par. 22. Le Canada savait qu'il y aurait un afflux massif de colons et que les Métis avaient besoin d'une longueur d'avance pour faire face à cette éventualité et il n'a pourtant pas agi avec diligence pour remplir la promesse constitutionnelle faite aux Métis, comme le commandait l'honneur de la Couronne. Les Métis n'ont pas obtenu l'avantage escompté et, après l'arrivée massive de colons, ils ont été de plus en plus marginalisés et ont dû affronter la discrimination et la pauvreté (voir, p. ex., le jugement de première instance, par. 541; C.A., par. 95, 244 et 638; m.a., par. 200). Bien que la mauvaise foi ne soit ni alléguée ni nécessaire en l'espèce, les appelants ont attiré l'attention sur une lettre écrite par Sir John A. Macdonald, qui porte à croire que cette marginalisation pourrait même avoir été désirée :

> [TRADUCTION] . . . il faudra très bien gérer la situation pour que ces sauvages restent tranquilles. D'ici une autre année, les résidents actuels seront tous submergés par l'afflux massif d'étrangers, qui arriveront avec l'idée de devenir des colons vaillants et paisibles.
>
> (14 octobre 1869, d.a., vol. VII, p. 65)

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

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

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

[151] Quoi qu'il en soit, cette marginalisation n'a d'importance que sur le plan de la preuve, puisqu'il n'est ni possible — ni nécessaire — de décortiquer l'histoire et de déterminer avec précision les causes de la marginalisation de la communauté des Métis au Manitoba après 1870. Il suffit de dire (et c'est là la seule déclaration demandée) que la promesse fondamentale — le transfert de terres aux enfants des Métis — que les Métis ont obtenue de la Couronne pour éviter leur marginalisation future n'a pas été mise en œuvre avec diligence, comme l'exigeait l'honneur de la Couronne.

[152] La deuxième considération pertinente relativement à la doctrine des *laches* consiste à déterminer si le temps écoulé a amené le Canada à changer sa position à cause du retard. La réponse est non. La présente affaire est semblable à celle examinée dans l'arrêt *M. (K.)*, où le juge La Forest a fait remarquer qu'il était impossible de comprendre comment « le demandeur [. . .] a amené le défendeur à changer sa position parce qu'il croyait raisonnablement que le demandeur avait accepté le statu quo ou qu'il avait permis une situation qu'il serait injuste de changer » : p. 77, citant R. P. Meagher, W. M. C. Gummow et J. R. F. Lehane, *Equity Doctrines and Remedies* (2e éd. 1984), p. 755.

[153] Cela suffit pour répondre à la thèse du Canada, selon laquelle la doctrine des *laches* empêche les Métis de demander un jugement déclarant que la Couronne n'a pas agi de façon honorable. Nous ajouterons cependant ceci. Nous voyons mal comment un tribunal, dans son rôle de gardien de la Constitution, pourrait appliquer une doctrine d'equity pour rejeter une demande de jugement déclarant qu'une disposition de la Constitution n'a pas été respectée comme l'exigeait l'honneur de la Couronne. Mentionnons que, dans l'arrêt *Ontario Hydro c. Ontario (Commission des relations de travail)*, [1993] 3 R.C.S. 327, p. 357, le juge en chef Lamer a souligné que la doctrine des *laches* ne s'applique pas à une question constitutionnelle touchant le partage des compétences. (Voir aussi *Procureur général du Manitoba c. Forest*, [1979] 2 R.C.S. 1032.) La Constitution est la loi suprême de notre pays, et elle demande que les tribunaux soient habilités à en protéger la substance et à en faire respecter les promesses.

VII. Disposition

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

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

[155] The appellants are awarded their costs throughout.

The reasons of Rothstein and Moldaver JJ. were delivered by

ROTHSTEIN J. (dissenting) —

I. Introduction

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

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

[158] The appellants, herein referred to collectively as the "Métis" made four main claims before this Court. Their primary claim was that

VII. Dispositif

[154] Le pourvoi est accueilli en partie. Nous sommes d'avis que les appelants ont droit a un jugement déclarant que :

La Couronne fédérale n'a pas mis en œuvre de façon honorable la disposition prévoyant la concession de terres énoncée à l'art. 31 de la *Loi de 1870 sur le Manitoba*.

[155] Les appelants se voient adjuger leurs dépens devant toutes les cours.

Version française des motifs des juges Rothstein et Moldaver rendus par

LE JUGE ROTHSTEIN (dissident) —

I. Introduction

[156] Les juges majoritaires imputent en l'espèce à la Couronne, en matière constitutionnelle, une nouvelle obligation de common law qui, selon eux, écarte la défense de common law fondée sur la doctrine des *laches* (un principe d'equity souvent appelé « doctrine du manque de diligence ») et le pouvoir incontesté du législateur provincial d'établir des délais de prescription. Ils recourent à pareille mesure même si les juridictions inférieures n'ont pas examiné la question et si les parties n'ont pas offert de plaidoirie à ce sujet devant nous. Ils établissent donc une règle vague, qui écarte la doctrine des *laches* et la prescription, et qui est insusceptible de correction par le législateur, de sorte que la portée et les conséquences des nouvelles obligations de la Couronne deviennent imprévisibles.

[157] J'adhère à plusieurs conclusions des juges majoritaires, mais je ne puis partager leur opinion sur la portée de l'obligation imposée par l'honneur de la Couronne et sur l'applicabilité en l'espèce des délais de prescription et de la doctrine des *laches*.

[158] Les appelants (ci-après, collectivement, les « Métis ») formulent devant nous quatre grandes prétentions, la principale étant que la Couronne

the Crown owed the Métis a fiduciary duty arising from s. 31 of the *Manitoba Act, 1870*, S.C. 1870, c. 3 ("*Manitoba Act*"), and that this duty had been breached. As evidence of the breach of fiduciary duty, the Métis pointed to several factors: the random allocation of the land grants, the delay in allocation of the land, and the allocation of scrip instead of land to some Métis children. These claims make up the bulk of the argument in the Métis' factum.

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

[160] The bulk of these claims were dismissed by the Chief Justice and Justice Karakatsanis and I am in agreement with them on those claims. I agree with their conclusion that there was no fiduciary duty here and therefore the claim for breach of fiduciary duty must fail. I agree that there are no valid claims arising from s. 32 of the *Manitoba Act* and that any claims that might have arisen from the now repealed Manitoba legislation on the land grants are moot, as those acts have long since been out of force. I agree with the majority that the random allocation of land grants was an acceptable means for Canada to implement the s. 31 land grants. Finally, I accept that the Manitoba Metis Federation has standing to bring these claims.

[161] However, in my view, after correctly deciding all of these issues and consequently dismissing the vast majority of the claims raised on this appeal, my colleagues nonetheless salvage one aspect of the Métis' claims by expanding the scope of the duties that are engaged under the honour of the Crown. These issues were not the

a manqué à l'obligation fiduciaire qu'elle aurait envers eux suivant l'art. 31 de la *Loi de 1870 sur le Manitoba*, S.C. 1870, ch. 3 (« *Loi sur le Manitoba* »). Plusieurs éléments concourent selon eux à prouver ce manquement : l'attribution des terres au hasard, le retard accusé dans le processus et l'octroi de certificats au lieu de terres à certains enfants métis. Voilà en gros la thèse que soutiennent les Métis dans leur mémoire.

[159] Les trois autres prétentions sont un peu moins étoffées. Les Métis font d'abord valoir que les lois provinciales sont *ultra vires* ou inopérantes en raison de la prépondérance fédérale. Ils affirment ensuite que la Couronne ne s'est pas acquittée de l'obligation fiduciaire découlant de l'art. 32 de la *Loi sur le Manitoba* ou qu'elle n'a tout simplement pas mis en œuvre convenablement cette disposition. Ils allègent enfin le manquement à des obligations constitutionnelles engageant selon eux l'honneur de la Couronne, sans toutefois préciser quels devoirs celui-ci imposerait en l'espèce.

[160] La Juge en chef et la juge Karakatsanis rejettent avec raison selon moi la plupart de ces prétentions. Comme elles, je conclus à l'inexistence d'une obligation fiduciaire en l'espèce et j'estime qu'il y donc lieu de rejeter l'allégation de manquement à une telle obligation. Je conviens qu'il n'y a pas de prétention valable découlant de l'art. 32 de la *Loi sur le Manitoba* et que toute demande qui aurait pu découler de dispositions manitobaines aujourd'hui abrogées sur la concession de terres est désormais théorique, ces lois ayant depuis longtemps cessé d'avoir effet. Je conviens avec les juges majoritaires que la concession de terres au hasard constituait pour le Canada un moyen acceptable de mettre l'art. 31 en œuvre et, enfin, que la Manitoba Metis Federation a qualité pour agir en l'espèce.

[161] J'estime cependant qu'après avoir correctement tranché toutes ces questions et donc rejeté la plupart des prétentions des appelants, mes collègues accèdent néanmoins à un volet de la demande des Métis en accroissant la portée des obligations qui découlent de l'honneur de la Couronne. Or, les parties n'ont présenté d'argumentation

focus of the parties' submissions before this Court or the lower courts. Moreover, the new duty derived from the honour of the Crown that my colleagues have created has the potential to expand Crown liability in unpredictable ways. Finally, I am also of the opinion that any claim based on honour of the Crown was, on the facts of this case, barred by both limitations periods and laches. As a result, I would find for the respondents and dismiss the appeal.

II. Facts

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

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

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

A. *Extent and Causes of the Delay*

[165] The majority concludes that the record and findings of the courts below suggest a "persistent pattern of inattention". This pattern leads them to find that the duty of diligent fulfillment of solemn promises derived from the honour of the Crown

substantielle en ce sens ni devant notre Cour ni devant les juridictions inférieures. De plus, la nouvelle obligation liée à l'honneur de la Couronne que créent mes collègues risque d'accroître la responsabilité de l'État de façon imprévisible. Enfin, j'estime par ailleurs que la prescription et la doctrine des *laches* font en l'espèce obstacle à toute demande fondée sur l'honneur de la Couronne. Je serais donc d'avis de rendre jugement en faveur des intimés et de rejeter le pourvoi.

II. Les faits

[162] Bien que j'adhère généralement à leur exposé des faits, je m'inscris en faux contre certaines inférences précises que mes collègues tirent du dossier.

[163] Comme toujours en appel, les conclusions de fait tirées en première instance ne doivent être infirmées que si elles sont entachées d'une erreur manifeste et dominante (*Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 10). Bien que ce ne soit pas fait expressément, dans l'examen et l'utilisation des faits, les juges majoritaires s'écartent sous certains rapports des conclusions de fait tirées en instance. Toutefois, nulle erreur manifeste et dominante n'est relevée dans celles-ci, et les Métis n'avancent pas qu'une telle erreur les entache.

[164] Sans y relever d'erreur manifeste et dominante, les juges majoritaires s'écartent des conclusions de fait tirées en première instance sur deux points principaux : (1) l'ampleur du retard accusé dans la distribution des terres et (2) les répercussions de ce retard sur les Métis. Cette rupture d'avec la norme de contrôle applicable en appel remet en cause selon moi le bien-fondé de leur analyse.

A. *Ampleur et causes du retard*

[165] Selon les juges majoritaires, le dossier et les conclusions des juridictions inférieures permettent de conclure à une « tendance persistante au manque d'attention », ce qui les amène à statuer qu'il y a eu manquement à l'obligation d'exécuter

was breached. In their view, there was a significant delay in implementing the land grants and this delay substantially defeated the purpose of s. 31. I respectfully disagree.

(1) Historical Evidence

[166] Historical evidence was presented at trial and the bulk of it was accepted by the trial judge. Based on that evidence and on the reasons of the trial judge, I have summarized the process of how the land grants were distributed below. Though I accept the finding of the trial judge that there was a lengthy delay in the distribution of the land grants, this history reveals a steady and persistent effort to distribute the land grants in the face of significant administrative challenges and an unstable political environment. While a faster process would most certainly have been better, I cannot accept the majority's conclusion that this evidence reveals a pattern of inattention — a finding that is nowhere to be found in the reasons of the trial judge.

(a) *The Census*

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

(b) *The Survey*

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

avec diligence un engagement solennel découlant de l'honneur de la Couronne. À leur avis, la mise en œuvre de la concession des terres a accusé un retard si important qu'elle a essentiellement contrecarré la réalisation de l'objectif sous-jacent à l'art. 31. Soit dit en tout respect, ce n'est pas mon avis.

(1) Preuve historique

[166] Au procès, la preuve historique offerte a été admise en grande partie. Prenant appui sur elle et sur les motifs du juge de première instance, je résume ci-après le processus de distribution des terres concédées. Je souscris à la conclusion du juge selon laquelle la distribution des terres a pris beaucoup de temps, mais il appert de la preuve historique que la démarche a été constante et soutenue malgré d'importantes difficultés administratives et un contexte politique instable. Il aurait certes été préférable que les choses se déroulent plus rapidement, mais je ne puis pour autant faire mienne la conclusion de la majorité selon laquelle la preuve révèle une tendance au manque d'attention, une conclusion qui ne figure nulle part dans les motifs du juge de première instance.

a) *Le recensement*

[167] Le recensement commandé par le premier lieutenant-gouverneur du Manitoba, A. G. Archibald, a pris fin le 9 décembre 1870. Il aurait été impossible de commencer l'attribution des terres sans disposer d'une estimation valable du nombre de Métis qui y avaient droit.

b) *L'arpentage*

[168] Pendant le recensement, le lieutenant-gouverneur a aussi été appelé à conseiller le gouvernement sur la manière de procéder à l'arpentage du territoire de la province. La méthode qu'il a préconisée a été adoptée par décret le 25 avril 1871. Il fallait en effet arpenter les terres avant de les attribuer, et l'arpentage des terres de la Puissance constituait un défi énorme pour l'Administration. La Cour d'appel reconnaît qu'[TRADUCTION] « il ressort de la preuve que la sélection des 1,4 million d'acres que le Canada devait concéder au total

to grant, would have been unworkable in the absence of a survey". The survey of the settlement belt was completed in the years 1871-74.

(c) *Selection of the Townships*

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

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

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

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

[172] Early in 1873, concern was expressed about whether it was proper for the heads of Métis families to share in the land grant. As a result, in April 1873, the federal government determined that a stricter interpretation of s. 31 should be adopted. Participation in the land grant was limited to the "children of half-breed heads of families" (trial, at

aurait été impossible sans arpentage préalable ». L'arpentage de la colonie a été réalisé de 1871 à 1874.

c) *La sélection des cantons*

[169] Dès que l'arpentage a été suffisamment avancé, le lieutenant-gouverneur a pu passer à l'étape suivante et sélectionner les cantons qui seraient distribués aux Métis. Il a reçu instruction d'entreprendre le processus le 17 juillet 1872. Il devait au préalable consulter les Métis de chacune des paroisses afin de déterminer les zones qui seraient retenues. La consultation a duré plusieurs mois et on ne saurait y voir un manque persistant d'attention eu égard à la situation des Métis.

