EB-2015-0334

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an Application by Jim Babirad under section 38(3) of the *Ontario Energy Board Act, 1998* for an Order of the Board determining the quantum of compensation that Jim Babirad is entitled to receive from Enbridge Gas Distribution Inc.

AND IN THE MATTER OF Rule 42 of the Rules of *Practice and Procedure of the Ontario Energy Board*.

SUPPLEMENTARY BOOK OF AUTHORITIES OF JIM BABIRAD

April 12, 2016

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COURT OF APPEAL FOR ONTARIO

CITATION: Intact Insurance Company of Canada v. Lombard General Insurance Company of Canada, 2015 ONCA 764
DATE: 20151112
DOCKET: C58290 and C59127

Hoy A.C.J.O., van Rensburg and Benotto JJ.A.

BETWEEN

Intact Insurance Company of Canada

Applicant (Respondent)

and

Lombard General Insurance Company of Canada

Respondent (Appellant)

AND BETWEEN

Zurich Insurance Company

Respondent (Respondent)

and

TD General Insurance Company

Applicant (Appellant)

Greg Bailey, for the appellant, Lombard General Insurance Company of Canada

Joseph Lin and Matthew Stepura, for the respondent, Intact Insurance Company of Canada

William G. Woodward and I. Caley Ross, for the appellant, TD General Insurance Company

Eric K. Grossman, for the respondent, Zurich Insurance Company

Heard: June 22, 2015

On appeal from the order of Justice Victoria R. Chiappetta of the Superior Court of Justice dated September 30, 2013, with reasons reported at 2013 ONSC 5878, and on appeal from the order of Justice Sidney N. Lederman of the Superior Court of Justice dated May 27, 2014, with reasons reported at 2014 ONSC 3191.

Hoy A.C.J.O.:

I OVERVIEW

[1] On these appeals, we are asked to determine whether the equitable doctrine of laches can defeat "loss-transfer claims" made under s. 275 of the *Insurance Act*, R.S.O. 1990, c. I.8 ("the Act"), and, if so, whether that doctrine should defeat the loss-transfer claims in the two instances before us.

[2] Under s. 268 of the Act, an insurer – a "first party insurer" – must pay statutory accident benefits to its insured when the insured is injured in a motor vehicle accident, regardless of fault. The legislature recognized that this scheme would result in first party insurers of lighter vehicles bearing a high share of the cost of statutory accident benefits, as their drivers are more likely to suffer

serious personal injuries than the drivers of heavier vehicles.[1] Section 275 provides a means to shift those costs from the first party insurer to another insurer. It permits a first party insurer of a vehicle other than a heavy commercial vehicle to claim indemnification for statutory accident benefits from the insurer of a heavy commercial vehicle involved in the accident – the "second party insurer".[2] Indemnification or "loss-transfer" with respect to this limited class of accidents is to be made based on the respective degree of fault of each insurer's insured as determined under the *Fault Determination Rules*, R.R.O. 1990, Reg. 668. If the insurers are unable to agree with respect to indemnification, the dispute is to be resolved by arbitration.

[3] This court determined that a first party insurer discovers its claim under the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B the day after the first party insurer makes a request to the second party insurer for indemnification under s. 275: *Markel Insurance Co. of Canada v. ING Insurance Co. of Canada*, 2012 ONCA 218, 109 O.R. (3d) 652, at paras. 26-27. Thus, the first party insurer must initiate arbitration within two years and a day of requesting indemnification.[3]

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[1] *Jevco Insurance Co. v. Wawanesa Insurance Co.* (1998), 42 O.R. (3d) 276 (Gen. Div.), at p. 286. See also *Royal Insurance Co. v. Wawanesa Mutual Insurance Co.*, [2004] O.J. No. 2924 (S.C.), at para. 3, aff'd, (2005), 25 C.C.L.I. (4th) 120 (Ont. C.A.).

[2] Loss transfer also benefits insurers of motorcycles and motorized snow vehicles. An insurer of a motorcycle or motorized snow vehicle may claim indemnification for statutory accident benefits from the insurer of another vehicle involved in the accident, as long as that other vehicle is not a motorcycle, motorized snow vehicle or off-road vehicle.

[3] The provisions of the *Limitations Act, 2002* apply to an arbitration as if the arbitration were an action and a claim made in the arbitration were a cause of action: *Arbitration Act*, *1991*, S.O. 1991, c. 17, s. 52(1).

[4] The Act imposes strict deadlines on insurers, including a 90-day notice period for disputes between insurers as to which insurer is required to respond to an accident benefits claim: *Disputes Between Insurers*, O. Reg. 283/95, s. 3. However, s. 275 does not specify when a first party insurer must make its indemnification request. It provides that the first party insurer's entitlement to indemnification is "subject to such terms, conditions, provisions, exclusions and limits as may be prescribed", but as of yet no condition as to when the first party insurer must make an indemnification request has been prescribed. And while the Financial Services Commission of Ontario, the licensing and regulating body for insurers in Ontario, issued F.S.C.O. Bulletin No. A-11/94, which sets out that the first party insurer should notify the second insurer "promptly", its bulletin does not create a condition of indemnification.

[5] In the two instances before us, the first party insurers requested indemnification – and thereby triggered the running of the two-year limitation period – a number of years after the underlying accident occurred. Arbitration ensued. As a preliminary issue, each arbitrator determined whether the first party insurer's delay in making its loss-transfer claim precluded recovery. Each losing insurer appealed, and the Superior Court judges hearing the appeals arrived at conflicting results. One held that the doctrine of laches can have no application to a loss-transfer claim under s. 275 of the *Insurance Act: Intact Insurance Co. of Canada v. Lombard General Insurance Co. of Canada*, 2013 ONSC 5878, 26

C.C.L.I. (5th) 158. The other held both that it could, and that it defeated the first party insurer's claim for loss-transfer: *Zurich Insurance Co. v. TD General Insurance Co.*, 2014 ONSC 3191, 120 O.R. (3d) 278.

[6] I conclude that the doctrine of laches is not available to a second party insurer in defence of a claim under s. 275 of the Act and that, even if it were, it would not have defeated the first party insurers' claims for indemnification in the instances before the court.

[7] Below, I outline the doctrine of laches, the reasons below and the first and second party insurers' arguments as to the availability of the doctrine of laches as a defence to a loss-transfer claim. I then provide my analysis of that question and explain why, even if the doctrine were available, the second party insurers could not have successfully relied on it in the two instances before the court.

II THE EQUITABLE DEFENCE OF LACHES

[8] Historically, statutes of limitations did not apply to equitable claims: *M.(K.) v. M.(H.),* [1992] 3 S.C.R. 6, at p. 76. As a result, the courts of equity developed their own limitation defences to delayed equitable claims, the most important of which was the defence of laches.

[9] In *M.(K.),* the Supreme Court discussed the equitable doctrine of laches in defence to a claim in equity. At pp. 77-78, the court stated that mere delay is insufficient to trigger laches. To trigger a laches defence, the defendant must

establish one of two things. The delay of the plaintiff must "[constitute] acquiescence or [result] in circumstances that make the prosecution of the action unreasonable."

[10] In *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at paras. 145-46, McLachlin C.J.C. and Karakatsanis J., writing for the majority, citing *M.(K.),* summarized the doctrine as follows:

> 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*.
>
> 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.

[11] This court in *Perry, Farley & Onyschuk v. Outerbridge Management Ltd.* (2001), 54 O.R. (3d) 131 (C.A.) – a decision central to the second party insurers'

arguments on this appeal – described, at para. 36, the second branch of *M.(K.)*: "A party relying on the defence must show a combination of delay and prejudice."