[170] Pendant ce processus, il y a eu changement de lieutenant-gouverneur. Ayant perdu la confiance du premier ministre Macdonald, le lieutenant-gouverneur Archibald a démissionné le 31 décembre 1871. Son successeur, Alexander Morris, n'a cependant été assermenté qu'à l'automne 1872, mais M. Archibald a continué d'exercer ses fonctions dans l'intervalle. Des changements de cet ordre occasionnent inévitablement des pertes de temps qui ne sauraient, sauf circonstances aggravantes, être attribuées à un manque d'attention.

[171] Le 22 février 1873, le travail préparatoire était assez avancé pour que le lieutenant-gouverneur Morris puisse entreprendre la délimitation des lots des concessions individuelles de 140 acres, ce qu'il a pu accomplir à raison d'une soixantaine de lots à l'heure.

d) *Les événements à l'origine de la deuxième répartition*

[172] Au début de 1873, on s'est demandé s'il convenait que les chefs de famille métis se voient ainsi attribuer des terres et, en avril suivant, le gouvernement a opté pour une interprétation plus stricte de l'art. 31. Dès lors, seuls les [TRADUCTION] « enfants des chefs de famille métis » avaient droit à la concession d'une terre (première instance,

para. 202). As a result of this change, the number of recipients was significantly reduced, which meant that larger allotments would be required to distribute the entire 1.4 million acres. On August 5, 1873, Lieutenant Governor Morris was instructed to cancel the previous allotments. On August 16, 1873, Morris began the second allotment.

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

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

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

par. 202). Le nombre des bénéficiaires étant sensiblement réduit, il fallait accroître la superficie des lots afin de distribuer les 1,4 million d'acres en entier. Le 5 août 1873, le lieutenant-gouverneur Morris a reçu instruction d'annuler les répartitions antérieures et, le 16 août 1873, il entreprenait la deuxième répartition.

[173] Les lots tracés jusqu'alors devenaient inutiles, mais pas à cause d'un manque d'attention. Le gouvernement fédéral cherchait plutôt à faire en sorte que les terres soient concédées correctement et aux bonnes personnes. Le lieutenant-gouverneur Archibald avait d'abord indiqué au gouvernement qu'il fallait inclure les chefs de famille métis afin d'atteindre l'objectif de la concession des terres. Même si son interprétation s'écartait du libellé de l'art. 31, elle reposait sur la volonté de comprendre l'objet de la disposition et de donner un sens aux mots « dans le but d'éteindre les titres des Indiens aux terres de la province ». L'obligation de tout reprendre à zéro a sans aucun doute retardé l'attribution des terres, mais pas à cause d'un manque d'attention.

e) *La chute du gouvernement de Sir John A. Macdonald*

[174] Le 5 novembre 1873, le gouvernement de Sir John A. Macdonald a démissionné, le 22 janvier 1874, des élections ont eu lieu et le 26 mars 1874, le nouveau parlement a commencé à siéger. Le nouveau premier ministre était Alexander Mackenzie, et David Laird devenait ministre de l'Intérieur chargé de l'administration des terres de la Puissance. Ce dernier s'est rendu au Manitoba à l'automne 1874 pour se familiariser avec toutes les facettes du dossier des terres. Selon M. Flanagan, son carnet de notes révèle qu'il a envisagé la mise sur pied d'une commission appelée à [TRADUCTION] « dresser la liste de ceux qui pouvaient prétendre à des droits fonciers en vertu de la *Loi sur le Manitoba*, notamment la concession de terres aux enfants en application de l'art. 31 » (témoignage de Thomas Flanagan, d.a., vol. XXVI, p. 11).

(f) *The Machar/Ryan Commission*

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

(g) *The Patents*

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

(h) *The Late Applications*

[177] In order to get their share of the land grant, the Métis had to file claims with the government. Because of the migration that was already underway, a certain number of these claims were filed late. While the government had anticipated some late claims, the number had been underestimated. As a

f) *La Commission Machar/Ryan*

[175] Une commission établie par décret le 26 avril 1875 devait recevoir les demandes de lettres patentes présentées par ceux qui avaient droit à la concession d'une terre en application de la *Loi sur le Manitoba*. Nommés par décret le 5 mai 1875, les commissaires John Machar et Matthew Ryan se sont rendus au Manitoba l'été suivant. À la fin de l'année, ils avaient établi pour toutes les paroisses des rapports qui, une fois approuvés, tenaient lieu de liste officielle des titulaires du droit à la concession d'une terre. L'exhaustivité de cette liste a cependant été mise en doute, et M. Ryan, qui était devenu magistrat dans les Territoires du Nord-Ouest, ainsi que Donald Codd, du Bureau des terres fédérales, ont été autorisés à recevoir les demandes d'enfants ou de chefs de famille métis qui n'avaient pas pu se présenter devant la commission en 1875 parce qu'ils avaient quitté le Manitoba.

g) *Les lettres patentes*

[176] Le 31 août 1877, les premières lettres patentes sont parvenues à Winnipeg. Une fois tracées les limites d'une paroisse, la délivrance de lettres patentes prenait généralement de un à deux ans. Dans l'intervalle, des affiches étaient préparées quelques semaines après l'approbation de la répartition pour informer les bénéficiaires de l'emplacement de leurs terres. En 1881, la plupart des lettres patentes avaient été délivrées, mais l'approbation d'autres attributions s'est poursuivie quelques années encore. Plus de 6 000 lettres patentes devaient être délivrées en application de l'art. 31 de la *Loi sur le Manitoba*, en plus des 2 500 qui devaient l'être suivant l'art. 32.

h) *Les demandes tardives*

[177] Pour obtenir une terre, les Métis devaient présenter une demande au gouvernement. Le mouvement migratoire s'étant déjà amorcé, des demandes ont été présentées tardivement. Le gouvernement l'avait prévu, mais il avait sous-estimé le nombre de demandes tardives. Il a donc

result, claims continued to be filed after the 1.4 million acres had already been allocated. On April 20, 1885, an order in council granted the Métis children scrip rather than land, for those children who had submitted late applications.

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

(2) Evidence of Delay

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

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

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

[180] The trial judge, at para. 1055, observed that Manitoba was "a fledgling province [that] had just come into existence". Manitoba was far removed from Ottawa, which was the source of the authority for administration of the grant. The trial judge noted, at paras. 155-56, that those involved in

continué de recevoir des demandes après avoir attribué les 1,4 million d'acres. Un décret pris le 20 avril 1885 a établi que les enfants métis qui s'étaient manifestés tardivement recevraient des certificats plutôt que des terres.

[178] La date limite pour demander le certificat de 240 $ était le 1er mai 1886, mais ce délai n'a pas été appliqué strictement, et les demandes ont continué d'affluer par la suite. Le gouvernement a prorogé le délai au moins quatre fois. Finalement, 993 certificats d'une valeur de 240 $ chacun (soit au total 238 320 $) ont été remis à des enfants métis ou à leurs héritiers.

(2) Preuve du retard

[179] Mes collègues relèvent un certain nombre de retards, dont ceux découlant des erreurs commises dans la délimitation du groupe des bénéficiaires et dans l'estimation du nombre de ces derniers, ainsi que la longueur du délai de délivrance des lettres patentes et des « périodes d'inaction inexpliquées ». Il convient toutefois de situer ces bavures administratives dans leur contexte historique. À l'époque, le Manitoba était une province éloignée et peu habitée. Les infrastructures de transport et de communication, de même que la fonction publique fédérale, y étaient restreintes. Il appert du témoignage de M. Flanagan que

> [TRADUCTION] [m]ême un gouvernement omniscient et omnicompétent aurait mis des années à mettre en œuvre la *Loi sur le Manitoba*. On ne pouvait répondre instantanément à la nécessité objective de procéder à l'arpentage, de trier les demandes et de donner suite aux protestations politiques. Et, bien sûr, le gouvernement du Canada n'était ni omniscient ni omnicompétent. [p. 171]

Dans un tel contexte, il paraît inévitable que la mise en œuvre de la *Loi sur le Manitoba* ait connu certains « retards ».

[180] Au paragraphe 1055 de ses motifs, le juge de première instance fait remarquer que le Manitoba était [TRADUCTION] « une toute jeune province » très éloignée d'Ottawa, le siège administratif du processus d'octroi. Il signale aux par. 155-156 que les responsables de la concession des terres,

the land grants, including the Lieutenant Governor and the Manitoba legislature, had many challenges to contend with in the establishment of the new province:

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

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

notamment le lieutenant-gouverneur et la législature manitobaine, avaient déjà fort à faire pour établir la nouvelle province :

[TRADUCTION] Entre autres, [le lieutenant-gouverneur] devait former un gouvernement intérimaire et, pour cela, choisir et nommer les membres de son conseil exécutif, désigner les ministres du gouvernement et nommer les membres du conseil législatif. Il devait établir des circonscriptions électorales pour les paliers fédéral et provincial. Il devait effectuer un recensement. Il devait préparer à l'intention du gouvernement fédéral des rapports sur les lois et le système de taxation qui existaient alors dans la province, ainsi que sur les tribus indiennes, le nombre de leurs membres, leurs besoins et leurs demandes, et soumettre toute recommandation sur leur protection et l'amélioration de leur situation. Il lui fallait faire rapport, de façon générale, sur tous les aspects du bon fonctionnement de la province.

Il recevait en outre de longues instructions quant à ce qu'il lui revenait d'entreprendre dans l'exercice de sa charge de lieutenant-gouverneur des Territoires du Nord-Ouest.

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

[181] Les juges majoritaires estiment à trois ans le retard ayant découlé de l'inclusion erronée des parents des enfants métis dans le groupe des bénéficiaires. Or, une grande partie de la période qui a précédé l'annulation de la première répartition a été consacrée à l'arpentage, lequel a ensuite servi de fondement à toutes les répartitions subséquentes. On ne saurait y voir un retard. J'estime pour ma part à moins d'un an le retard imputable à l'erreur sur l'identité des bénéficiaires puisque la première répartition n'a commencé qu'en février 1873 pour être annulée le 5 août suivant.

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

[182] Mes collègues déplorent en outre un « retard inexplicable » de 1873 à 1875. Or, c'est pendant cette période qu'est survenue (en novembre 1873) la chute du gouvernement Macdonald. L'établissement d'un nouveau gouvernement, suivi de la décision d'instituer une commission, explique selon moi le délai. Notre Cour doit reconnaître les répercussions d'un tel événement. Aujourd'hui encore, un changement de gouvernement a, sur les plans politique et pratique, des incidences qui retardent la mise en œuvre de programmes publics.

constitute inattention to decide to proceed by way of commission in order to determine who was eligible to share in the land grant.

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

[184] There was another changeover in the Lieutenant Governor from Morris to Joseph-Édouard Cauchon in 1877. While there was no doubt time lost as a result of the change itself, drawing of lots was also delayed as Cauchon was concerned about reports of dissatisfaction he had received. Unfortunately, over a hundred years later, the details of those reports are unclear. It is quite possible that they account for the second delay from 1878 to 1880.

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

[186] The majority states, at para. 107, that

a negligent act does not in itself establish failure to implement an obligation in the manner demanded by

La décision de confier à une commission la tâche d'établir l'admissibilité à la concession d'une terre n'équivaut pas à un manque d'attention.

[183] Mes collègues reprochent aux représentants du gouvernement de ne pas avoir consacré assez de temps à la répartition, mais aucun élément de preuve relatif à la taille de la fonction publique au Manitoba ou à Ottawa pendant les décennies 1870 et 1880 n'a été présenté. Nous ignorons quel était alors le nombre de fonctionnaires fédéraux ou provinciaux et quelle était l'étendue de leurs tâches. Nous savons cependant que le lieutenant-gouverneur Morris [TRADUCTION] « voulait aller plus vite mais [qu'il] en était empêché par le peu de temps que Donald Codd [l'agent des terres de la Puissance] pouvait consacrer à l'entreprise » (Flanagan, p. 58). Jusqu'à ce qu'Ottawa envoie quelqu'un au Bureau des terres pour lui prêter main-forte, M. Codd ne pouvait tracer des lots que deux jours par semaine. D'autres obstacles ont pu nuire au processus, mais nous ne disposons pas d'éléments de preuve à cet égard.

[184] En 1877, Joseph-Édouard Cauchon a succédé à Alexander Morris au poste de lieutenant-gouverneur, un changement qui a sans doute occasionné un certain retard. Toutefois, des rapports de mécontentement inquiétaient M. Cauchon, ce qui a aussi retardé le traçage des lots. Malheureusement, il est difficile, un siècle plus tard, de déterminer la teneur de ces rapports, mais elle pourrait très bien expliquer le deuxième retard accusé de 1878 à 1880.

[185] Le juge de première instance ne conclut ni à la négligence ni à la mauvaise foi. Il estime en fait que peu d'éléments de preuve étayaient la manifestation de quelque mécontentement pendant le processus. Il ne conclut pas non plus que les représentants du gouvernement ont manqué de diligence ou que leurs actes dénotent une [TRADUCTION] « tendance au manque d'attention ».

[186] Les juges majoritaires ajoutent, au par. 107 :

. . . un acte négligent ne suffit pas, à lui seul, à établir le défaut de mettre en œuvre une obligation comme

the honour of the Crown. On the other hand, a persistent pattern of inattention may do so if it frustrates the purpose of the constitutional obligation, particularly if it is not satisfactorily explained.

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

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

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

B. *Effect of the Delay on the Métis*

[190] The majority attributes a number of negative consequences to the length of time that it took for the land grants to be made. In my respectful

le commande l'honneur de la Couronne. Par contre, une tendance persistante au manque d'attention peut l'établir, si cette pratique va à l'encontre des objectifs de l'obligation constitutionnelle, particulièrement en l'absence d'explications satisfaisantes.

[187] Je partage l'avis de mes collègues qu'il ne suffit pas de prouver un acte négligent pour établir le manque de diligence. Toutefois, alors que le juge de première instance n'estime même pas qu'il y a eu négligence, les juges majoritaires concluent au manque de diligence. Malgré le respect que je leur porte, c'est aller à l'encontre des conclusions de fait initiales.

[188] Le dossier est incomplet, et mes collègues paraissent s'appuyer sur ses lacunes pour opiner que le gouvernement a manqué aux obligations que lui imposait l'art. 31. À mon sens, on ne peut exiger du gouvernement qu'il explique un retard survenu il y a si longtemps. L'écoulement du temps et l'insuffisance des données historiques rendent cette tâche impossible.

[189] Si l'obligation de concéder des terres était contemporaine, nous nous attendrions à plus de célérité. Or, ce n'est pas l'actuel gouvernement fédéral qui a entrepris de s'en acquitter. L'entreprise remonte à plus de 130 ans, alors que le gouvernement et le pays venaient de se former et luttaient pour leur établissement. Nous ne pouvons soumettre ce gouvernement aux normes actuelles relativement à des faits survenus dans un contexte très différent du nôtre. Notre Cour a en effet déjà relevé qu'il faut s'abstenir d'appliquer une norme de conduite moderne à des circonstances d'une époque ancienne (*Bande indienne Wewaykum c. Canada*, 2002 CSC 79, [2002] 4 R.C.S. 245, par. 121). S'il y a eu retard, on ne saurait dire, au vu de la preuve disponible et des conclusions du juge de première instance considérées d'un œil impartial, qu'il est imputable à un manque d'attention, encore moins à une tendance persistante au manque d'attention.

B. *Incidence du retard sur les Métis*

[190] Les juges majoritaires attribuent diverses conséquences défavorables au temps mis à concéder les terres. À mon humble avis, ils font abstraction

view, in so doing they have departed from the factual findings made by the trial judge and drawn inferences that are not supported by the evidence. While the length of time that it took for the land to be distributed may have been frustrating for some of the Métis, it was not the cause of every negative experience that followed for them.

(1) Departure From the Red River Settlement

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

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

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

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

des conclusions de fait du juge de première instance, et ils tirent des conclusions que n'étaye pas la preuve. Bien que la longueur du processus de distribution ait pu être source de frustration pour une partie des Métis, on ne peut lui imputer tous les revers que ces derniers ont connus par la suite.

(1) Le départ de la colonie de la rivière Rouge

[191] Selon mes collègues, il est possible que le temps écoulé ait marginalisé les Métis et les ait incités à quitter la colonie de la rivière Rouge. Ni les conclusions de fait du juge de première instance ni la preuve n'appuient une telle inférence. D'autres éléments ont joué à cet égard.

[192] Après examen de la preuve historique sur ce point, le juge de première instance conclut :

> [TRADUCTION] Au moment où la traite de la fourrure de bison gagnait en vigueur, plusieurs années de mauvaises récoltes accablaient l'agriculture. De 1844 à 1848, seule la récolte de 1845 a suffi pour nourrir la colonie. À l'automne 1848, la colonie était au bord de la famine. Les récoltes ont été meilleures pendant la décennie 1850, mais elles ont encore une fois été médiocres pendant les années 1860. La forte demande de fourrure de bison jumelée aux maigres récoltes a amené de plus en plus de Métis à abandonner l'agriculture et à quitter la colonie pour suivre les bisons vers l'ouest. En 1869, les bisons se trouvaient à une telle distance au sud-ouest de la rivière Rouge que la chasse ne pouvait plus s'entreprendre à partir de la colonie. [Je souligne; par. 50.]

[193] Il appert donc que, en raison des pressions économiques exercées à la fois par le déclin de l'agriculture et la migration du bison, les habitants de la colonie de la rivière Rouge ont commencé à émigrer avant même que ne soient envisagées les concessions de terres fondées sur l'art. 31. Le repli des troupeaux de bisons vers l'ouest a été un facteur capital. Les Métis vivaient principalement de la traite de la fourrure de bison, l'un des moteurs de leur économie. L'émigration des Métis obéissait donc à des pressions économiques, de sorte que l'action ou l'inaction du gouvernement n'était ni la seule cause du phénomène ni sa cause prédominante.

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

[194] Les juges majoritaires estiment en outre que le retard accusé dans la concession des terres a empêché les Métis d'échanger leurs terres contre des parcelles contiguës. Le juge de première instance conclut plutôt que l'intention générale du législateur n'était pas de créer une assise territoriale métisse et, partant, que la possibilité d'échanger des terres contre des parcelles contiguës n'avait jamais été un objectif de la concession de terres. Selon lui, seuls quelques Métis voulaient obtenir des terres contiguës, les autres préférant avoir les meilleures terres possible. La déférence est de mise à l'égard de cette conclusion de fait.

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

[195] Enfin, les juges majoritaires citent le sous-ministre de l'Intérieur, A. M. Burgess, pour montrer que l'existence du retard et de ses prétendues conséquences préjudiciables était généralement admise. Contrairement à ce qu'ils laissent entendre, on ne peut voir dans les propos de M. Burgess des observations générales sur l'ensemble du processus de concession de terres visant à condamner le manque d'attention du gouvernement fédéral. M. Burgess affirme que les [TRADUCTION] « retards scandaleux dans la délivrance des lettres patentes » lui donnent « la nausée » (d.a., vol. XXI, p. 123-124 (je souligne)). Or, la délivrance des lettres patentes et les retards qu'elle a pu accuser ne constituent qu'un aspect du défi administratif posé par la concession des terres. M. Burgess écrit aussi qu'il travaille jour et nuit à ces lettres patentes, ce qui ne saurait attester une tendance au manque d'attention.

(2) Price Obtained for the Land

(2) Le prix obtenu pour les terres

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

[196] Mes collègues concluent que le retard de 10 ans qu'ils voient dans la mise en œuvre de la concession des terres a accru la vente aux spéculateurs, étant sous-entendu que celle-ci a nui aux intérêts des Métis. Je conviens avec le juge de première instance que des spéculateurs ont acquis des terres à des prix dérisoires, mais ce ne sont pas toutes les ventes qui ont été conclues au détriment des Métis.

[197] The trial judge also found that there was evidence of sales which occurred at market prices, sales to people who were not speculators and sales

[197] Le juge de première instance conclut également que, suivant la preuve, il y a eu ventes à la valeur marchande, ventes à des non-spéculateurs et

which were not the result of pressure or conduct of speculators. The trial judge held:

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

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

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

(3) Scrip

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

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

[200] I cannot agree that the delayed issuance of scrip demonstrates a persistent pattern of inattention by the government. Rather, the issuance of scrip

ventes sans pression ni intervention de spéculateurs. Il écrit :

> [TRADUCTION] Globalement, si les cas de ce qui paraît être de l'exploitation sont nombreux, il est difficile de déterminer, si longtemps après, si tel était bien le cas ou si le prix obtenu était juste compte tenu de la variation de ce qui était en fait vendu et, par conséquent, de sa valeur marchande. [par. 1057]

Certains Métis ont vendu leurs terres à prix fort, d'autres ont obtenu moins en contrepartie. Il se peut que, dans l'ensemble, les Métis aient touché un juste prix. Conclure aujourd'hui que les ventes ont été préjudiciables à toute la collectivité métisse est pure conjecture.

[198] Mes collègues donnent à entendre que plus le temps s'écoulait, plus les terres risquaient de se déprécier, ce que n'étaye pas la preuve. De fait, les années 1880 à 1882 ont connu un boom, et les terres auraient pris encore plus de valeur. La Cour d'appel signale que la quasi-totalité des ventes a eu lieu entre 1877 et 1883. Il paraît incongru de demander collectivement réparation au nom de certains ancêtres métis qui ont pu tirer avantage du retard.

(3) Les certificats

[199] Les juges majoritaires reconnaissent qu'il était inévitable que la distribution des terres se fasse en fonction d'une estimation, plus ou moins exacte, du nombre de Métis admissibles. Ils conviennent aussi que la délivrance d'un certificat constituait un moyen valable d'octroyer leur dû aux enfants exclus. Ils ajoutent toutefois :

> . . . la délivrance tardive de certificats échangeables contre un lot d'une superficie bien moindre que celle offerte aux autres bénéficiaires illustre encore davantage la tendance persistante au manque d'attention . . . [par. 123]

[200] Je ne saurais convenir que la délivrance tardive de certificats prouve une tendance persistante au manque d'attention de la part du gouvernement.

was equally if not more consistent with the late filing of applications — over which the government had little control — and the corresponding underestimate in the number of eligible recipients. That is hardly evidence of government inattention.

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

C. *Conclusion on the Facts*

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

III. Analysis

A. *Honour of the Crown*

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

Cette mesure tenait tout autant, sinon davantage, à la présentation tardive des demandes, laquelle était indépendante de la volonté du gouvernement, qu'à la sous-estimation concomitante du nombre des bénéficiaires admissibles, ce qui est loin d'établir le manque d'attention du gouvernement.

[201] S'il n'y avait pas eu de retard et que le nombre exact d'enfants métis avait été connu dès le départ, chacun des enfants aurait reçu moins que ce qu'il a obtenu dans les faits, car les bénéficiaires de certificats auraient été pris en compte dans la répartition initiale. En ce sens, le Canada s'est montré plus généreux que ne l'exigeait la *Loi sur le Manitoba* en délivrant des certificats une fois distribués les 1,4 million d'acres. La délivrance des certificats atteste que le Canada s'est employé à s'acquitter véritablement de ses obligations, et non qu'il a fait preuve d'un manque d'attention.

C. *Conclusion sur les faits*

[202] Le juge conclut clairement qu'il y a eu retard, mais ni ses conclusions ni la preuve ne révèlent une tendance au manque d'attention ou un manquement à l'obligation de diligence, pas plus qu'elles n'indiquent que les objectifs de la concession des terres ont été contrecarrés. Ce seul élément prive de fondement toute prétention des Métis prenant appui sur le manquement à une obligation découlant de l'honneur de la Couronne, à supposer qu'une telle obligation existe, ce que j'examine ci-après.

III. Analyse

A. *L'honneur de la Couronne*

[203] Dans leurs motifs, mes collègues élaborent une nouvelle obligation découlant de l'honneur de la Couronne, celle d'exécuter avec diligence un engagement solennel. Dans des affaires antérieures, notre Cour s'est surtout prononcée sur la manière dont les tribunaux doivent interpréter les traités et les textes législatifs, et non sur la manière dont l'État doit en assurer l'application. Même si l'arrêt *Nation haïda c. Colombie-Britannique (Ministre des Forêts)*, 2004 CSC 73, [2004] 3 R.C.S. 511,

future, this is not an appropriate case to develop such a duty.

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

(1) Ambiguity as to What Constitutes a Solemn Obligation

[205] In order to trigger this new duty of diligent fulfillment, there must first be a "solemn obligation". But no clear framework is provided for when an obligation rises to this "solemn" level such that it triggers the duty of diligent implementation. Furthermore, the majority reasons are unclear as to what types of legal documents will give rise to solemn obligations: Is it only provisions in the Constitution or does it also include treaties? In para. 75, the majority appears to restrict their conclusion on diligence to constitutional obligations to Aboriginal peoples. But, in para. 79, they note that the duty applies whether the obligation arises in a treaty or in the Constitution. This further reflects the inappropriateness of fashioning new common law rights and obligations without the benefit of consideration by the trial judge or Court of Appeal and in particular without the benefit of argument before this Court.

[206] This difficulty is manifested in other aspects of the majority reasons. My colleagues accept that s. 31 was a constitutional provision (para. 94). Adopting the narrowest reading of their holding as to what documents trigger solemn obligations —

n'exclut pas la possibilité d'accroître les obligations de la Couronne, il n'y a pas lieu de le faire en l'espèce.

[204] Une obligation d'exécution diligente pourrait emporter un accroissement opportun des obligations de la Couronne. Cependant, l'obligation créée par les juges majoritaires se révèle problématique. Le critère préliminaire qui permet de conclure au caractère solennel d'un engagement n'est pas clair. Mais plus fondamentalement, la Cour ne saurait élargir ainsi la common law dans la mesure où les plaidoiries des parties ne portent aucunement sur la portée et la définition d'une telle obligation nouvelle, et où les juridictions inférieures, elles, ne les ont pas examinées.

(1) Ambiguïté liée à la notion d'engagement solennel

[205] Il doit avant tout exister un « engagement solennel » pour que s'applique la nouvelle obligation d'exécution diligente. Or, la majorité n'offre pas de repères clairs qui permettent de déterminer si un engagement est « solennel » et emporte l'application de cette obligation. Mes collègues n'établissent pas clairement non plus quel type de document juridique peut renfermer un engagement solennel : s'agit-il uniquement de la Constitution ou peut-il aussi s'agir d'un traité? Au paragraphe 75, leur conclusion relative à l'exécution diligente paraît s'appliquer aux seules obligations constitutionnelles envers les peuples autochtones. Ils signalent cependant, au par. 79, que l'obligation vaut peu importe qu'elle découle d'un traité ou de la Constitution. Cela montre bien qu'il faut s'abstenir de façonner de nouveaux droits et obligations de common law sans que leur existence n'ait été considérée en première instance ou en cour d'appel et, en particulier, lorsque les parties ne présentent pas de plaidoiries sur le sujet à notre Cour.

[206] La difficulté se manifeste à d'autres égards dans les motifs des juges majoritaires. Ces derniers considèrent l'art. 31 comme une disposition constitutionnelle (par. 94). Selon l'interprétation la plus stricte de leur conclusion quant à savoir quels textes

one limited to constitutional provisions — it would seem such obligations would be triggered here. The majority nonetheless proceeds to consider how s. 31 of the *Manitoba Act* is similar to a treaty (para. 92). It thus appears that s. 31 engages the honour of the Crown, not just because of its constitutional nature, but also because of its treaty-like character.

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

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

juridiques font naître un engagement solennel — seulement les dispositions constitutionnelles selon eux —, il semblerait qu'un tel engagement existe en l'espèce. Or, mes collègues se demandent en quoi l'art. 31 de la *Loi sur le Manitoba* s'apparente à un traité (par. 92). Il appert donc que l'art. 31 engage l'honneur de la Couronne, non pas seulement à cause de sa nature constitutionnelle, mais aussi parce qu'il s'apparente à un traité.

[207] L'idée que certains articles de la Constitution doivent être interprétés différemment ou imposer des obligations accrues au gouvernement parce qu'ils peuvent s'apparenter à ceux d'un traité est pour le moins nouvelle. Je ne puis concevoir que les modalités de mise en application d'une obligation constitutionnelle par le gouvernement dépendent du degré de ressemblance de celle-ci avec une obligation issue d'un traité.