[12] In *Perry*, the limitations act, to the extent it applied at all, did not bar the creditor's claim under the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29. The court agreed with the motions judge that the doctrine of laches could apply to an action brought by a creditor pursuant to the *Fraudulent Conveyances Act* to attack the conveyance of assets as void. The doctrine was not unavailable merely because the claim arose under a statute. Sharpe J.A., writing for the court, explained at para. 35:

> 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.

III THE DECISIONS BELOW

The Lombard Appeal

[13] In the first matter under appeal, Intact Insurance Company of Canada sought indemnity from Lombard General Insurance Company of Canada approximately four years and seven months after a multi-vehicle accident involving a pickup truck insured by Intact and a tractor trailer insured by Lombard.

[14] When the matter proceeded to arbitration, Lombard raised the defence of laches as a preliminary matter. The arbitrator, Bruce R. Robinson, concluded, based on *Perry,* that the doctrine of laches could be applied to loss-transfer claims under s. 275. He then determined that Intact's failure to make a request for indemnification for four years and three months after it was aware of its ability to seek loss-transfer from Lombard amounted to acquiescence. Further, he concluded that Intact's unexplained delay gave rise to a presumption of prejudice; the onus was on Intact to explain that prejudice and it had not done so. Therefore, Intact was precluded from proceeding with its loss-transfer claim.

[15] On Intact's appeal of Arbitrator Robinson's award to the Superior Court of Justice, Chiappetta J. concluded that the laches doctrine does not apply to loss-transfer claims under s. 275. She reasoned, at para. 7, that the right to loss-transfer indemnity is purely statutory and that, unlike the statutory provision considered in *Perry*, it does not have a "distinctively equitable flavour". She wrote, at para. 10, that "[i]t is … not appropriate to purposely re-characterize the equitable doctrine of laches in an effort to fill a perceived legislative omission, or to augment a statutory limitation period."

[16] She further concluded that, even if the doctrine of laches could apply, Arbitrator Robinson had erred in concluding that it was made out in this case. At para. 18, she held that "acquiescence" requires a plaintiff to fail to react to the defendant's conduct. Here, there was no evidence that Lombard attempted to

deny Intact any of its rights: “Intact cannot acquiesce to conduct that never occurred”. And, she wrote at para. 24, a presumption of prejudice arising out of delay has no place in the context of a positive laches defence. Lombard was required to demonstrate actual prejudice and did not.

[17] Lombard appeals the order of Chiappetta J. setting aside the decision of Arbitrator Robinson.

The TD Appeal

[18] In the second matter under appeal, TD General Insurance Company sought indemnity from Zurich Insurance Company approximately 11 years after an accident involving a heavy commercial vehicle insured by Zurich and an automobile insured by TD. Over the decade that followed, TD paid statutory accident benefits to its insured. Ten years after the accident, a global mediation was held to settle TD’s insured’s tort claim. TD’s insured’s accident benefits claim settled approximately one week later. TD requested indemnification seven months later. TD paid the majority of the amounts for which it sought indemnification following the settlement.

[19] Zurich moved before Arbitrator Kenneth J. Bialkowski to have TD’s claim dismissed on the basis of laches.

[20] Arbitrator Bialkowski declared himself bound by the decision of Chiappetta J. in *Intact*, and dismissed Zurich's motion. However, he expressed his disagreement with her conclusion that laches should never apply:

> I am of the view that there may well be circumstances where laches ought [to] apply. If crucial documentation, information or witnesses are no longer available by reason of the passage of an inordinate amount of time to the prejudice of the second party insurer then laches should be available to preclude a loss transfer claim.

[21] He concluded that, even if the doctrine of laches could apply in certain cases, it would not apply in this instance. Zurich was required to prove presumed prejudice or actual prejudice and it had failed to do so. He wrote that Zurich had knowledge of the accident and the personal injury claims resulting from the accident. It had defended the tort claim brought by TD's insured and would have completed a thorough liability investigation to defend that claim. There was no indication that their liability investigation documents were no longer in existence or that a crucial witness was no longer available.

[22] Lederman J. allowed Zurich's appeal to the Superior Court. He considered *Perry* and found, at para. 22:

> [T]hat Ontario's loss transfer regime possesses an equitable flavour because it is designed to address unfairness between participants in the province's insurance industry, and that is a sufficient basis to permit the application of the doctrine of laches. Alternatively, I find that the fusion of law and equity, which has evolved in order to achieve fairness and

> justice, requires a finding that laches can apply in this case.

[23] He also reasoned that, as the doctrine of laches developed because limitation periods did not apply to equitable claims and, as post-*Markel*, there is no limitation period governing when a first party insurer must request indemnification, applying the doctrine of laches in this situation is consistent with the purpose of the doctrine.

[24] Lederman J. held, at para. 28, that Arbitrator Bialkowski had not erred in finding that Zurich did not suffer prejudice:

> There was evidence that Zurich had knowledge of both the accident and the personal injury claims brought by TD's insured; there was no suggestion that Zurich's liability documentation was no longer available; nor that any crucial witness was no longer available. In the circumstances, his conclusion as to prejudice was reasonable and the Court should give deference to it.

[25] However, the Arbitrator failed to consider whether there was acquiescence in this case. Lederman J. reasoned, at para. 45, that *Manitoba Metis* "at least implied that in some cases, delay might be interpreted as a clear act by the plaintiff amounting to acquiescence." At para. 47, he concluded that, in the unique circumstances of this case, "TD's delay in requesting loss transfer gave rise to an inference that it had abandoned or waived its rights to the claim."

[26] TD appeals Lederman J.'s order setting aside Arbitrator Bialkowski's award.

IV THE POSITIONS OF THE PARTIES: CAN LACHES DEFEAT A CLAIM OF A FIRST PARTY INSURER UNDER S. 275?

[27] The second party insurers argue that Ontario's loss-transfer regime has an equitable flavour and that, in any event, the fusion of law and equity should permit the application of laches to prevent injustice.

[28] They submit that *Perry* and Lederman J.'s conclusion find further support in *N.A.P.E. v. Memorial University of Newfoundland* (1998), 167 Nfld. & P.E.I.R. 72 (N.L.C.A.) and *ING Halifax v. Royal & SunAlliance Insurance Co. of Canada* (2004), 12 C.C.L.I. (4th) 272 (Ont. S.C.).

[29] Between 1986 and 1995, no legislative provision in Newfoundland and Labrador stipulated the time within which an application to set aside an arbitration award had to be brought. At paras. 84 and 85, the court in *N.A.P.E.*, relying on *Lindsay Petroleum,* concluded that laches could be used to fill the limitation gap: "*Lindsay Petroleum* speaks generally of utilizing 'principles substantially equitable' to fill a limitation gap."

[30] In *ING*, a first party insurer paid statutory accident benefits to its insured then sought and obtained indemnification from the second party insurer under s. 275. The insurers subsequently learned that the accident occurred while the insured was in the course of employment and therefore was not entitled to statutory accident benefits. The second party insurer sought reimbursement from

the first party insurer, asserting that the first party insurer was similarly entitled to reimbursement. E. MacDonald J. held that the second party insurer was entitled to rely on the equitable principle of restitution to seek repayment of amounts paid to the first party insurer under s. 275. This was a claim in equity as opposed to a claim under s. 275. Nevertheless, the second party insurers rely on this case as authority for the proposition that equity is not foreign to loss-transfer disputes.