[208] Non seulement les juges majoritaires ne précisent pas la nature du texte juridique susceptible de renfermer un engagement solennel, mais l'objet de cet engagement qui fera naître la nouvelle obligation est incertain. Mes collègues affirment que, pour engager l'honneur de la Couronne, un groupe autochtone doit être expressément créancier de l'obligation. Il s'agit assurément d'une condition d'application du principe, mais ce seul élément ne suffit pas. Comme le signalent les juges majoritaires, dans le contexte autochtone, l'obligation fiduciaire peut découler de l'exercice par la Couronne d'un pouvoir discrétionnaire à l'égard d'un *intérêt autochtone particulier*. Faire dépendre le respect de l'honneur de la Couronne du seul fait qu'un groupe autochtone est simplement créancier d'une obligation risque de faire de l'honneur de la Couronne une « version allégée » de l'obligation fiduciaire comme fondement d'une demande. Cette nouvelle cause d'action diluée permettrait à une personne de demander réparation même si elle ne peut prouver l'existence d'un intérêt autochtone particulier susceptible de fonder une obligation fiduciaire, du moment qu'une promesse a été faite à un groupe autochtone. Qui plus est, les juges majoritaires reconnaissent au par. 108 qu'il ne

of application and a lower threshold for breach, is a significant expansion of Crown liability.

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

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

[210] While there is no doubt that the phrase "honour of the Crown" was used in argument before this Court, no submissions of any substance were made as to what duty the honour of the Crown should have engaged on these facts beyond a fiduciary duty, nor were there any submissions on a duty of diligent implementation.

[211] During the pleadings phase, honour of the Crown was not mentioned in the Métis' statement of claim and was mentioned only once in passing in their response to particulars (A.R., vol. IV, at p. 110). Before this Court, the Métis referred to honour of the Crown four times in their factum, but never alleged that there was a duty of diligent fulfillment of solemn obligations. Instead, two of the references to the honour of the Crown are contained in their summary of the points in issue and in their

saurait y avoir manquement à la nouvelle obligation lorsque les actes en cause ne sont pas suffisamment graves pour emporter un manquement à une obligation fiduciaire. Étant donné sa portée accrue et ses conditions d'application moins strictes, la nouvelle obligation élargit sensiblement la responsabilité de l'État.

(2) Absence de plaidoiries des parties ou d'opinions des juridictions inférieures sur le sujet

[209] Abstraction faite des points susmentionnés, il demeure que les parties au pourvoi n'ont pas fait porter leurs plaidoiries sur l'obligation particulière, découlant de l'honneur de la Couronne, d'exécuter diligemment un engagement solennel. Elles n'ont pas allégué l'existence d'une telle obligation. Les Métis n'ont pas tenté de justifier l'application de l'honneur de la Couronne en l'espèce, ni précisé quelle obligation en découlerait eu égard aux faits ou en quoi l'obligation n'aurait pas été exécutée. Le Canada et le Manitoba n'ont donc pas eu la possibilité de se faire entendre sur ces points, de sorte que notre Cour ne dispose pas des thèses opposées voulues dont la présentation forme l'essence même de notre système de débat contradictoire.

[210] L'expression « honneur de la Couronne » a certes été employée lors des plaidoiries, mais nulle prétention véritable n'a été formulée devant nous quant à la nature de l'obligation qui découlerait en l'espèce de l'honneur de la Couronne au-delà de l'obligation fiduciaire, ni aucune prétention concernant l'existence d'une obligation de diligence dans la mise en œuvre.

[211] Dans les actes de procédure, les Métis n'invoquent pas l'honneur de la Couronne dans leur déclaration et ils en font mention une seule fois de manière incidente dans leur réponse à une demande de précisions (d.a., vol. IV, p. 110). Devant notre Cour, les Métis en font mention quatre fois dans leur mémoire, mais ils n'allèguent aucunement l'existence d'une obligation d'exécuter diligemment un engagement solennel. Deux des mentions figurent dans leur résumé des points en litige et dans

requested order. They also briefly assert that the honour of the Crown required the government to take a liberal approach to interpreting s. 32 and that the honour of the Crown could be used to show one of the elements of a fiduciary obligation under s. 32. They never provided submissions as to what constitutes a solemn obligation nor did they allege specifically that the honour of the Crown required due diligence in the implementation of such solemn obligations. In oral argument before this Court, the only submissions made on honour of the Crown were supplied by the Métis Nation of Alberta and the Attorney General for Saskatchewan. Neither of these interveners, nor the Métis themselves, made submissions about diligence, a new legal test based on patterns of inattention, or solemn obligations.

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

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

l'énoncé de l'ordonnance demandée. Ils font aussi brièvement valoir que l'honneur exige de la Couronne qu'elle interprète libéralement l'art. 32 et que cet honneur peut permettre d'établir l'un des éléments d'une obligation fiduciaire découlant de cette disposition. Ils n'avancent rien au sujet de ce qui constitue un engagement solennel, ni ne font expressément valoir que l'honneur de la Couronne exige la mise en œuvre diligente d'un tel engagement solennel. Lors des plaidoiries devant notre Cour, seuls la Métis Nation of Alberta et le procureur général de la Saskatchewan ont abordé le sujet de l'honneur de la Couronne, et ni ces intervenants ni les Métis eux-mêmes n'ont parlé de diligence, d'un nouveau critère juridique lié aux tendances au manque d'attention ou d'engagement solennel.

[212] Circonscrire un nouveau concept juridique commande la prudence et la prise en compte d'un dossier complet qui fait état du raisonnement des juridictions inférieures et des thèses respectives des parties. Sans ces points de vue divergents et l'analyse des juridictions inférieures, il est périlleux pour la Cour d'entreprendre l'élaboration d'une nouvelle obligation de common law. L'incertitude quant à savoir quels documents juridiques peuvent, selon les juges majoritaires, renfermer un engagement solennel atteste clairement ce risque.

[213] En outre, imposer une nouvelle obligation à une partie sans lui donner la possibilité de s'exprimer sur la validité de l'obligation ou de sa portée prête particulièrement flanc à la critique. Que cette partie soit le gouvernement ne rend pas moins préoccupante l'entorse à l'application régulière de la loi. Les motifs majoritaires pavent la voie à un accroissement imprévisible de la responsabilité de l'État envers les peuples autochtones. La Couronne n'a pas eu l'occasion de se pencher sur les répercussions que cette nouvelle obligation pourrait avoir sur la possibilité de conclure des traités avec les peuples autochtones ou de prendre des engagements envers eux. On ne saurait imposer d'obligation à une partie, l'État compris, sans lui ménager la possibilité de faire valoir son point de vue sur les répercussions éventuelles de cette obligation. S'agissant de l'État, lui imposer une

through ongoing dialogue with Parliament, it is of very serious concern.

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

B. *Limitations*

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

(1) Decisions of the Courts Below

[216] The present action was commenced on April 15, 1981. The trial judge held that, except for the claims related to the constitutional validity of the Manitoba statutes, there was no question that the

obligation nouvelle fondée sur la Constitution, et donc non susceptible de précision ou de modification dans le cadre d'un échange suivi avec le Parlement, fait naître de très sérieuses préoccupations.

[214] La Cour fait toujours preuve de circonspection avant de modifier radicalement le droit : voir *Watkins c. Olafson*, [1989] 2 R.C.S. 750, p. 760. Dans cet arrêt, notre Cour conclut que les tribunaux ne sont pas en mesure de connaître toutes les lacunes du droit applicable ni, surtout, de prévoir les problèmes que causera l'accroissement projeté. Les tribunaux ne sont pas toujours conscients des effets que celui-ci peut avoir sur les plans politique et économique. Ces considérations sont pertinentes en l'espèce, même si la question des rôles respectifs des tribunaux et du législateur n'est pas en jeu. À défaut des arguments des parties sur le fond, la Cour peut difficilement savoir de quelle manière s'appliquera la nouvelle obligation et quelles conséquences en résulteront. Pour tous ces motifs, il ne convient pas de créer cette nouvelle obligation en l'espèce.

B. *Prescription*

[215] À supposer même que l'honneur de la Couronne ait été engagé, qu'il ait exigé la mise en œuvre diligente de l'art. 31 et qu'il y ait eu manquement à cette obligation, toute action ayant pour cause ce manquement est prescrite depuis longtemps. Les juges majoritaires tentent de contourner la prescription en qualifiant l'action de grief fondamentalement constitutionnel découlant d'un « clivage persistant dans notre tissu national » (par. 140). Soit dit en tout respect, cette exception à l'application de lois sur la prescription régulièrement adoptées n'a à mon sens aucune assise juridique ou rationnelle. Selon moi, il y a lieu de rejeter la demande au motif qu'elle est prescrite.

(1) Les décisions des juridictions inférieures

[216] L'action a été intentée le 15 avril 1981. Le juge de première instance statue que, sauf en ce qui concerne son volet relatif à la constitutionnalité des lois du Manitoba, l'action des Métis a été introduite

Métis' action was outside the statutorily mandated limitation period and he would have dismissed the action on that basis.

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

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

(2) Limitations Legislation in Manitoba

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

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

après l'expiration du délai de prescription légal et qu'il y a lieu de rejeter l'action pour ce motif.

[217] Le juge fait remarquer que les allégations en cause sont assujetties aux dispositions applicables à la prescription. Il statue que, à l'époque considérée, les Métis connaissaient les droits que leur conférait l'art. 31 de la *Loi sur le Manitoba* et qu'ils se sont adressés aux tribunaux pour faire respecter d'autres droits. Il en infère que les Métis [TRADUCTION] « ont renoncé à contester les art. 31 et 32 ou à ester sur leur fondement, alors qu'ils connaissaient l'existence de ces dispositions, l'objet de celles-ci et leur droit d'action » (par. 446). Il conclut que la prescription légale s'applique et rend la demande irrecevable.

[218] Le juge en chef Scott, de la Cour d'appel, relève la conclusion du juge de première instance selon laquelle, bien avant le 15 avril 1981, les Métis connaissaient leurs droits et savaient qu'ils disposaient de six ans pour ester en justice. La Cour d'appel estime que la déférence est de mise à l'égard de ces conclusions de fait sur la connaissance de leurs droits par les Métis. Le juge en chef Scott confirme la décision de première instance portant que l'action des Métis pour manquement à une obligation fiduciaire découlant des art. 31 et 32 est prescrite, car les Métis n'ont pas démontré que le juge a mal appliqué le droit ou que sa conclusion procède d'une erreur manifeste et dominante.

(2) Les dispositions manitobaines sur la prescription

[219] Le Manitoba a édicté sa première loi en la matière en 1931, mais des délais de prescription s'appliquent depuis 1870 dans la province par application des lois d'Angleterre. La loi intitulée *The Limitation of Actions Act, 1931*, S.M. 1931, ch. 30, accordait un délai de six ans pour intenter une [TRADUCTION] « action ayant pour cause un accident ou une erreur, ou une autre cause reconnue en equity » (al. 3(1)*i*)).

[220] Un délai de six ans s'appliquait aussi à toute autre action non expressément prévue par

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

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

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

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

(3) Limitations and Constitutional Claims

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

cette loi ou une autre (al. 3(1)*l*)). Suivant son libellé, la *Limitation of Actions Act, 1931* s'appliquait [TRADUCTION] « à toutes les causes d'action, qu'elles aient pris naissance avant ou après son entrée en vigueur » (art. 42). Des dispositions analogues figurent dans toutes les lois manitobaines sur la prescription qui ont été adoptées depuis.

[221] Il s'ensuit selon moi que l'action des Métis est prescrite depuis au moins 1937, peu importe qu'ils allèguent le manquement à une obligation fiduciaire ou le manquement à une obligation découlant de l'honneur de la Couronne.

[222] Pour mes collègues, l'action n'étant plus fondée sur le manquement à une obligation fiduciaire, l'al. 3(1)*i*) de la *Limitation of Actions Act, 1931* n'y fait pas obstacle. Or, peu importe la manière dont on qualifie l'action, la prescription générale énoncée à l'al. 3(1)*l*) la rend irrecevable puisque cet alinéa vise à faire en sorte que la prescription de six ans s'applique à toutes les causes d'action non mentionnées dans la Loi.

[223] Le manquement allégué à l'obligation d'exécuter diligemment un engagement solennel constitue une « cause d'action » et, par conséquent, l'action est prescrite par application de l'al. 3(1)*l*).

(3) La prescription d'une demande de nature constitutionnelle

[224] Mes collègues soutiennent que la prescription légale ne vaut pas lorsqu'il s'agit de se prononcer sur la constitutionnalité des actes de l'État. Ils ajoutent que des dispositions sur la prescription ne peuvent faire obstacle à une action intentée au motif que la Couronne n'a pas agi honorablement dans la mise en œuvre d'une obligation constitutionnelle. Il s'agit pour moi de propos inédits, car la Cour n'a jamais reconnu l'existence d'une exception générale à l'application de la prescription dans le cas d'une demande prenant appui sur la Constitution. Elle conclut en fait invariablement que la prescription vaut pour les allégations de nature factuelle comportant des éléments constitutionnels.

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

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

[227] Instead, what the Métis seek in this case is like the personal remedies that the applicants sought in *Kingstreet* and *Ravndahl*. The Métis are asking this Court to rule on a factual dispute about how lands were distributed over 130 years ago. While they are not asking for a monetary remedy, they are asking for their circumstances and the specific facts of the land grants to be assessed. As this Court said in *Ravndahl*:

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

These claims are made by individual Métis and their organized representatives. The claims do not arise from a law which is unconstitutional. Rather, they arise from individual factual circumstances. As

[225] Invoquant les arrêts *Kingstreet Investments Ltd. c. Nouveau-Brunswick (Finances)*, 2007 CSC 1, [2007] 1 R.C.S. 3; *Ravndahl c. Saskatchewan*, 2009 CSC 7, [2009] 1 R.C.S. 181; et *Thorson c. Procureur général du Canada*, [1975] 1 R.C.S. 138, les juges majoritaires signalent que la prescription ne saurait empêcher un tribunal de déclarer une loi inconstitutionnelle. J'en conviens, mais la constitutionnalité de dispositions législatives n'est pas contestée en l'espèce. La présente affaire a plutôt pour objet des questions d'ordre factuel et des manquements allégués à des obligations qui, même dans les affaires *Ravndahl* et *Kingstreet*, ont toujours été soumis à la prescription.

[226] Ces deux arrêts établissent clairement que l'application des délais de prescription souffre une exception lorsque la demande vise à faire déclarer une loi inconstitutionnelle. En l'espèce, mes collègues concluent au caractère théorique des prétentions d'inconstitutionnalité formulées par les Métis, et le jugement déclaratoire demandé n'a par ailleurs rien à voir avec la constitutionnalité d'une loi.

[227] En fait, l'objet du recours des Métis s'apparente à la réparation personnelle demandée dans *Kingstreet* et *Ravndahl*. Les Métis exhortent notre Cour à trancher un litige factuel se rapportant à la manière dont on leur a attribué des terres il y a plus de 130 ans. Bien qu'ils ne sollicitent pas de réparation pécuniaire, ils demandent l'examen de leur situation et des circonstances de la concession des terres. Comme le dit notre Cour dans *Ravndahl* :

> Il s'agit de demandes introduites par un individu, en tant qu'individu, en vue d'obtenir une réparation personnelle. Comme il en sera question plus loin, il y a lieu d'établir une distinction entre les demandes de réparations personnelles de ce type et celles sollicitant la déclaration d'inconstitutionnalité d'une loi qui peuvent profiter aux personnes touchées en général. [par. 16]

Dans le présent dossier, les demandes ont été présentées par des Métis à titre individuel et par l'organisation qui les représente. Elles n'ont pas pour assise l'inconstitutionnalité d'une loi, mais

a result, the rule in *Kingstreet* and *Ravndahl* that individual factual claims are barred by limitations periods applies to bar suit in this case.

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

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

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

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

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

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

prennent plutôt appui sur des situations factuelles individuelles. La règle établie dans *Kingstreet* et *Ravndahl*, à savoir que les demandes fondées sur de telles situations sont assujetties aux délais de prescription, s'applique donc et emporte l'irrecevabilité de l'action.

(4) La raison d'être de la prescription vaut en l'espèce

[228] Selon les juges majoritaires, la question en litige revêt une importance telle pour la réconciliation des Métis avec la souveraineté canadienne que l'on ne saurait invoquer la prescription. Ils ajoutent que l'omission de trancher la question soulevée emportera un « clivage persistant dans notre tissu national ».

[229] À mon avis, il ne convient pas d'écarter judiciairement l'application de la prescription à la demande. Les délais de prescription sont établis par le législateur, et ils ne sont pas discrétionnaires. Bien que la prescription ne s'applique pas à une demande visant à faire déclarer un texte de loi inconstitutionnel, je rappelle que nous ne sommes pas saisis d'une telle demande.

[230] Les lois sur la prescription, tout comme les exceptions qu'elles prévoient, procèdent de décisions de principe arrêtées par le législateur. Il n'appartient pas aux tribunaux de créer une exception pour la demande de nature fondamentalement constitutionnelle découlant d'un clivage persistant dans notre tissu national, et d'intervenir ainsi directement dans la politique sociale.

[231] Les dispositions sur la prescription ont toujours reposé sur des raisons de principe. Dans *M. (K.) c. M. (H.)*, [1992] 3 R.C.S. 6, la Cour relève trois justifications, soit la certitude, la preuve et la diligence.

[232] La certitude est liée à la tranquillité d'esprit en ce qu'« [i]l arrive un moment, dit-on, où un éventuel défendeur devrait être raisonnablement certain qu'il ne sera plus redevable de ses anciennes obligations » (*M. (K.) c. M. (H.)*, p. 29).

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

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

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

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

(a) *Discoverability*

[236] The discoverability principle has its origins in judicial interpretations of when a cause of action "accrues". Discoverability was described

[233] Dans *Wewaykum*, la Cour apporte des précisions sur la justification liée à la preuve (au par. 121) :

> Des témoins ne sont plus disponibles, des documents historiques ont disparu ou sont difficiles à mettre en contexte et l'idée de ce que constituent des pratiques loyales évolue. En raison de l'évolution des normes de conduite et de l'application de nouvelles normes en matière de responsabilité, il devient inéquitable de juger des actions passées au regard de normes contemporaines.

[234] Enfin, la raison d'être qu'est la diligence veut que le demandeur soit incité à faire valoir ses droits sans tarder. Elle tient notamment au constat selon lequel [TRADUCTION] « on ne tarde habituellement pas à présenter une demande fondée » (*Riddlesbarger c. Hartford Insurance Co.*, 74 U.S. (7 Wall.) 386 (1868), p. 390, cité dans *United States c. Marion*, 404 U.S. 307 (1971), p. 322, note de bas de page 14).

[235] À partir de ces trois justifications, les règles de prescription ont évolué de manière à prévoir diverses exceptions qui reflètent les nuances apportées aux principes qui les sous-tendent. Les dispositions anciennes comportaient peu d'exceptions, mais celles d'aujourd'hui reconnaissent l'existence de situations où l'application stricte du délai de prescription entraînerait une injustice. Par exemple, bien que des exceptions à la prescription se soient toujours appliquées aux mineurs, ces exceptions liées à l'incapacité ont vu leur portée s'accroître pour reconnaître désormais diverses autres inaptitudes. L'impossibilité de découvrir le dommage emporte elle aussi l'application d'une exception. Or, tout en élargissant la portée des exceptions ou en accroissant le nombre de celles-ci, les législatures ont créé en contrepartie des délais ultimes qui s'appliquent de manière à apporter définitivement certitude et clarté. Ni les exceptions prévues par la loi ni leurs justifications ne trouvent application en l'espèce.

a) *Possibilité de découvrir*

[236] La règle de la possibilité de découvrir le dommage tire son origine de la jurisprudence relative au moment où la cause d'action « prend naissance ».

in the English case of *Sparham-Souter v. Town and Country Developments (Essex) Ltd.*, [1976] 1 Q.B. 858 (C.A.), at p. 868, where Lord Denning, M.R. stated:

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

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

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

[239] The discoverability principle has been applied in a variety of contexts. In *Kamloops*, the claim arose from negligent construction of the foundation of a house, where there was evidence that the defect was not visible until long after the house was completed. In *M. (K.) v. M. (H.)*, discoverability was used to toll the limitation period until such time as the victim of childhood incest was able to discover "the connection between the harm she has suffered and her childhood history" (p. 35). In *Peixeiro v. Haberman*, [1997] 3 S.C.R.

Dans la décision anglaise *Sparham-Souter c. Town and Country Developments (Essex) Ltd.*, [1976] 1 Q.B. 858 (C.A.), lord Denning, maître des rôles, dit ce qui suit à son sujet (p. 868) :

> [TRADUCTION] . . . lorsqu'un ouvrage est mal construit — puis maquillé —, la cause d'action ne prend naissance, et le délai ne commence à courir, que lorsque le demandeur découvre le dommage en résultant ou qu'il aurait dû le découvrir s'il avait exercé la diligence voulue.

[237] Malgré le rejet subséquent de la règle judiciaire par la Chambre des lords, des modifications ont été apportées aux lois sur la prescription pour tenir compte du fait que le demandeur ne peut pas toujours connaître dès leur survenue les faits qui lui confèrent un droit d'action. Dans *Kamloops c. Nielsen*, [1984] 2 R.C.S. 2, p. 40-42, notre Cour fait état de cette évolution et relève que la législature de la Colombie-Britannique a modifié sa loi sur la prescription pour donner effet à une décision antérieure portant « que le délai de prescription ne commence à courir que lorsqu'on prend connaissance ou [qu']on est en mesure de prendre connaissance des faits qui donnent naissance à la cause d'action ».

[238] La règle de la possibilité de découvrir existe parce que, même sans dissimulation active du défendeur, laquelle peut par ailleurs interrompre la prescription, les faits qui confèrent le droit d'action peuvent demeurer hors d'atteinte du demandeur pendant un certain temps. Il y aurait risque d'injustice si le droit d'action pouvait être prescrit avant que le demandeur n'apprenne son existence (*M. (K.) c. M. (H.)*, p. 33).

[239] La règle a été appliquée dans divers contextes. Dans *Kamloops*, la demande alléguait la négligence dans la construction des fondations d'une maison, et des éléments de preuve établissaient que le vice n'avait été perceptible que longtemps après l'achèvement des travaux. Dans *M. (K.) c. M. (H.)*, l'application de la règle a interrompu la prescription jusqu'à ce que la victime d'actes incestueux commis pendant son enfance ait été en mesure de découvrir « le lien entre le préjudice qu'elle a[vait] subi et les faits vécus pendant son enfance » (p. 35). Dans

549, at para. 43, this Court delayed the start of a limitation period under Ontario's no-fault insurance scheme until the plaintiff had knowledge of the extent of injuries that would allow him to make a claim within the scheme.

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

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

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

Peixeiro c. Haberman, [1997] 3 R.C.S. 549, par. 43, notre Cour a statué que le délai de prescription établi par le régime ontarien d'indemnisation sans égard à la faute ne commençait à courir que le jour où le demandeur avait su que la gravité de ses blessures justifiait la présentation d'une demande en application du régime.

[240] Dans chacune de ces affaires, le demandeur ignorait l'existence du dommage subi ou du lien entre le dommage et les actes du défendeur. Les dispositions sur la prescription prévoient des exceptions fondées sur l'ignorance des faits générateurs et du lien entre ces faits, les actes du défendeur et le préjudice subi par le demandeur.

[241] Les Métis ne peuvent prétendre que tel a été leur cas. Ils n'ignoraient pas la lenteur de la distribution des terres pendant le déroulement de celle-ci. Le juge de première instance signale que, dès 1872, le conseil législatif et l'assemblée législative du Manitoba se sont adressés au gouvernement fédéral pour déplorer le retard accusé dans la concession des terres. La législature du Manitoba comptait alors une grande proportion de Métis. Ils ne peuvent non plus soutenir n'avoir pas été conscients du lien entre la longueur du processus et les actes du gouvernement. Le juge de première instance conclut en effet que le gouvernement fédéral a répondu aux doléances exprimées en 1872 en rappelant que la sélection et l'attribution des terres relevaient exclusivement du gouvernement canadien. Par conséquent, l'exception nouvelle que créent les juges majoritaires est incompatible, même sur le plan des considérations de politique générale, avec l'exception légale liée à l'impossibilité de découvrir le dommage subi.

[242] En outre, même s'il appert de l'évolution de l'exception liée à l'impossibilité de découvrir que le droit de la prescription se prête à l'interprétation judiciaire, celle-ci doit se fonder sur le libellé de loi. En l'espèce, les juges majoritaires ne rattachent aucunement leur nouvelle exception au texte de la Loi.

(b) *Disability*

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

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

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

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

b) *Incapacité*

[243] Depuis longtemps, une autre exception aux règles générales de prescription interrompt le calcul du délai imparti dans le cas d'un mineur ou d'une personne frappée d'incapacité. L'article 6 de la *Limitation of Actions Act, 1931* prévoyait que, dans certains cas, la personne frappée d'incapacité disposait d'au plus deux ans à compter de la fin de son incapacité pour intenter une action. Avec le temps, les dispositions en la matière ont évolué et, aujourd'hui, la *Loi sur la prescription*, C.P.L.M. ch. L150, dispose qu'il y a interruption de la prescription pour la personne mineure et celle qui est « effectivement incapable de gérer ses affaires, par suite de maladie ou de détérioration de son état physique ou mental » (art. 7).

[244] L'exception pour incapacité a également servi de modèle à l'interruption de la prescription au bénéfice de la victime d'une agression sexuelle commise par une personne en qui elle avait confiance ou qui se trouvait en situation d'autorité. Le paragraphe 10(2) de la *Loi de 2002 sur la prescription des actions* de l'Ontario, L.O. 2002, ch. 24, ann. B., établit la présomption selon laquelle la victime de voies de fait est dans « l'incapacité d'introduire l'instance antérieurement à la date de son introduction si, au moment où ont été commises les voies de fait, [elle] avait des relations intimes avec une des parties aux voies de fait ou dépendait d'elle financièrement ou autrement ». Il s'agit d'une présomption réfutable.

[245] On considère que divers éléments empêchent la victime d'une agression sexuelle commise par une personne en qui elle avait confiance de dénoncer son agresseur, dont

> [TRADUCTION] la nature de l'acte (violation de l'intégrité personnelle), la situation de pouvoir de l'agresseur vis-à-vis de la victime et l'abus de ce pouvoir pour réduire la victime au silence. Qui plus est, bon nombre de victimes d'agression sexuelle se heurtaient, récemment encore, à la réprobation sociale tenant à l'idée qu'elles étaient responsables d'une manière ou d'une autre de ce qui leur était arrivé.

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

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

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

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

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

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

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

[246] Si l'exception liée à l'impossibilité de découvrir tient à l'impossibilité d'exercer un recours à cause de l'ignorance des faits générateurs du droit d'action, tels le préjudice subi ou le lien entre le préjudice et le défendeur, l'exception applicable au mineur et à la personne frappée d'incapacité repose sur une conception élargie de l'incapacité :

> Les personnes frappées d'une incapacité juridique sont présumées ignorer leurs droits et les recours dont elles disposent et il serait injuste de s'attendre à ce qu'elles fassent preuve de diligence en la matière.

(*Murphy c. Welsh*, [1993] 2 R.C.S. 1069, p. 1080)

[247] Les Métis ne se sont jamais trouvés en situation d'incapacité juridique. Comme le conclut le juge de première instance, ils étaient citoyens à part entière du Manitoba et souhaitaient être traités comme les autres Canadiens. Bien que certains aient préconisé de tailler les terres visées par l'art. 31 afin d'en empêcher l'aliénation, leur point de vue ne faisait pas l'unanimité, car les Métis avaient toujours possédé leurs terres à titre individuel et eu la faculté de s'en départir. C'est faire preuve de paternalisme que d'affirmer aujourd'hui que les Métis de 1870 ignoraient leurs droits et leurs recours, une attitude qui aurait hérissé les Métis de l'époque, qui souhaitaient être traités en égaux.

[248] L'inégalité du rapport de force qui justifie l'incapacité présumée des victimes de certains types d'agression sexuelle ne joue pas non plus en l'espèce. L'article 31 a été édicté *parce que* la collectivité des Métis était vigoureuse, non parce qu'elle était faible ou vulnérable ou victime d'abus de la part du gouvernement. Certes, l'afflux de colons a diminué leur influence au Manitoba, mais affirmer qu'ils se trouvaient dans une telle situation de faiblesse que le gouvernement fédéral a pu les « réduire [. . .] au silence » (expression précitée au par. 245) relève du révisionnisme. Bien que bon

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

(c) *Ultimate Limitations Periods*

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

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

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

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

[251] As ultimate limitations periods were introduced, many provincial legislatures chose to effectively exempt certain types of Aboriginal claims from them by grandfathering Aboriginal claims into the former acts, which did not contain ultimate limitations periods. This was done in

nombre des bénéficiaires de la concession des terres aient été mineurs, le juge de première instance dit clairement que leurs parents, des adultes qui auraient pu agir au nom de leurs enfants, connaissaient leurs droits. La situation des Métis ne s'inscrit pas dans la raison d'être de l'exception prévue pour le mineur et la personne frappée d'incapacité.

c) *Délai ultime de prescription*

[249] Pour faire contrepoids aux exceptions plus récentes comme celle liée à la possibilité de découvrir le dommage et à l'élargissement des dispositions sur l'incapacité, les législatures ont aussi établi des délais ultimes de prescription afin d'assurer une réelle tranquillité d'esprit au défendeur, y compris lorsqu'une cause d'action n'a pas été découverte. Ainsi, un délai ultime peut rendre l'action irrecevable même s'il n'y a pas eu découverte et que le délai de base n'a pas commencé à courir. Le délai de base se situe souvent entre deux et six ans, tandis que le délai ultime varie habituellement entre 10 et 30 ans.