[31] The first party insurers, on the other hand, say laches cannot apply to a claim under s. 275 of the Act.

[32] They say a loss-transfer claim is a purely statutory claim and does not have the "distinctively equitable flavour" of the action under the *Fraudulent Conveyances Act* considered in *Perry*. Moreover, they argue, laches does not apply when – as in these cases – a claim is subject to and made within a statutory limitation period: *Paul v. 1433295 Ontario Ltd.*, 2013 ONSC 7002, 120 O.R. (3d) 339, at para. 43; G. Mew, *The Law of Limitations*, 2nd ed. (Markham: LexisNexis, 2004), at p. 38.

V ANALYSIS: CAN LACHES DEFEAT A CLAIM OF A FIRST PARTY INSURER UNDER S. 275?

[33] I agree with Chiappetta J. that the defence of laches cannot be invoked in response to a loss-transfer claim under s. 275. Such a claim is a claim for legal relief. In my view, given the historic restriction of laches to claims for equitable

relief, the removal of the provision preserving the use of equitable defences from the *Limitations Act, 2002* and the comprehensive nature of the new Ontario limitations scheme, the defence of laches cannot be raised to defeat claims for legal relief that are subject to the unexpired basic limitation period under the *Limitations Act, 2002,* even those with an "equitable flavour". Accordingly, even if a second party insurer's right to indemnity under s. 275 might be argued to have an "equitable flavour" because its objective is to re-allocate the cost of statutory accident benefits in a more equitable fashion, a second party insurer cannot invoke the doctrine of laches as a defence.

Loss Transfer is Not an Equitable Claim or a Claim for Equitable Relief

[34] The remedy of indemnification is a "direct right to reimbursement": *Addison & Leyen Ltd. v. Fraser Milner Casgrain LLP*, 2014 ABCA 230, 577 A.R. 99, at para. 22. A party may have a legal claim for indemnity that arises as a result of a contract or statute. In the absence of a legal right to indemnity, a party may, in a narrow set of circumstances, be able to seek equitable indemnification (also referred to as implied indemnity). In *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 147, the Supreme Court of Canada recently explained:

> Equitable indemnity is a narrow doctrine, confined to situations of an express or implied understanding that a principal will indemnify its agent for acting on the directions given. As stated in *Parmley v. Parmley*,

> [1945] S.C.R. 635, "claims of equitable indemnity 'proceed upon the notion of a request which one person makes under circumstances from which the law implies that both parties understand that the person who acts upon the request is to be indemnified if he does so'". [Citations omitted.]

[35] A loss-transfer claim is clearly a statutorily-provided legal right to indemnity and not an equitable claim or a claim for equitable relief: see *Markel*, at paras. 20 and 26.

Historic Restriction of Laches to Claims for Equitable Relief where Limitations Statute Did not Apply

[36] Historically, the doctrine of laches was restricted to claims for equitable relief that were not subject to a statutory limitation period. Several of the authorities relied on by the second party insurers in this case were decided when the Ontario limitations statute did not apply to the equitable claims at issue. Accordingly, these cases do not assist in determining whether laches can defeat a legal claim for indemnity that is subject to the basic limitation period prescribed under the *Limitations Act, 2002*.

[37] As the Supreme Court explained in *M.(K.)*, the courts of equity developed their own limitation defences to delayed equitable claims because historically statutes of limitations did not apply to equitable claims. In that case, the court concluded that the defendant could raise the defence of laches to defeat the

plaintiff's claim for breach of fiduciary duty.[4] At the time, the old *Limitations Act*, R.S.O. 1990, c. L.15 was in effect. This act applied only to specified causes of action and not to civil actions in general. No relevant limitation period under that Act would have applied to the fiduciary duty claim. The limitation periods prescribed under the *Limitations Act, 2002*, however, apply to all claims – whether legal or equitable, arising under statute or common law – unless they are specifically exempted from its application. It is undisputed that the *Limitations Act, 2002* and the basic limitation period prescribed thereunder apply to a claim for indemnification under s. 275 of the Act.

[38] In *N.A.P.E.*, there was similarly no applicable statutory limitation period. The Newfoundland Court of Appeal held that laches could fill a legislative gap. *ING*, the other case relied on by the second party insurers, involved a claim for restitution – an equitable remedy – and simply recognized that such a claim could be advanced. There was no question of delay or the application of the equitable defence of laches.

Absence of a Laches-Saving Provision in the Limitations Act, 2002

[39] Unlike the *Limitations Act, 2002*, s. 2 of the old *Limitations Act* specifically preserved entitlement to equitable relief. It provided that nothing in that act interfered "with any rule of equity in refusing relief on the ground of

[4] It concluded, however, that the defence was not made out in the circumstances.

acquiescence, or otherwise, to any person whose right to bring an action is not barred by virtue of this Act." (For convenience only, I refer in the following paragraphs to this section as the "laches-saving provision".) The court in *M.(K.)*, at p. 70, commented with respect to that section:

> This section makes clear that the Act does not exhaust the defences available to a defendant because of the passage of time. Thus, certain actions expressly made subject to the *Limitations Act* may not yet be out of time under the terms of that statute, but may be precluded by equitable defences that apply notwithstanding the terms of the Act. The section also gives rise to the inference that there is a category of equitable claims not subject to the Act at all, and that the equitable defences survive in those cases.

[40] While s. 2 was contained in Part I of the old *Limitations Act*, which dealt with limitation periods in respect of real property claims, the Supreme Court interpreted it as applying generally to all claims under that act. See also: *Susin v. Genstar Development Co.* (2001), 14 C.L.R. (3d) 292 (Ont. S.C.), aff'd (2003), 27 C.L.R. (3d) 161 (Ont. C.A.), at paras. 21-23.

[41] In *Perry*, which is the cornerstone of the second party insurers' arguments, the old *Limitations Act* – with its broad laches-saving provision in s. 2 – was applicable. Nolan J. noted in *Paul*, at para. 44, that the decision not to include the saving provision from the old *Limitations Act* in the *Limitations Act, 2002* "could be interpreted as an implication by the legislature that, where limitations

legislation is applicable to claims in equity, equitable remedies are not to be used."

[42] While I refrain from commenting on the availability of equitable remedies generally, I agree with the view that the absence of a laches-saving provision from the *Limitations Act, 2002* suggests that the equitable defence of laches is not available to bar a claim that is brought within the basic limitation period prescribed under the *Limitations Act, 2002*. While the mere fact that the laches-saving provision was left out of the new Act may not necessarily give rise to a presumption that the legislature intended to change the law, the removal takes on additional significance when viewed in context. A number of factors support the conclusion that the removal of the laches-saving provision in this case was intentional.

(a) Consideration of the Impact of a New Limitations Scheme on Laches

[43] The need to consider the impact of any legislative changes on the doctrine of laches was highlighted in the review of limitations law that preceded the enactment of the *Limitations Act, 2002*. However, the laches-saving provision from the 1990 *Limitations Act* was not included in the *Limitations Act, 2002* in the face of decades of consideration.

[44] In its seminal 1969 report entitled “Report on Limitation of Actions” (the “1969 Report”), the Ontario Law Reform Commission recommended the adoption of a “catch-all” provision that would make all claims subject to the new Ontario limitations scheme. The Commission cautioned, at p. 22, that “when reform of limitation laws is being undertaken, careful consideration should be given to the role that … laches should play and the consequences that changes would have on [this] equitable [defence].”