[250] Depuis 1980, le délai ultime de prescription est de 30 ans au Manitoba (*An Act to Amend The Limitation of Actions Act*, S.M. 1980, ch. 28, art. 3), et il est prévu au par. 14(4) de la loi actuelle. De nombreuses autres provinces appliquent un tel délai ultime de prescription. Voici comment la Commission de réforme du droit du Manitoba justifie l'existence du délai ultime dans son rapport de 2010 sur la prescription :

> [TRADUCTION] Aux fins de l'importante justification de la prescription qu'est la tranquillité d'esprit, à l'expiration d'un certain délai, nulle action ne doit pouvoir être intentée, sans égard à la possibilité de découvrir un dommage survenu tardivement.

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

[251] Bon nombre de législatures provinciales qui ont établi des délais ultimes de prescription ont décidé d'exclure de leur champ d'application certaines demandes des Autochtones et de préserver à leur égard l'application des anciennes lois, lesquelles ne prévoyaient pas de délai ultime

Alberta and Ontario, and will soon be done in British Columbia: *Limitations Act*, R.S.A. 2000, c. L-12, s. 13; Ontario *Limitations Act, 2002*, s. 2; *Limitation Act*, S.B.C. 2012, c. 13, s. 2 (not yet in force). In my view, this is evidence that legislatures are alive to the issues posed by Aboriginal claims and limitations periods and the choice of whether or not to exempt such claims from basic and ultimate limitations periods is one that belongs to the legislature.

de prescription. C'est le cas de l'Alberta et de l'Ontario, et ce devrait bientôt être chose faite en Colombie-Britannique (*Limitations Act*, R.S.A. 2000, ch. L-12, art. 13; *Loi de 2002 sur la prescription des actions* (Ontario), art. 2; *Limitation Act*, S.B.C. 2012, ch. 13, art. 2 (non encore en vigueur)). Ces éléments établissent à mon sens que les législatures sont conscientes des questions soulevées par l'application des délais de prescription aux demandes des Autochtones, et il appartient à ces mêmes législatures de soustraire ou non ces demandes à l'application des délais de base ou des délais ultimes.

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

[252] Un juste équilibre doit être établi entre l'interruption de plus en plus courante de la prescription au moyen d'une exception liée à l'impossibilité de découvrir ou à l'incapacité, d'une part, et le caractère strict des délais ultimes de prescription, d'autre part. Il n'appartient pas aux tribunaux de contrecarrer la décision de chacune des législatures ou du Parlement par la création d'une exception générale de large portée qui s'applique aux demandes qu'ils jugent fondamentales ou sérieuses. Le genre d'exception que préconisent mes collègues est à l'opposé de la prudence qui caractérise l'élaboration de politiques générales dans ce domaine du droit. L'instance judiciaire se prête mal à cette tâche dont l'accomplissement doit procéder d'une perception claire de la façon dont tous les éléments du régime de la prescription contribuent à produire un résultat juste.

[253] If Parliament or provincial legislatures wanted to exclude factual claims with a constitutional component from limitations periods, then they could do so by statute. As they have not chosen to make an exception for the type of declaration that the Métis seek in this case, it is inappropriate for this Court to do so.

[253] Si le Parlement ou les législatures provinciales veulent soustraire à l'application de la prescription les allégations factuelles comportant un volet constitutionnel, ils peuvent légiférer en ce sens. Comme ils n'ont pas prévu d'exception pour le type de jugement déclaratoire que sollicitent les Métis en l'espèce, il n'appartient pas à la Cour d'en créer une.

(d) *Role of Reconciliation*

d) *L'objectif de la réconciliation*

[254] My colleagues suggest that the above rationales have little role to play in an Aboriginal context, where the goal of reconciliation must

[254] Selon mes collègues, les raisons d'être de la prescription mentionnées précédemment jouent peu dans le contexte autochtone, où l'objectif de

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

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

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

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

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

la réconciliation doit être prioritaire. Ils remettent ainsi en question l'opinion exprimée par notre Cour dans *Wewaykum*, par. 121 et, plus récemment, dans *Canada (Procureur général) c. Lameman*, 2008 CSC 14, [2008] 1 R.C.S. 372. Dans ce dernier arrêt, la Cour dit expressément que la raison d'être des délais de prescription « vaut autant pour les [demandes des Autochtones] que pour les autres » (par. 13 (je souligne)). Même s'ils ne le font pas explicitement, les juges majoritaires semblent rompre avec la certitude juridique établie dans *Wewaykum* et *Lameman* au profit d'une approche où la « réconciliation » doit être tenue pour prioritaire.

[255] En outre, le cadre juridique dans lequel s'inscrit la demande en l'espèce diffère beaucoup de celui d'une demande fondée sur un droit ancestral. L'article 35 de la *Loi constitutionnelle de 1982* protège contre l'extinction les droits ancestraux, lesquels confèrent donc un droit d'action susceptible d'être exercé à tout moment. À l'opposé, la demande formulée en l'espèce se fonde sur une obligation constitutionnelle dont l'exécution remonte à plus de 100 ans.

(5) Le législateur manitobain ne soustrait pas à la prescription la demande de jugement déclaratoire

[256] Mes collègues font valoir que la prescription ne devrait pas être opposée au demandeur qui allègue l'omission d'exécuter diligemment un engagement solennel découlant de la Constitution lorsque la seule réparation qu'il sollicite est un jugement déclaratoire. Or, c'est au législateur d'en décider. Au Manitoba, les dispositions sur la prescription n'ont jamais prévu d'exception pour la demande de jugement déclaratoire. Notre Cour n'est pas habilitée à en créer une.

[257] Dans certaines autres provinces, les dispositions sur la prescription prévoient une exception spécifique lorsque la seule réparation demandée est un jugement déclaratoire à l'exclusion de tout autre redressement indirect : *Limitations Act* (Alberta), al. 1(i)i); *Loi de 2002 sur la prescription des actions* (Ontario), al. 16(1)a); *Limitation Act* (Colombie-Britannique), al. 2(1)d) (non encore en vigueur).

[258] These exceptions are contained within the finely tailored legislative schemes as described above. In those provinces where recent amendments have provided for declaratory judgments to be exempt from limitations periods, the limitations legislation also contains provisions that restrict the retroactive application of those exemptions. For example, in Ontario, if a claim was not started before the exemption was enacted and the limitation period under the former act had elapsed, the creation of the new exemption from limitation periods for declaratory judgments would not revive those previously barred claims, even if the only remedy sought was a declaration: Ontario *Limitations Act, 2002*, s. 24. Thus, even where the legislature has seen fit to exempt declarations from limitation periods, it has not done so retroactively.

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

[260] The issue of whether to exempt declaratory judgments from limitations periods is one that has been canvassed recently in Manitoba. In 2010, the Manitoba Law Reform Commission recommended that an exception be created for declaratory judgments, but this recommendation has not been implemented. In making that recommendation, the Manitoba Law Reform Commission recognized that, while declaratory judgments do not compel

[258] Cette exception figure dans le libellé bien ficelé de chacun des régimes législatifs susmentionnés. Dans les provinces où de récentes modifications ont été apportées afin de soustraire la demande de jugement déclaratoire à l'application de la prescription, les dispositions législatives prévoient en outre que l'exception ne s'applique pas rétroactivement. Par exemple, en Ontario, lorsque l'instance n'a pas été engagée avant l'adoption de la nouvelle exception et que le délai de prescription imparti par l'ancienne loi a expiré, l'existence de la nouvelle exception ne rend pas recevable l'action auparavant irrecevable, même si la seule réparation demandée est un jugement déclaratoire : *Loi de 2002 sur la prescription des actions* (Ontario), art. 24. Ainsi, même lorsque le législateur a jugé opportun de soustraire la demande de jugement déclaratoire à l'application de la prescription, il ne l'a pas fait avec effet rétroactif.

[259] Ce n'est pas étonnant, car les modifications apportées aux délais de prescription sont rarement rétroactives. Si elles l'étaient, les personnes qui auraient tenu compte de ces délais pour mener leurs affaires en subiraient un préjudice. La modification rétroactive d'une disposition sur la prescription exposerait à nouveau le défendeur éventuel à une poursuite qu'il croyait prescrite. À l'opposé, lorsque la modification est prospective, le défendeur éventuel ne peut jamais avoir tenu compte d'un autre délai et il sait toujours qu'une poursuite est possible. En effet, si un délai de prescription était modifié rétroactivement, l'élément de la certitude serait grandement compromis du fait que le défendeur ne bénéficierait plus de la prescription sur laquelle il avait compté.

[260] La question de l'opportunité de soustraire la demande de jugement déclaratoire à l'application de la prescription a récemment fait l'objet d'un examen au Manitoba. En 2010, la Commission manitobaine de réforme du droit a recommandé la création d'une telle exception, mais aucune suite n'a été donnée à sa recommandation. En formulant celle-ci, la Commission a reconnu que même si le jugement déclaratoire n'oblige pas l'État

the Crown to act in a particular way, there is still a risk that an exception for declaratory remedies might "undermin[e] the principles that support the establishment of limitations" (*Limitations*, at p. 33). This is because obtaining a declaration can be the first step in obtaining an additional remedy, one that would otherwise be barred by a limitation period.

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

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

(6) Effect of Exempting These Claims From Limitations Periods

[263] The majority has removed these claims by the Métis from the ordinary limitations regime by arguing that these claims are fundamental

à prendre telle ou telle mesure, il demeure que l'application d'une exception à la demande de jugement déclaratoire risque [TRADUCTION] « de compromettre les principes qui sous-tendent les délais de prescription » (*Limitations*, p. 33). En effet, l'obtention d'un jugement déclaratoire peut être la première étape d'une démarche visant l'obtention d'une autre réparation à laquelle un délai de prescription fait par ailleurs obstacle.

[261] La Commission manitobaine de réforme de droit signale que ce risque se pose avec une acuité particulière lorsque le jugement déclaratoire vise la Couronne, car il appert des sources que l'État obéit généralement à une décision judiciaire (p. 32). Comme la suite donnée par l'État au jugement déclaratoire ne satisfait pas toujours tous les intéressés, le risque que le jugement débouche sur quelque autre réparation extrajudiciaire est réel. Bien qu'un jugement déclaratoire non assorti de mesures accessoires puisse paraître avoir peu d'incidence sur la certitude assurée par les délais de prescription, il ne s'agit pas toujours d'une réparation sans grandes conséquences pour les parties. Un jugement déclaratoire peut entraîner d'autres réparations, même si le tribunal ne l'ordonne pas.

[262] À mon avis, ce risque se concrétise bel et bien en l'espèce. Comme le font observer mes collègues, les Métis ne voient pas dans le jugement déclaratoire une fin en soi. Ils entendent plutôt s'en servir pour négocier avec la Couronne et obtenir une réparation extrajudiciaire. Pareil dénouement compromet la certitude qu'est censé assurer un délai de prescription, la Couronne s'exposant à se voir reprocher l'inexécution d'une obligation bien après l'expiration du délai de prescription applicable. En soustrayant à l'application de la prescription la demande de jugement déclaratoire des Métis, les juges majoritaires usurpent le pouvoir du législateur manitobain.

(6) Conséquences de l'inapplication de la prescription à la demande des Métis

[263] Les juges majoritaires soustraient la demande des Métis à l'application des règles ordinaires de prescription au motif que des prétentions

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

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

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

[266] This exception creates the possibility of indeterminate liability for the Crown, since claims under this new duty will apparently be possible forever. Courts have always been wary of the possibility of indeterminate liability. In *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931), at p. 444, Cardozo C.J. expressed concern about the creation of "liability in an indeterminate amount for an indeterminate time to an indeterminate class". This

fondamentales y sont formulées et que l'omission de statuer sur elles perpétue un « clivage persistant dans le tissu national ». Soit dit en tout respect, la conclusion qu'une injustice historique crée pareil clivage relève de la politique ou de la sociologie; il ne s'agit pas d'un motif reconnu en droit pour soustraire une demande à l'application de la prescription. Qui plus est, les tribunaux en sont réduits à déterminer si une demande est fondamentale au point qu'il soit justifié de statuer sur elle au fond malgré son caractère tardif.

[264] Au cours de l'histoire du pays, le gouvernement canadien a parfois agi d'une manière que l'on tiendrait aujourd'hui pour inappropriée, choquante ou même scandaleuse. Les mesures qu'il convient aujourd'hui de prendre à cet égard dépendent de multiples considérations, et il vaut mieux s'en remettre au Parlement ou à l'État, lesquels ont pris diverses mesures ces dernières années, dont la présentation d'excuses et l'établissement de régimes d'indemnisation, pour réparer certaines erreurs du passé.

[265] Les juges majoritaires souhaitent que les tribunaux interviennent désormais dans ces débats politiques et sociaux. Lorsque seul un jugement déclaratoire sera demandé et qu'un principe constitutionnel sera invoqué à l'appui, les tribunaux pourront entendre l'affaire peu importe le temps écoulé depuis les actes ou les faits en cause. Le système judiciaire s'expose selon moi à un déferlement de demandes fondées sur d'anciennes politiques sociales. La volonté de réparer une injustice historique est sans aucun doute louable, mais la création d'une exception judiciaire à l'application de la prescription n'est pas la bonne solution.

[266] Cette exception expose l'État à une responsabilité indéterminée, puisque les recours fondés sur la nouvelle obligation reconnue semblent ne jamais se prescrire. Or, les tribunaux se sont toujours méfiés d'une éventuelle responsabilité indéterminée. Dans *Ultramares Corp. c. Touche*, 174 N.E. 441 (N.Y. 1931), p. 444, le juge en chef Cardozo s'inquiète de la création d'une [TRADUCTION] « obligation d'un montant

concern was recognized, albeit more with respect to indeterminate amounts and classes, by this Court in *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737, at paras. 59-66. In my view, as this exception from limitations periods creates liability for an indeterminate time, it is not an appropriate step for this Court to take.

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

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

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

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

indéterminé pour une période indéterminée à l'égard d'une catégorie indéterminée ». Dans *Design Services Ltd. c. Canada*, 2008 CSC 22, [2008] 1 R.C.S. 737, par. 59-66, notre Cour partage cette inquiétude, mais surtout en ce qui concerne le montant et la catégorie indéterminés. Selon moi, notre Cour crée une exception qui fait naître une responsabilité d'une durée indéterminée, et elle devrait s'en abstenir.

[267] L'exception proposée par mes collègues ne cadre avec aucun des principes qui sous-tendent le régime de la prescription. Sa portée est pratiquement illimitée, puisqu'elle procède d'une volonté de restaurer le tissu national qui relève davantage de la politique sociale que de l'application de principes juridiques reconnus. On ne peut y voir un changement progressif propre à faire évoluer la common law, et il ne s'agit donc pas d'une modification judiciaire opportune.

(7) La Couronne peut invoquer la prescription

[268] Les délais de prescription s'appliquent à la Couronne comme à toute autre partie à un litige. Il fut un temps où, en common law, la prescription pouvait être invoquée en défense par la Couronne mais non par un défendeur qu'elle poursuivait (P. W. Hogg, P. J. Monahan et W. K. Wright, *Liability of the Crown* (4e éd. 2011), p. 98-99). Aujourd'hui, ce n'est plus le cas, la *Loi sur la responsabilité civile de l'État et le contentieux administratif*, L.R.C. 1985, ch. C-50, énonçant expressément à l'art. 32 que les règles de prescription provinciales s'appliquent aux poursuites intentées par la Couronne ou contre elle :

32. Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent lors des poursuites auxquelles l'État est partie pour tout fait générateur survenu dans la province. Lorsque ce dernier survient ailleurs que dans une province, la procédure se prescrit par six ans.

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

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

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

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

C. *Laches*

[272] In addition to being barred by the limitation period, these claims are subject to laches. Laches is an equitable doctrine that requires a claimant in equity to prosecute his or her claim without undue delay. In Canada, there are two recognized branches to the doctrine of laches: delays that result from

Cet article assujettit la Couronne fédérale aux dispositions manitobaines sur la prescription, mais même sans elles, la Couronne aurait pu, suivant la common law, invoquer la prescription en défense (Hogg, Monahan et Wright, p. 99).

[269] Il ressort de la jurisprudence en général et des décisions relatives aux demandes des Autochtones en particulier que les règles de prescription s'appliquent aux recours contre la Couronne. Dans *Wewaykum* et *Lameman*, par exemple, notre Cour conclut à la prescription des recours intentés contre l'État par les Autochtones.

[270] L'application des délais de prescription à l'État est bénéfique au système judiciaire car elle apporte certitude et prévisibilité. Elle protège également la société en général en faisant en sorte qu'un recours contre la Couronne soit exercé en temps utile de façon que cette dernière puisse se défendre convenablement.

[271] Les faits à l'origine du pourvoi illustrent bien la raison d'être de l'application des délais de prescription aux recours contre la Couronne. Mes collègues se fondent sur des « périodes d'inaction inexpliquées » et un « retard inexplicable » pour conclure à une tendance à l'indifférence. À mon avis, on ne peut raisonnablement écarter la possibilité que, si l'action avait été intentée en temps utile, la Couronne aurait pu expliquer au tribunal la longueur du processus d'attribution des terres. La Couronne ne peut plus offrir le témoignage des personnes qui ont participé à l'entreprise, et le dossier historique comporte de nombreuses lacunes. La présente affaire est l'illustration parfaite de la nécessité des délais de prescription.

C. *La doctrine des « laches »*

[272] Non seulement il y a prescription en l'espèce, mais la doctrine des *laches* fait obstacle au recours. Cette doctrine veut que celui qui se pourvoit en equity le fasse sans retard injustifié. Au Canada, la doctrine comporte deux volets, l'un pour le retard qui résulte de l'acquiescement, l'autre

acquiescence or delays that result in circumstances that make prosecution of the action unreasonable (*M. (K.) v. M. (H.)*, at pp. 76-77, citing *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221, at pp. 239-40).

[273] The majority finds that the Métis cannot have acquiesced because of their marginalized position in society and the government's role in bringing about that marginalization. They further find that the government did not alter its position in reasonable reliance on the *status quo*, nor would disturbing the current situation give rise to an injustice. Finally, they conclude that given the constitutional aspect of the Métis' claim, it would be inappropriate in any event to apply the doctrine of laches.

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

(1) Decisions of the Courts Below

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

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

pour celui qui engendre une situation où le recours devient déraisonnable (*M. (K.) c. M. (H.)*, p. 76-77, citant *Lindsay Petroleum Co. c. Hurd* (1874), L.R. 5 P.C. 221, p. 239-240).

[273] Pour les juges majoritaires, les Métis n'ont pu acquiescer à la situation étant donné leur marginalisation sociale et le rôle du gouvernement dans celle-ci. Ils concluent également que le gouvernement n'a pas modifié sa position parce qu'il croyait raisonnablement que les Métis avaient accepté le statu quo ou que la modification de celui-ci aurait entraîné une injustice. Enfin, ils estiment que, de toute manière, le volet constitutionnel de la demande des Métis s'oppose à l'application de la doctrine des *laches*.

[274] Je ne puis me rallier à leur opinion. Les Métis ont, en connaissance de cause, attendu plus d'un siècle pour s'adresser aux tribunaux. Ils ont de ce fait accepté la situation et permis au gouvernement de tenir leur acquiescement pour acquis, d'une part, de sorte que le recours est déraisonnable, d'autre part. Il s'ensuit que leur demande est irrecevable au regard des deux volets de la doctrine des *laches*.

(1) Décisions des juridictions inférieures

[275] Selon le juge de première instance, la doctrine des *laches* pouvait être opposée à toutes les prétentions des Métis. Il estime que, à l'époque considérée, les bénéficiaires de l'application des art. 31 et 32 de la *Loi sur le Manitoba* connaissaient les droits que leur conférait cette loi et savaient qu'ils pouvaient s'adresser aux tribunaux pour les faire respecter. Il conclut que les Métis ont [TRADUCTION] « tardé de manière totalement déraisonnable » à faire valoir ces droits et à dénoncer les manquements à ceux-ci (par. 454). Les juges majoritaires ne relèvent pas d'erreur manifeste et dominante dans cette conclusion.

[276] Il est quelque peu ironique que mes collègues déplorent le retard du gouvernement et excuse celui des Métis — de plus d'un siècle — à saisir les tribunaux.

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

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

(2) Acquiescence

[279] My colleagues suggest, at para. 149, that no one can acquiesce where the law has changed, since it is "unrealistic" to expect someone to have enforced their claim before the courts were prepared to recognize those rights. With respect, this conclusion is at odds with the common law approach to changes in the law. While there is no doubt that the law on Crown duties to Aboriginal people has evolved since the 1870s, defences of general application, including laches, have always applied to claimants despite such changes in the

[277] Le juge de première instance fait observer qu'aucun élément de preuve n'explique le caractère tardif du recours en justice. Les seules explications fournies sont celles des avocats des Métis, et aucune [TRADUCTION] « ne justifie légalement que les bénéficiaires des droits conférés aux art. 31 et 32 n'aient rien entrepris avant 1981, individuellement ou collectivement, pour les faire valoir » (par. 457). Sans compter que ce retard ne cadre pas avec la preuve selon laquelle des recours ont été exercés par les Métis, individuellement ou collectivement, au cours des années 1890, pour faire valoir d'autres droits découlant de la *Loi sur le Manitoba*. Le juge de première instance conclut donc à l'acquiescement. La présentation tardive de la demande inflige un préjudice au Canada et au Manitoba à cause du caractère incomplet de la preuve susceptible d'être présentée au procès.

[278] La Cour d'appel arrive à la conclusion que la doctrine des *laches* [TRADUCTION] « peut s'appliquer à la demande de jugement déclaratoire, que ce dernier soit considéré comme une réparation en equity ou *sui generis* » (par. 342). Elle examine ensuite si la doctrine est opposable à une demande constitutionnelle, pour conclure qu'elle ne peut faire obstacle à une demande fondée sur le partage des pouvoirs, mais que la demande des Métis n'est pas de cette nature. Elle juge cependant inutile d'examiner si la doctrine peut valoir à l'encontre de la demande de nature constitutionnelle des Métis, car celle-ci est devenue théorique.

(2) Acquiescement

[279] Mes collègues donnent à entendre au par. 149 qu'il ne saurait y avoir acquiescement lorsque le droit a évolué, car il serait « irréaliste » d'exiger d'une personne qu'elle ait fait valoir ses droits avant que les tribunaux n'aient été disposés à les reconnaître. Malgré le respect que je leur porte, cette conclusion va à l'encontre de l'approche de common law en matière d'évolution du droit. Certes, le droit relatif aux obligations de la Couronne vis-à-vis des peuples autochtones a évolué depuis 1870, mais les moyens de défense

law (*In re Spectrum Plus Ltd. (in liquidation)*, 2005 UKHL 41, [2005] 2 A.C. 680, at para. 26). The applicability of general defences like limitations periods to evolving areas of the law was also recognized by this Court in *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429, at para. 101. My colleagues' approach to acquiescence is a significant change in the law of laches in Canada with potentially significant repercussions.

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

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

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

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

d'application générale, dont la doctrine des *laches*, ont toujours continué de valoir malgré les changements apportés au droit (*In re Spectrum Plus Ltd. (in liquidation)*, 2005 UKHL 41, [2005] 2 A.C. 680, par. 26). Dans l'arrêt *Canada (Procureur général) c. Hislop*, 2007 CSC 10, [2007] 1 R.C.S. 429, par. 101, notre Cour reconnaît l'applicabilité des moyens de défense généraux, telle la prescription, dans les domaines du droit en mutation. La conception que se font mes collègues de l'acquiescement emporte une réforme importante de la doctrine des *laches* au Canada qui pourrait avoir de grandes répercussions.

[280] En ce qui concerne précisément les conditions d'application de l'acquiescement, je conviens avec mes collègues qu'il s'agit de la connaissance, de la capacité et de la liberté (*Halsbury's Laws of England* (4e éd. 2003), vol. 16(2), par. 912). À mon avis, les trois conditions sont remplies au vu des faits de l'espèce.

[281] Dans *M. (K.) c. M. (H.)*, le juge La Forest décrit le degré de connaissance exigé pour que s'applique la doctrine des *laches* :

> . . . un aspect important du concept [des *laches*] est la connaissance que la partie demanderesse a de ses droits. Il ne suffit pas qu'elle connaisse les faits qui justifient une réclamation en *equity*; encore faut-il qu'elle sache que lesdits faits donnent naissance à cette réclamation: *Re Howlett*, [1949] Ch. 767. Toutefois, notre Cour a statué que la connaissance de l'existence d'une réclamation doit être évaluée en fonction d'une norme objective; voir l'arrêt *Taylor c. Wallbridge* (1879), 2 R.C.S. 616, à la p. 670. En d'autres termes, il s'agit de déterminer s'il est raisonnable qu'une partie demanderesse ignore ses droits lorsqu'elle connaît les faits sous-jacents qui peuvent donner lieu à un recours en justice. [Soulignement omis; p. 78-79.]

[282] Compte tenu des conclusions du juge de première instance, dans les années 1870, les Métis avaient la connaissance requise, ce qui constitue une conclusion de fait qu'on ne peut écarter que si elle est entachée d'une erreur manifeste et dominante. Les juges majoritaires ne relèvent pas une telle erreur.

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

(a) *Historical Injustices*

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

(b) *Imbalance in Power Following Crown Sovereignty*

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

[283] Au lieu de s'en prendre à cette conclusion relative à la connaissance, mes collègues affirment qu'il n'a pu y avoir acquiescement pour trois raisons : (1) les injustices subies par les Métis dans le passé, (2) l'inégalité du rapport de force après la proclamation de la souveraineté de la Couronne et (3) les conséquences négatives des retards dans l'attribution des terres. Je ne puis faire mienne leur opinion.

a) *Les injustices passées*

[284] La principale injustice historique relevée correspond à l'objet même du litige, à savoir le retard à concéder les terres. Mes collègues concluent que les Métis n'ont pas obtenu l'avantage censé découler la concession de terres et ils laissent entendre que c'est là l'une des causes de leur marginalisation subséquente. Selon eux, puisque la doctrine des *laches* relève de l'equity, il faut s'interroger sur le caractère équitable du comportement de chacune des deux parties, ce en quoi ils ont indiscutablement raison. Toutefois, ils se fondent ensuite sur les faits allégués dans la demande pour conclure que l'equity ne permet pas à l'État de bénéficier en défense de la doctrine des *laches*. Ils concluent en effet que le tort même reproché à l'État revêt un caractère inéquitable tel qu'il fait obstacle à l'application de la doctrine. Il ne peut en être ainsi selon moi. Cette doctrine est toujours invoquée en défense par la partie qui aurait lésé l'autre de quelque manière. Si se prononcer sur le caractère équitable des actes du défendeur revient seulement à se demander si le demandeur a prouvé ses allégations, le moyen de défense offert par la doctrine devient illusoire.

b) *Inégalité du rapport de force après la proclamation de la souveraineté de la Couronne*

[285] La preuve ne révèle pas une inégalité du rapport de force entre les parties qui soit de nature à saper la connaissance, la capacité et la liberté des Métis de telle sorte qu'on ne puisse conclure à l'acquiescement de ces derniers.

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

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

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

[288] While the power of the Métis had declined by the 1890s, there is no evidence that this prevented them from organizing in such a way as to avail themselves of the courts when they felt their rights were being threatened. Throughout the 1890s

[286] Au début de la période considérée, les Métis représentaient une force politique et militaire avec laquelle il fallait compter. Les juges majoritaires signalent d'ailleurs au par. 23 que « [l]es Métis étaient le groupe démographique le plus important de la colonie, représentant environ 85 pour 100 de la population, et ils occupaient des postes de direction dans les entreprises, de même qu'au sein de l'Église et du gouvernement. » Ils ajoutent plus loin :

> Lorsque la *Loi sur le Manitoba* a été adoptée, les Métis dominaient le gouvernement provisoire de la rivière Rouge, et ils contrôlaient une force militaire d'importance. Le Canada avait de bonnes raisons de prendre les mesures nécessaires pour maintenir la paix entre les Métis et les colons. [par. 93]

[287] En outre, bien que le pouvoir et l'influence des Métis aient décliné par la suite, aucun élément de la preuve n'indique que l'inégalité du rapport de force ait été telle qu'ils n'aient plus eu la connaissance, la capacité ou la liberté nécessaires à l'acquiescement. De fait, tout au long de la décennie 1890, les tribunaux ont été saisis de recours individuels relativement aux terres concédées sous le régime de l'art. 31. Le procureur général du Manitoba cite trois affaires : *Barber c. Proudfoot*, [1890-91] 1 W.L.T.R. 144 (B.R. Man. *in banco*) (action en annulation de vente intentée par un Métis), *Hardy c. Desjarlais* (1892), 8 Man. R. 550 (B.R.) (l'acte de vente avait été signé avant son approbation par le tribunal, les fonds n'avaient été consignés au greffe qu'une fois la terre vendue à un prix supérieur) et *Robinson c. Sutherland* (1893), 9 Man. R. 199 (B.R.) (une Métisse mineure alléguait que son père l'avait obligée à vendre sa terre alors que son mari s'y opposait). Il appert de ces litiges que des Métis connaissaient alors leurs droits suivant l'art. 31 et qu'ils n'étaient pas sans savoir qu'ils pouvaient s'adresser aux tribunaux pour les faire respecter.