[45] The Commission distinguished between the defence of acquiescence (which it described as conduct by which a person has shown himself indifferent to the violation of his rights and as something which may arise without delay) and laches, which may exist even without any element of acquiescence being present. The Commission noted that “it seems that acquiescence will always be a defence” and “it makes no difference whether the Act expressly governs the matter or not”. Laches, on the other hand, could operate as a limitation period by analogy, when no statutory limitation period applies. The Commission contemplated that the scope of laches would be narrowed once the new act governed all claims and would not be applicable to equitable claims generally. It wrote, at pp. 22-23:

> Where the Act expressly applies to an equitable claim, delay short of the full period is clearly irrelevant.
>
> …

> Once all actions are expressly governed, there will be no need for the operation of the doctrine of laches except insofar as the granting of certain equitable remedies in aid of legal rights is concerned. Claims for specific performance or rescission of a contract, for example, should remain subject to the defence of laches. Acquiescence, on the other hand, should continue to be a valid defence to the full extent that it now is.

[46] In a 1977 discussion paper, the Ministry of the Attorney General proposed draft legislation reflecting this recommendation: it contained a catch-all provision, capturing any residual claims not covered by a specified limitation period, and preserved the doctrine of laches only in the case of equitable relief claimed in aid of a legal right: Ministry of the Attorney General, *Discussion Paper on Proposed Limitations Act* (Toronto: Ministry of the Attorney General, 1977), at pp. 6 and 8.

[47] In 1983, the Ontario legislature introduced Bill 160, *An Act to revise the Limitations Act*, 3rd Sess, 32nd Leg, Ontario, which would apply generally to all claims. Subsection 2(1) of the Bill contained a broader laches-saving provision than that recommended by the 1969 Report and 1977 discussion paper, explicitly preserving the use of equitable defences to defeat a claim on the grounds of "acquiescence or undue delay."

[48] In December 1989, the Ministry of the Attorney General established a Limitations Act Consultation Group to conduct a comprehensive review of the Ontario limitations regime and make recommendations for reform. While it did not specifically mention equitable doctrines or the role they should play in the new

limitations scheme in its subsequent report (the "March 1991 Report"), the Consultation Group referred to the 1969 Report, the 1977 draft legislation and Bill 160 in discussing the ongoing attempts to modernize Ontario's limitations scheme and endorsed many of the recommendations contained therein: Limitations Act Consultation Group, *Recommendations for a New Limitations Act* (Toronto: Ministry of the Attorney General, 1991), at p. 1. The 1969 Report, the 1977 draft legislation and Bill 160 continued to remain at the forefront as new legislation was considered. Despite over three decades of considering the role of laches in Ontario's limitations regime, the legislature ultimately did not include a laches-saving provision in the *Limitations Act, 2002*.

(b) Laches-Saving Provision in the Real Property Limitations Act

[49] While the legislature did not include a laches-saving provision in the *Limitations Act, 2002*, it preserved s. 2 of the old *Limitations Act* in the *Real Property Limitations Act*, R.S.O. 1990, c. L.15.

[50] In its March 1991 Report, the Consultation Group had recommended further review of Part I of the old *Limitations Act* – the provisions in respect of actions affecting real property (primarily to recover land or rent or relating to charges on land). It also expressed concern that such further review not delay the implementation of the balance of the proposed reforms. The legislature acted on that recommendation. In 2002, it repealed Parts II and III of the old *Limitations*

Act, leaving only the definitions and Part I. To reflect this narrowed scope, the old *Limitations Act* was renamed the *Real Property Limitations Act* and the *Limitations Act, 2002,* which came into effect on January 1, 2004, was enacted to deal with limitation periods other than those affecting real property. The fact that the legislature extricated Part I of the old *Limitations Act* – including the laches-saving provision in s. 2 – and enacted it as the *Real Property Limitations Act* without adding a general laches-saving provision to the *Limitations Act, 2002* might suggest that it had always intended that the laches-saving provision apply only to real property claims.

(c) Other Common Law Provinces Retained a Laches-Saving Provision

[51] Ontario was one of the last provinces to adopt a limitations statute that applies to civil actions generally. At the time the *Limitations Act, 2002* was enacted, every other common law province where the limitations legislation governed all civil actions contained a laches-saving provision, expressly preserving the application of equitable doctrines, notwithstanding that the applicable limitation period had not expired.[5] The drafters of the *Limitations Act, 2002* would have been familiar with this legislation and the widespread retention

[5] *Limitations Act*, R.S.A. 2000, c. L-12, ss. 3 and 10; *Limitation Act*, R.S.B.C. 1996, c. 266, ss. 3(5) and 2, as repealed by S.B.C. 2012, c. 13, s. 31; *The Limitation of Actions Act*, C.C.S.M. c. L150, ss. 2(1)(n) and 59; *Limitation of Actions Act*, R.S.N.B. 1973, c. L-8, ss. 9 and 65, as repealed by 2009, c. L-8.5, ss. 34(3) and 34(17); *Limitations Act*, S.N.L. 1995, c. L-16.1, ss. 9 and 3; *Limitation of Actions Act*, R.S.N.W.T. 1988, c. L-8, ss. 2(1)(j) and 49; *Limitation of Actions Act*, R.S.N.W.T. 1988, c. L-8, ss. 2(1)(j) and 49, as amended by S.Nu. 2013, c.20, s. 23; *Statute of Limitations*, R.S.P.E.I. 1988, c. S-7, ss. 2(1)(g) and 51; *The Limitation of Actions Act*, R.S.S. 1978, c. L-15, ss. 3(1)(j) and 51, as repealed by *The Limitations Act,* S.S. 2004, c. L-16.1, s. 28; *Limitation of Actions Act*, R.S.Y. 2002, c. 139, ss. 2(1)(j) and 50.

of a laches-saving provision in the context of generally applicable limitations statutes. A number of these provinces have recently amended their limitations legislation to adopt a uniform limitation period applying to all claims, similar to the *Limitations Act, 2002*. With the exception of Nova Scotia, these amended acts continue to retain a laches-saving provision.[6] The absence of such a provision in Ontario is therefore noteworthy.

[52] The legislature's removal of the laches-saving provision overrules any suggestion in *Perry* that laches might bar the commencement of a proceeding to pursue an unexpired legal claim to which the basic limitation period prescribed by the *Limitations Act, 2002* applies. Indeed, even in the presence of such a provision, this court has held that "[s]o long as the action was instituted within the limitation period, the question of laches does not arise": *F.(L.) v. F.(J.R.)* (2001), 144 O.A.C. 372 (C.A.), at para. 6.

Comprehensive Nature of the Limitations Act, 2002

[53] The deletion of the laches-saving provision from the *Limitations Act, 2002* coincided with a major reform of the existing limitations law in Ontario and a shift toward a more comprehensive scheme that aims to provide certainty and clarity to litigants.

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[6] *Limitation Act,* S.B.C. 2012, c. 13, s. 5; *Limitation of Actions Act*, S.N.B. 2009, c. L-8.5; *The Limitations Act*, S.S. 2004, c. L-16.1.

[54] As I note above, the old *Limitations Act* applied only to a closed list of enumerated causes of action and not to civil actions in general. Equitable causes of action, with few exceptions, were outside of its scope. The *Limitations Act, 2002* "represents a revised, comprehensive approach to the limitation of actions": *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469, 90 O.R. (3d) 401, at para. 8. In *Joseph*, this court concluded that the common law doctrine of special circumstances had no application under the new, comprehensive *Limitations Act, 2002*. That doctrine had allowed a court to add or substitute a party or to add a cause of action after the expiry of a limitation period where special circumstances existed, unless the change would cause prejudice that could not be compensated for with either costs or an adjournment. Permitting a defendant to invoke the equitable doctrine of laches because a legal claim has an "equitable flavour" would be inconsistent with the comprehensive approach to the limitation of actions represented by the *Limitations Act, 2002*.