[288] Même si leur influence avait décliné au cours de la décennie ayant précédé l'année 1890, aucun élément n'indique que les Métis n'ont pu de ce fait trouver un moyen de s'adresser aux tribunaux lorsqu'ils estimaient leurs droits menacés. Pendant

Métis individuals were involved in a series of cases related to the "Manitoba Schools Question".

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

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

[291] The trial judge did not conclude that Archbishop Taché and Father Ritchot were Métis; he merely noted that they were leaders of a group that included some Métis and that group had accessed the courts to enforce rights contained in the *Manitoba Act*. This conclusion did not demonstrate any palpable and overriding error. It was reasonable for the trial judge to infer that by signing the petition and being aware of the litigation on denominational schools individual Métis had the

toute la décennie 1890, des Métis ont été parties à la série d'affaires relative à la « question des écoles du Manitoba ».

[289] Des Métis catholiques ont collectivement contesté devant les tribunaux — s'adressant même deux fois au Comité judiciaire du Conseil privé — les dispositions relatives aux écoles confessionnelles (*City of Winnipeg c. Barrett*, [1892] A.C. 445; et *Brophy c. Attorney-General of Manitoba*, [1895] A.C. 202). Ils ont été déboutés. L'archevêque Taché a alors lancé une pétition à laquelle 4 267 signatures ont été apposées et qui a été remise au gouverneur général. Il en a résulté un renvoi devant notre Cour, suivi d'un appel au Conseil privé.

[290] Le juge de première instance infère de ces éléments de preuve que [TRADUCTION] « bon nombre des 4 267 signataires [de la pétition] devaient être des Métis » et qu'il était « clair que ces membres de la collectivité, y compris ses dirigeants, étaient certainement conscients [de leurs] droits [. . .] et des recours qu'ils pouvaient exercer s'ils estimaient que ces droits étaient bafoués » (par. 435). Mes collègues rejettent la seconde inférence — sans invoquer, cette fois non plus, d'erreur manifeste et dominante — au motif que les actes de la collectivité dans son ensemble renseignent peu sur la capacité des Métis à demander un jugement déclaratoire fondé sur l'honneur de la Couronne (par. 148). Je ne puis me ranger à cet avis. Il appert selon moi de la preuve que, lorsqu'une mesure gouvernementale portait atteinte à leurs droits suivant la *Loi sur le Manitoba*, les Métis étaient au fait des recours judiciaires dont ils disposaient et en mesure de les exercer.

[291] Le juge de première instance ne conclut pas que l'archevêque Taché et le père Ritchot étaient Métis. Il fait seulement observer qu'ils étaient à la tête d'un groupe qui comprenait des Métis et qui s'était adressé aux tribunaux pour faire respecter des droits reconnus par la *Loi sur le Manitoba*. On ne saurait voir d'erreur manifeste et dominante dans cette conclusion. Le juge pouvait raisonnablement inférer que des Métis, du fait qu'ils avaient signé la pétition et qu'ils étaient au courant du recours

knowledge required under the test described by La Forest J. in *M. (K.) v. M. (H.)*. Both the cases of individual claims under the Manitoba legislation and the cases about the denominational schools show that members of the Métis community had the capacity and freedom to pursue litigation when they saw their rights being affected. In respect of any delay in making land grants, they chose not to do anything until 100 years later. As a result, the Métis acquiesced and laches should be imputed against them.

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

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

[293] Moreover, I do not accept the implication that the marginalization of the Métis was caused by delays in the distribution of the land grants. As noted above, the Métis community was under pressure for a number of reasons during the 1870s and 1880s. To suggest, as my colleagues do, that delays in the land grants caused the vulnerability of the Métis is to make an inference that was not made by the trial judge and is not supported by the record.

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

relatif aux écoles confessionnelles, satisfaisaient au critère de la connaissance énoncé par le juge La Forest dans *M. (K.) c. M. (H.)*. Il appert tant des recours individuels intentés sur le fondement de dispositions manitobaines que des affaires relatives aux écoles confessionnelles que les membres de la collectivité métisse avaient la capacité et la liberté d'agir en justice s'ils s'estimaient lésés dans leurs droits. Pour ce qui est de tout retard accusé dans la concession des terres, ils ont décidé de ne rien faire pendant 100 ans, acquiesçant ainsi à la situation, de sorte que la doctrine des *laches* leur est opposable.

c) *Conséquences négatives du retard dans l'attribution des terres*

[292] Selon les juges majoritaires, le retard accusé dans la distribution des terres a suffi à rendre les Métis vulnérables au point qu'ils ne puissent acquiescer à la situation. Cette conclusion ne résiste pas à l'analyse juridique. Elle sous-entend que la partie qui a subi un préjudice ne peut jamais acquiescer, de sorte que le premier volet de la doctrine des *laches* n'a plus de raison d'être. Bien que celle-ci exige que l'on détermine si le demandeur pouvait exercer un recours, cette exigence n'a jamais eu une portée telle que la doctrine devienne inopposable à toute personne vulnérable. Comme la prescription, la doctrine des *laches* est opposable aux personnes vulnérables. L'une et l'autre ne peuvent remplir leur fonction que si elles ont une application universelle.

[293] Je ne puis non plus convenir que les retards accusés dans la distribution des terres ont entraîné la marginalisation des Métis. Rappelons que la collectivité métisse a connu des difficultés pour diverses raisons au cours des années 1870 et 1880. Attribuer sa vulnérabilité aux retards à concéder les terres revient à tirer une inférence que ne tire pas le juge de première instance et qui n'est pas étayée par la preuve.

[294] À mon avis, le juge de première instance a raison de conclure à l'acquiescement des Métis et à la recevabilité du moyen de défense fondé sur la doctrine des *laches*.

(3) Circumstances That Make the Prosecution Unreasonable

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

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

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

(4) Laches Applies to Equitable Claims Against the Crown

[298] The doctrine of laches can be used by all parties, including the Crown, to defend against equitable claims that have not been brought in a sufficiently timely manner. In *Wewaykum*, this Court considered the application of laches to an Aboriginal claim against the Crown and concluded

(3) Circonstances rendant la poursuite déraisonnable

[295] Bien que ma conclusion relative à l'acquiescement suffise pour opposer aux Métis la doctrine des *laches*, j'estime en outre que le caractère tardif de leur demande crée des circonstances qui rendent leur poursuite déraisonnable.

[296] Les juges majoritaires concluent que le caractère tardif de la poursuite ne crée pas de circonstances qui la rendent déraisonnable car, selon eux, le gouvernement n'a pu raisonnablement croire à l'acceptation du statu quo par les Métis. Je ne puis partager cet avis. Une centaine d'années se sont écoulées avant que l'action ne soit intentée, ce qui se traduit par une preuve incomplète. Les retards inexpliqués qui, selon mes collègues, attestent le caractère déshonorable des actes de la Couronne auraient fort bien pu être expliqués si l'action avait été intentée avec diligence. L'effet sur la preuve d'un retard à agir aussi considérable, dans une affaire dont l'issue dépend des actes accomplis par des représentants de l'État il y a plus de 100 ans, constitue une circonstance qui rend la poursuite déraisonnable.

[297] De plus, nous ne saurons jamais si le gouvernement aurait pu, dans l'hypothèse où le recours aurait été exercé à l'époque, réaffecter ses ressources pour accélérer le processus de concession ou prendre d'autres mesures afin de donner satisfaction à la collectivité métisse. On ne saurait affirmer que le gouvernement n'a pas modifié sa position ou qu'il s'est abstenu de le faire parce que les Métis ont omis d'exercer un recours en temps opportun.

(4) Application de la doctrine des *laches* aux demandes en equity présentées contre la Couronne

[298] Toute partie, y compris la Couronne, peut invoquer la doctrine des *laches* à l'encontre de la demande en equity qui n'est pas présentée à temps. Dans *Wewaykum*, notre Cour se penche sur l'applicabilité de la doctrine à une demande des Autochtones dirigée contre la Couronne. Elle

that laches could act to bar a claim for breach of fiduciary duty. The delay at issue in that case was at least 45 years. The Court in *Wewaykum*, at para. 110, stated that

> [t]he doctrine of laches is applicable to bar the claims of an Indian band in appropriate circumstances: *L'Hirondelle v. The King* (1916), 16 Ex. C.R. 193; *Ontario (Attorney General) v. Bear Island Foundation* (1984), 49 O.R. (2d) 353 (H.C.), at p. 447 (aff'd on other grounds (1989), 68 O.R. (2d) 394 (C.A.), aff'd [1991] 2 S.C.R. 570); *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (C.A.). There are also dicta in two decisions of this Court considering, without rejecting, arguments that laches may bar claims to aboriginal title: *Smith v. The Queen*, [1983] 1 S.C.R. 554, at p. 570; *Guerin*, *supra*, at p. 390.

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

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

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

conclut que la doctrine peut être opposée à l'action fondée sur le manquement à l'obligation fiduciaire. Dans cette affaire où le retard était d'au moins 45 ans, la Cour dit ce qui suit au par. 110 :

> Dans des circonstances appropriées, la [doctrine des *laches*] peut être invoquée à l'encontre de réclamations présentées par des bandes indiennes : *L'Hirondelle c. The King* (1916), 16 R.C. de l'É. 193; *Ontario (Attorney General) c. Bear Island Foundation* (1984), 49 O.R. (2d) 353 (H.C.), p. 447 (conf. pour d'autres motifs par (1989), 68 O.R. (2d) 394 (C.A.), conf. par [1991] 2 R.C.S. 570); *Chippewas of Sarnia Band c. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (C.A.). On trouve également des affirmations à ce sujet dans deux arrêts de notre Cour, où celle-ci a examiné, sans les rejeter, des arguments portant que la [doctrine] peut faire obstacle à la revendication du titre aborigène : *Smith c. La Reine*, [1983] 1 R.C.S. 554, p. 570; *Guerin*, précité, p. 390.

[299] Comme je le dis précédemment du délai de prescription, le moyen de défense fondé sur la doctrine des *laches* s'applique dans l'intérêt du système de justice et de la société en général. La raison d'être de ce moyen vaut autant pour le litige qui oppose des parties privées que pour celui auquel est partie la Couronne.

(5) Application de la doctrine des *laches* aux demandes fondées sur l'honneur de la Couronne

[300] Les juges majoritaires concluent que la doctrine des *laches* ne saurait être opposable à la demande qui vise l'obtention d'un jugement selon lequel une disposition de la Constitution n'a pas été exécutée conformément à l'honneur de la Couronne. C'est s'avancer beaucoup, surtout que, dans *Wewaykum*, notre Cour conclut que la doctrine peut être invoquée à l'encontre d'une allégation de manquement à l'obligation fiduciaire; or, l'obligation fiduciaire découle de l'honneur de la Couronne. Il est foncièrement illogique de permettre que certaines demandes prenant appui sur l'honneur de la Couronne (p. ex. celles fondées sur un « engagement solennel » contenu dans un document constitutionnel) et pas d'autres (p. ex. celles fondées sur la notion, mieux établie et plus strictement définie, d'obligation fiduciaire) échappent à l'application de la doctrine des *laches*. Sans

generous exception to the doctrine of laches, which — particularly in light of the ambiguities associated with the new duty — creates uncertainty in the law.

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

(6) Conclusion on Laches

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

IV. Conclusion

[303] I would dismiss the appeal with costs.

compter que cela incitera les parties à formuler leurs demandes de façon à bénéficier de cette exception nouvelle et plus généreuse, ce qui, compte tenu notamment de l'ambiguïté de la nouvelle obligation, sera source d'incertitude juridique.

[301] Mes collègues citent à l'appui de leur position l'arrêt *Ontario Hydro c. Ontario (Commission des relations de travail)*, [1993] 3 R.C.S. 327, où la Cour se prononce sur le partage des pouvoirs. Ils le font à tort, selon moi, car la délimitation des compétences fédérales et provinciales confère à tout moment un droit d'action. La demande visée en l'espèce relève de l'honneur de la Couronne et s'origine de faits qui se sont produits il y a plus de 100 ans. Tout comme les arrêts *Kingstreet* et *Ravndahl* établissent une distinction entre les allégations ayant un fondement factuel et celles ayant pour assise une disposition législative dans le contexte de l'application d'un délai de prescription, les secondes étant à tout moment susceptibles d'être formulées, la présente affaire devrait être distinguée d'avec *Ontario Hydro*.

(6) Conclusion sur la doctrine des *laches*

[302] À mon avis, la doctrine peut être invoquée pour les deux motifs reconnus. La Couronne peut invoquer ce moyen de défense fondé sur l'equity dans toute instance et, plus particulièrement, lorsqu'on lui reproche d'avoir manqué à son honneur dans la mise en œuvre d'une disposition constitutionnelle. Comme le dit le juge La Forest dans *M. (K.) c. M. (H.)*, p. 78, « [e]n fin de compte, [la question de l'application de la doctrine] doit être réglé[e] comme une question de justice entre les parties ». Tant les Métis que l'État ont droit à la justice et, au regard du droit, la doctrine des *laches* s'applique en l'espèce et fait obstacle au recours fondé sur l'equity.

IV. Conclusion

[303] Je suis d'avis de rejeter le pourvoi avec dépens.

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

Solicitors for the appellants: Rosenbloom Aldridge Bartley & Rosling, Vancouver.

Solicitor for the respondent the Attorney General of Canada: Attorney General of Canada, Saskatoon.

Solicitor for the respondent the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General for Saskatchewan: Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitor for the intervener the Métis National Council: Métis National Council, Ottawa.

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Solicitors for the intervener the Treaty One First Nations: Rath & Company, Priddis, Alberta.

Solicitors for the intervener the Assembly of First Nations: Arvay Finlay, Vancouver; Nahwegahbow, Corbiere, Rama, Ontario.

Pourvoi accueilli en partie avec dépens devant toutes les cours, les juges ROTHSTEIN *et* MOLDAVER *sont dissidents.*

Procureurs des appelants : Rosenbloom Aldridge Bartley & Rosling, Vancouver.

Procureur de l'intimé le procureur général du Canada : Procureur général du Canada, Saskatoon.

Procureur de l'intimé le procureur général du Manitoba : Procureur général du Manitoba, Winnipeg.

Procureur de l'intervenant le procureur général de la Saskatchewan : Procureur général de la Saskatchewan, Regina.

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Procureur de l'intervenant le Ralliement national des Métis : Ralliement national des Métis, Ottawa.

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Procureurs de l'intervenante les Premières Nations du Traité n^{o} 1 : Rath & Company, Priddis, Alberta.

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