[55] Permitting a defendant to rely on the defence of laches where the claim is a legal claim and subject to and within the basic limitation period prescribed under the *Limitations Act, 2002* would also be counter to the purpose of that Act of promoting certainty and clarity in the law of limitation periods: *msi Spergel Inc. v. I.F. Propco Holdings (Ontario) 36 Ltd.,* 2013 ONCA 550, 117 O.R. (3d) 81, at para. 61.

[56] Given the comprehensive approach of, and absence of a laches-saving provision in, the *Limitations Act, 2002*, together with the historic restriction of laches to claims for equitable relief, I am satisfied that a second party insurer cannot invoke the doctrine of laches as a defence to a first party insurer's legal claim for indemnity.

Scope of Decision and Impact on Equitable Defences Generally

[57] I wish to make clear that this decision does not address the availability of equitable defences (such as waiver, estoppel and acquiescence) to the extent not founded solely on a plaintiff's delay in initiating its claim. Nor do I suggest that delay in seeking equitable relief such as an injunction could not be a relevant factor in deciding whether such equitable relief should be granted. This decision considers whether a defendant seeking legal relief within the basic limitation period prescribed under the *Limitations Act, 2002* can rely on the delay-based defence of laches.

[58] In coming to my conclusion, I am mindful of the fact that the arbitrators in the loss-transfer disputes (*Federation Insurance Co. of Canada v. Kingsway General Insurance Co.*, 2010 CarswellOnt 17903 (Ins. Arb.) (S. Densem), at p. 16, and *ING Insurance Co. of Canada v. Markel Insurance Co. of Canada* (4 April 2011), Toronto (Ins. Arb.) (L. Samis), at p. 10) that led to this court's decision in *Markel*, either assumed or contemplated that the doctrine of laches could be

available to a second party insurer where the first party insurer had been exceptionally dilatory in seeking indemnification.

[59] However, I am not persuaded that the inability to invoke the doctrine of laches is as significant an issue for second party insurers as they argue. First, it is in a first party insurer's best interests to request indemnification under s. 275 promptly. It will only obtain payment from the second party insurer if it requests payment. Presumably, therefore, any instances of exceptional delay would be the result of inadvertence and would not be commonplace. Second, the Act and the regulations under the Act are the subject of frequent amendment. What the second party insurers characterize as a "legislative gap" could seemingly be filled by the enactment of regulations. Finally, given the requirements of the doctrine of laches, the situations in which a second party insurer could have successfully invoked the doctrine would have been very limited. As I discuss below, neither Lombard nor Zurich would have been able to rely on laches in the cases under consideration.

VI COULD THE SECOND PARTY INSURERS HAVE RELIED ON LACHES IN THESE CASES?

[60] To rely on the doctrine of laches a defendant must establish that in all the circumstances the delay was unreasonable and either that:

> (1) the delay by the claimant constituted acquiescence of the defendant's conduct; or

> (2) the claimant's delay resulted in *actual* prejudice to the defendant that would make the action unreasonable or unjust.
>
> *Manitoba Metis*, at paras. 145-46; *M.(K.)*, at pp. 76-78; *Perry*, at para. 36; *Lindsay Petroleum*, at pp. 239-240, *N.A.P.E. v. Memorial University of Newfoundland* (1995), 132 Nfld. & P.E.I.R. 205 (N.L. T.D.), aff'd (1998), 167 Nfld. & P.E.I.R. 72 (N.L. C.A.), at paras. 42, 44, 49-50, 52-55.

[61] At p. 78 of *M.(K.)*, the Supreme Court explained what acquiescence means in the context of laches: "after the deprivation of her rights and in the full knowledge of their existence, the plaintiff delays. This leads to an inference that her rights have been waived."

[62] Contrary to the second party insurers' submissions, the notion of a "presumption of prejudice" arising from the passage of time which surfaces in other contexts has no place in this equitable doctrine. This is clear from *Perry* and *Manitoba Metis*. In *Perry*, the court indicated that the defendant "must show … prejudice" and set aside the summary judgment below because the motion judge had not specified the nature of the prejudice suffered by the defendants that would justify barring the claim. *Manitoba Metis* directed, at para. 145, that under the second branch of the test in *M.(K.)* the court must consider whether there was "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*."

[63] The party seeking to rely on the defence of laches must show actual prejudice.

[64] Accordingly, in the context of a claim under s. 275 of the Act, a second party insurer seeking to rely on the second branch of the test would have to establish that the first party insurer's delay resulted in *actual* prejudice to the second party insurer that would make a determination of the loss-transfer, based on the Fault Determination Rules, unreasonable or unjust.

[65] Neither Lombard nor Zurich could have successfully invoked the doctrine of laches in these cases.

The Lombard Appeal

[66] I agree with Chiappetta J. that the defence of laches, if applicable, was not made out.

[67] Lombard did not establish acquiescence. As Chiappetta J. wrote, at para. 18, there was no evidence that Lombard attempted to deprive Intact of any of its rights. Indeed, it is difficult to envisage a situation where a second party insurer could successfully invoke laches in response to a first party insurer's claim for indemnification under s. 275 based on "acquiescence".

[68] And, as Chiappetta J. wrote, at para. 25, Lombard was required to demonstrate actual prejudice and did not.

The TD Appeal

[69] I disagree with Lederman J. that acquiescence was made out simply because of TD's delay. While delay *after a plaintiff has been deprived of her rights* can give rise to an inference that her rights have been waived, Zurich had not deprived TD of any rights. TD's delay in making a loss-transfer claim therefore could not constitute acquiescence in the context of laches.

[70] *Manitoba Metis* was central to Lederman J.'s reasoning. With respect, *Manitoba Metis* does not permit a finding of acquiescence where – as here – the claimant has not been denied any rights.

[71] In *Manitoba Metis*, the majority concluded that the doctrine of laches did not bar a claim by Métis claimants that the Crown failed to implement its land-grant obligations to the Métis people enshrined in the *Manitoba Act, 1870,* S.C. 1870, c. 3, in a manner consistent with the honour of the Crown.

[72] In addressing the issue of acquiescence, the majority focussed on, among other things, the imbalance in power between the Métis people and Crown. At para. 147, the majority concluded that, in the context of that case, the delay of more than 100 years could not by itself "be interpreted as some clear act by the claimants which amounts to acquiescence or waiver."

[73] Lederman J. interpreted this passage as implying that, in some cases, delay alone might be interpreted as giving rise to an inference that a claimant had abandoned its rights and that the claimant need not have been deprived of any rights. However, the majority found that the Métis people had been deprived of rights: the federal Crown had failed to implement the land grant provisions set out in the *Manitoba Act* in accordance with the honour of the Crown. The statement on which Lederman J. relied was made in that context and must in my view be interpreted in that light.

[74] As to prejudice, Arbitrator Bialkowski determined that Zurich had failed to prove prejudice, and Lederman J. held that the Arbitrator's conclusion was reasonable. I agree with Lederman J.'s analysis and conclusion on this issue.

VII DISPOSITION

[75] I would dismiss the Lombard appeal and allow the TD appeal. In accordance with the agreement of the parties, I make no order as to costs of these appeals.

Released: "AH" "NOV 12 2015"

"Alexandra Hoy A.C.J.O."
"I agree K. van Rensburg J.A."
"I agree M.L. Benotto J.A."

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** Preliminary Version **

Case Name:

Manitoba Metis Federation Inc. v. Canada (Attorney General)

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.

[2013] S.C.J. No. 14

[2013] A.C.S. no 14

2013 SCC 14

[2013] 1 S.C.R. 623

[2013] 1 R.C.S. 623

291 Man.R. (2d) 1

441 N.R. 209

2013EXP-799

J.E. 2013-429

[2013] 2 C.N.L.R. 281

27 R.P.R. (5th) 1

[2013] 4 W.W.R. 665

355 D.L.R. (4th) 577

223 A.C.W.S. (3d) 941

2013 CarswellMan 62

File No.: 33880.

Supreme Court of Canada

Heard: December 13, 2011;
Judgment: March 8, 2013.

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

(303 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Aboriginal law -- Aboriginal status and rights -- Duties of the Crown -- Honour of the Crown -- Sui generis fiduciary duty -- Appeal by Manitoba Metis Federation from decision dismissing its claim for a declaration on ground that ss. 31 and 32 of Manitoba Act gave rise to neither fiduciary duty nor duty based on the honour of the Crown, allowed -- Obligation enshrined in s. 31 did not impose fiduciary or trust duty on government -- However, as a solemn constitutional obligation to MÚtis aimed at reconciling their Aboriginal interests with sovereignty, it engaged honour of Crown -- This required government to act with diligence in pursuit of fulfillment of promise -- Crown failed to do so and obligation to MÚtis children remained largely unfulfilled.

Aboriginal law -- Aboriginal lands -- Types -- MÚtis settlement areas -- MÚtis scrip -- Duties of the Crown -- Honour of the Crown -- Sui generis fiduciary duty -- Practice and procedure -- Limitation periods -- Appeal by Manitoba Metis Federation from decision dismissing its claim for a declaration on ground that ss. 31 and 32 of Manitoba Act gave rise to neither fiduciary duty nor duty based on the honour of the Crown, allowed -- Obligation enshrined in s. 31 did not impose fiduciary or trust duty on government -- However, as a solemn constitutional obligation to MÚtis aimed at reconciling their Aboriginal interests with sovereignty, it engaged honour of Crown -- This required government to act with diligence in pursuit of fulfillment of promise -- Crown failed to do so and obligation to MÚtis children remained largely unfulfilled.

Appeal by Manitoba Metis Federation Inc. (MMF) from a decision dismissing its 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. The appeal was about obligations to the MÚtis people enshrined in the Manitoba Act, a constitutional document. These promises represented the terms under which the MÚtis people agreed to surrender their claims to govern themselves and

their territory in 1870, and become part of the new nation of Canada. The MÚtis people sought a declaration in the courts that Canada breached its obligation to implement the promises it made to the MÚtis people in the Manitoba Act. Section 31 of the Manitoba Act, known as the children's grant, set aside 1.4 million acres of land to be given to MÚtis children. Section 32 of the Manitoba Act provided for recognition of existing landholdings, where individuals asserting ownership had not yet been granted title. Contrary to the expectations of the parties, it took over 10 years to make the allotments of land to MÚtis children promised by s. 31. The MMF sought a declaration that in implementing the Manitoba Act, the federal Crown breached fiduciary obligations owed to the MÚtis, that the federal Crown failed to implement the Manitoba Act in a manner consistent with the honour of the Crown, and that certain legislation passed by Manitoba affecting the implementation of the Manitoba Act was ultra vires. The Court of Appeal upheld the decision of the trial judge dismissing the claims. The courts below denied the MMF public interest standing to bring this action.

HELD: Appeal allowed in part. This collective claim merited allowing the body representing the collective MÚtis interest to come before the court. Section 31 of the Manitoba Act constituted a constitutional obligation to the MÚtis people of Manitoba, an Aboriginal people, to provide the MÚtis children with allotments of land. The obligation enshrined in s. 31 of the Manitoba Act did not impose a fiduciary or trust duty on the government. The first way a fiduciary duty may arise is where the Crown administers lands or property in which Aboriginal peoples have an interest. The duty arises if there is a specific or cognizable Aboriginal interest, and a Crown undertaking of discretionary control over that interest. The words of s. 31 do not establish pre-existing communal Aboriginal title held by the MÚtis, and neither does the evidence. It follows that the argument that Canada was under a fiduciary duty in administering the children's land because the MÚtis held an Aboriginal interest in the land must fail. The second way a fiduciary duty may be established is on the basis of an undertaking by the Crown. While s. 31 shows an intention to benefit the MÚtis children, it does not demonstrate an undertaking to act in their best interests, in priority to other legitimate concerns. However, as a solemn constitutional obligation to the MÚtis 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. The Crown failed to do so and the obligation to the MÚtis children remained largely unfulfilled. The MÚtis claim based on the honour of the Crown was not barred by the law of limitations or the equitable doctrine of laches. The court therefore concluded that the MÚtis were entitled to a declaration that Canada failed to implement s. 31 as required by the honour of the Crown. The s. 32 claim was not established, and it was unnecessary to consider the constitutionality of the implementing statutes.

Statutes, Regulations and Rules Cited:

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,

Act to Amend The Limitation of Actions Act, S.M. 1980, c. 28, s. 3,

Act to enable certain children of Half-breed heads of families to convey their land, S.M. 1878, c. 20,

Act relating to the Titles of Half-Breed Lands, S.M. 1885, c. 30,

Constitution Act, 1867, R.S.C. 1985, App. II, No. 5,

Constitution Act, 1871 (U.K.), 34 & 35 Vict., c. 28 [reprinted in R.S.C. 1985, App. II, No. 11],

Constitution Act, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 35

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 32

Half-Breed Land Grant Protection Act, S.M. 1873, c. 44, Preamble

Half-Breed Lands Act, R.S.M. 1891, c. 67,

Limitation Act, S.B.C. 2012, c. 13, s. 2

Limitation of Actions Act, C.C.S.M. c. L150, s. 2(1)(k), s. 7, s. 14(4)

Limitation of Actions Act, R.S.M. 1940, c. 121,

Limitation of Actions Act, R.S.M. 1970, c. L150,

Limitation of Actions Act, 1931, S.M. 1931, c. 30, s. 3(1)(i), s. 3(1)(l), s. 6, s. 42

Limitations Act, R.S.A. 2000, c. L-12, s. 1(i), s. 13

Limitations Act, 2002, S.O. 2002, c. 24, Sch. B, s. 2, s. 10(2), s. 16(1)(a), s. 24

Manitoba Act, 1870, S.C. 1870, c. 3 [reprinted in R.S.C. 1985, App. II, No. 8], s. 31, s. 32

Royal Proclamation (1763) [reprinted in R.S.C. 1985, App. II, No. 1],

Rupert's Land Act, 1868 (U.K.), 31 & 32 Vict., c. 105 [reprinted in R.S.C. 1985, App. II, No. 6],

Statute Law Revision and Statute Law Amendment Act, 1969, S.M. 1969 (2nd Sess.), c. 34, s. 31

Prior History:

* Deschamps J. took no part in the judgment.

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

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

Court Summary:

After Confederation, the first government of Canada embarked on a policy aimed at bringing the western territories within the boundaries of Canada, and opening them up to settlement. Canada became the titular owner of Rupert's Land and the Red River Settlement; however, the French-speaking Roman Catholic Métis, the dominant demographic group in the Red River Settlement, viewed with alarm the prospect of Canadian control leading to a wave of English-speaking Protestant settlers that would threaten their traditional way of life. In the face of armed resistance, Canada had little choice but to adopt a diplomatic approach. The Red River settlers agreed to become part of Canada, and Canada agreed to grant 1.4 million acres of land to the Métis children (subsequently set out in s. 31 of the *Manitoba Act*) and to recognize existing landholdings (subsequently set out in s. 32 of the *Manitoba Act*). The Canadian government began the process of implementing s. 31 in early 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 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 ("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 **Karatkatsanis** 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.

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 Act*. 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 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 the honour of the Crown: it increased improvident sales to speculators; it meant that when the children received scrip, they obtained significantly less than the 240 acres provided to those who took part in the initial distribution, because the price of land had increased in the interim; and it made it more difficult for Métis to trade grants amongst themselves to achieve contiguous parcels.

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

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

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

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

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

Even if the honour of the Crown was engaged and required the diligent implementation of s. 31, and even if this duty was not fulfilled, any claims arising from such a cause of action have long been barred by statutes of limitations and the equitable doctrine of laches. 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 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 derived from the honour of the Crown, assuming that any such duty exists.

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History and Disposition:

APPEAL from a judgment of the Manitoba Court of Appeal (Scott C.J.M. and Monnin, Steel, Hamilton and Freedman JJ.A.), 2010 MBCA 71, 255 Man. R. (2d) 167, 486 W.A.C. 167, [2010] 12 W.W.R. 599, [2010] 3 C.N.L.R. 233, 216 C.R.R. (2d) 144, 94 R.P.R. (4) 161, [2010] M.J. No. 219 (QL), 2010 CarswellMan 322, affirming a decision of MacInnes J., 2007 MBQB 293, 223 Man. R. (2d) 42, [2008] 4 W.W.R. 402, [2008] 2 C.N.L.R. 52, [2007] M.J. No. 448 (QL), 2007 CarswellMan 500. Appeal allowed in part, Rothstein and Moldaver JJ. dissenting.

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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

McLACHLIN C.J. and KARAKATSANIS J.:--

I. Overview

1 Canada is a young nation with ancient roots. The country was born in 1867, by the consensual union of three colonies -- United Canada (now Ontario and Quebec), Nova Scotia and New Brunswick. Left unsettled was whether the new nation would be expanded to include the vast territories to the west, stretching from modern Manitoba to British Columbia. The Canadian government, led by Prime Minister John A. Macdonald, embarked on a policy aimed at

bringing the western territories within the boundaries of Canada, and opening them up to settlement.

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

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

4 The government policy with respect to the Métis population -- which, in 1870, comprised 85 percent of the population of what is now Manitoba -- was less clear. Settlers began pouring into the region, displacing the Métis' social and political 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 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*, S.M. 1931, c. 30; *The Limitation of Actions Act*, 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.

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.
>
> 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. 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 ("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 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 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 GBP 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.

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 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 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, 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.

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 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 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.

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 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 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 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 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, 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 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).

(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, 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 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. 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. 1009. 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 Constitution is not a mere statute; it is the very document by which the "Crow[n] assert[ed its] sovereignty in the face of prior Aboriginal occupation": *Taku River*, at para. 24. See also *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, at para. 9. It is at the root of the honour of the Crown, and an explicit obligation to an Aboriginal group placed therein engages the honour of the Crown at its core. As stated in *Haida Nation*, "[i]n all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably": para. 17 (emphasis added).

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

72 The last element under this rubric is that the obligation must be explicitly owed to an Aboriginal group. The honour of the Crown will not be engaged by a constitutional obligation in which Aboriginal peoples simply have a strong interest. Nor will it be engaged by a constitutional obligation owed to a group partially composed of Aboriginal peoples. Aboriginal peoples are part of Canada, and they do not have special status with respect to constitutional obligations owed to Canadians as a whole. But a constitutional obligation explicitly directed at an Aboriginal group invokes its "special relationship" with the Crown: *Little Salmon*, at para. 62.

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

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

(1) The honour of the Crown gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest (*Wewaykum*, at paras. 79 and 81; *Haida Nation*, at para. 18);

(2) The honour of the Crown informs the purposive interpretation of s. 35 of the *Constitution Act, 1982*, and gives rise to a duty to consult when the Crown contemplates an action that will affect a claimed but as of yet unproven Aboriginal interest: *Haida Nation*, at para. 25;

(3) The honour of the Crown governs treaty-making and implementation: *Province of Ontario v. Dominion of Canada*, (1895), 25 S.C.R. 434, at p. 512, per Gwynne J., dissenting; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, at para. 51, leading to requirements such as honourable negotiation and the avoidance of the appearance of sharp dealing (*Badger*, at para. 41); and

(4) The honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples: *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 43, referring to *The Case of The Churchwardens of St. Saviour in Southwark* (1613), 10 Co. Rep. 66b, 77 E.R. 1025, 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.

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.

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.

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 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 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, 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, 1870* 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 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 of McDougall's conduct on December 1, 1869, had in a practical sense claimed the territory for Canada, but the legal transfer of the territory from Britain had not yet occurred. Accordingly, Canada had no lawful authority to govern the area. Furthermore, there was neither the practical ability nor the will for Canada or the Imperial Government to enforce authority and in that sense, the purpose of the discussions or negotiations between the Red River delegates and Macdonald and Cartier was to bring about in a peaceful way the entry of the territory into Canada, thereby giving Canada the opportunity to peacefully take over the territory and its governance and be able to move forward with its goal of nation building. [para. 649]

94 Section 31 is a constitutional obligation to an Aboriginal group. In accordance with the principles outlined above,

the honour of the Crown is engaged by s. 31 and gives rise to a duty of diligent, purposive fulfillment.

(6) Did Section 32 of the Manitoba Act, 1870 Engage the Honour of the Crown?

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

(7) Did the Crown Act Honourably in Implementing Section 31 of the Manitoba Act, 1870?

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 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".

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 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 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 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. 1208-09. 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, 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.

(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 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.

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 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.

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 $1.00 per acre. While the Order in Council price for land was $1.00 an acre in 1879, by 1885, when the scrip was delivered, most categories of land were priced at $2.00 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 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.

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 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 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 Quieting Titles Act, 1885*")). 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.

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.

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.

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(l)(k) (emphasis added). 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 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 *Charter* 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 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 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: factum, Assembly of First Nations' at para. 31. Were the Métis in this action seeking personal remedies, the reasoning set out here would not be available. However, as acknowledged by Canada, the remedy sought here is clearly not a personal one: R.F., at para. 82. The principle of reconciliation demands that such declarations not be barred.

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

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

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

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

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

La Forest J. concluded as follows:

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

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

148 The trial judge found that the delay in bringing this action was unexplained, in part because other constitutional

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

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. Gummon 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.

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 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 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 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 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 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 of the Act" (evidence of Dr. Thomas Flanagan, A.R., vol. XXVI, at p. 9).

(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 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 the land grants, including the Lieutenant Governor and the Manitoba legislature, had many challenges to contend with in the establishment of the new province:

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

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

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

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

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

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

pattern of inattention.

(2) Price Obtained for the Land

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

197 The trial judge also found that there was evidence of sales which occurred at market prices, sales to people who were not speculators and sales 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 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 fulfil 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 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 -- 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 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 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 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 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 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.

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*, 2007 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 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.)*, 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: "[t]here 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).

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, fn.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 in the English case of *Sparham-Souter v. Town and Country Developments (Essex) Ltd.*, [1976] 1 Q.B. 858 (C.A.), at p. 868, where Lord Denning M.R. stated:

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

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

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

239 The discoverability principle has been applied in a variety of contexts. In *Kamloops*, the claim arose from negligent construction of the foundation of a house, where there was evidence that the defect was not visible until long after the house was completed. In *M. (K.) v. M. (H.)*, discoverability was used to toll the limitation period until such time as the victim of childhood incest was able to discover "the connection between the harm she has suffered and her

childhood history" (p. 35). In *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, 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.

(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.
>
> (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 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 Alberta and Ontario, and will soon be done in British Columbia: *Limitations Act*, R.S.A. 2000, c. L-12, s. 13; Ontario *Limitations Act, 2002*, s. 2; *Limitation Act*, S.B.C. 2012, c. 13, s. 2 (not yet in force). In my view, this is evidence that legislatures are alive to the issues posed by Aboriginal claims and limitations periods and the choice of whether or not to exempt such claims from basic and ultimate limitations periods is one that belongs to the legislature.

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

253 If Parliament or provincial legislatures wanted to exclude factual claims with a constitutional component from limitations periods, then they could do so by statute. As they have not chosen to make an exception for the type of declaration that the Métis seek in this case, it is inappropriate for this Court to do so.

(d) *Role of Reconciliation*

254 My colleagues suggest that the above rationales have little role to play in an Aboriginal context, where the goal of reconciliation must 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, at para. 13. 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 *Limitations Act*, s. 2(1)(d) (not yet in force).

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 judgements, but this recommendation has not been implemented. In making that recommendation, the Manitoba Law Reform Commission recognized that, while declaratory judgments do not compel 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 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 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.

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 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.

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 section 31 and section 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 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.

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.

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 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 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.

(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 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 (i.e. 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 (i.e. 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 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.

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

Solicitors:

Solicitors for the appellants: Rosenbloom Aldridge Bartley & Rosling, Vancouver.

Solicitor for the respondent the Attorney General of Canada: Attorney General of Canada, Saskatoon.

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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.

Solicitors for the intervener the Métis Nation of Alberta: JTM Law, Toronto.

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Indexed as:

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K.M., appellant;
v.
H.M., respondent, and
Women's Legal Education and Action Fund, intervener.

[1992] 3 S.C.R. 6

[1992] 3 R.C.S. 6

[1992] S.C.J. No. 85

[1992] A.C.S. no 85

File No.: 21763.

Supreme Court of Canada

1991: November 8 / 1992: October 29.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO (119 paras.)

NOTE: A re-hearing on the issue of costs in this Court and in the courts below, including the issue whether costs are to be awarded on a party and party or a solicitor-client basis was held (Coram: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.) and the following was ordered April 29, 1993:

The appellant is entitled to costs at trial on a party and party basis to the date of service of the offer, dated September 24, 1987, and thereafter on a solicitor and client basis. The appellant is also entitled to costs in the Court of Appeal and in this Court on a party and party basis.

Limitation of actions -- Torts -- Assault and battery -- Incest -- Woman bringing action against father for damages for incest -- Whether or not action limited by Limitations Act -- Application of the reasonable discoverability principle -- Whether or not incest a separate and distinct tort -- Limitations Act, R.S.O. 1980, c. 240, s. 45(1)(j), 47.

Limitation of actions -- Equity -- Fiduciary relationship -- Parent-child -- Woman bringing action against father for incest -- Whether incest constitutes a breach of fiduciary duty by a parent -- Whether limitation period applicable and whether the defence of laches applies.

Limitation of actions -- Fraudulent concealment -- Incest -- Whether a limitation period in an incest action is postponed by defendant's fraudulent concealment.

Appellant was the victim of incest. It began with fondling by her father and, after the age of ten or eleven, involved regular sexual intercourse with him. Her cooperation and silence were elicited by various threats which appellant had good reason to take seriously. She was also rewarded with pop, potato chips and money. In time, respondent gave her the responsibility for initiating sexual contact. Appellant tried several times to disclose [page7] this abuse to no avail. At the age of ten or eleven appellant tried to tell her mother and at age sixteen she told a high school guidance counsellor, who referred her to a school psychologist. Her father had her recant both to the psychologist and to a lawyer for the local school board. Other disclosures made after leaving home came to nothing until she finally attended meetings of a self-help group for incest victims and realized that her psychological problems as an adult were caused by the incest. With therapy appellant also came to realize that it was her father rather than herself who was at fault. Professional opinion was that appellant was unable to assess her situation rationally until she entered this therapy.

In 1985, at the age of 28, appellant sued her father for damages arising from the incest and for breach of a parent's fiduciary duty. A jury found that the respondent had sexually assaulted his daughter, and assessed tort damages of $50,000. The trial judge ruled, however, that the action was barred by s. 45 of the Limitations Act. The Ontario Court of Appeal dismissed an appeal from the trial judge's ruling.

At issue here are: (1) whether incest is a separate and distinct tort not subject to any limitation period; (2) whether incest constitutes a breach of fiduciary duty by a parent not subject to any limitation period; and (3) if a limitation period applies, whether it is postponed by the reasonable discoverability principle.

Held: The appeal should be allowed.

Per La Forest, Gonthier, Cory and Iacobucci JJ.: Incest is both a tortious assault and a breach of fiduciary duty. The tort claim, although subject to limitations legislation, does not accrue until the plaintiff is reasonably capable of discovering the wrongful nature of the defendant's acts and the nexus between those acts and the plaintiff's injuries. In this case, that discovery occurred only when the appellant entered therapy, and the lawsuit was commenced promptly thereafter. The time for bringing a claim for breach of a fiduciary duty [page8] is not limited by statute in Ontario, and this breach therefore stands along with the tort claim as a basis for recovery by the appellant. Incest does not constitute a distinct tort, separate and apart from the intentional tort of assault and battery, and the continuous nature of the tort need not be decided here.

Incest unquestionably constitutes an assault and battery, and based on the jury's verdict, all of the requisite elements of the test were proved. Assault and battery, however, can only serve as a crude legal description of incest; the law must also take account of the unique and complex nature of incestuous abuse and its consequential harms. Various psychological and emotional harms immediately beset the victim of incest, but much of the damage is latent and extremely debilitating. When the damages begin to become apparent, the causal connection between the incestuous activity and present psychological injuries is often unknown to the victim. A statute of limitations provides little incentive for an incest victim to prosecute his or her action in a timely fashion if the victim has been rendered psychologically incapable of recognizing that a cause of action exists.

The reasonable discoverability rule, as developed in previous decisions of this Court, should be applied and the limitations period should begin to run only when the plaintiff has a substantial awareness of the harm and its likely cause. The causal link between fault and damage is an important fact, essential to the formulation of the right of action, that is often missing in cases of incest. In making this link, the plaintiff must have an awareness of the wrongfulness of the defendant's incestuous conduct. Battery consists of wrongful touching, and the plaintiff must discover the wrongfulness of the contact and its consequential effects before the cause of action accrues. The issue properly turns on the question of when the victim becomes fully cognizant of who bears the responsibility for his or her childhood abuse,

for it is then that the victim realizes the nature of the wrong suffered. As such, responsibility plays a pivotal role in both the genesis and the cessation of the harms caused by incestuous abuse.

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The close connection between therapy and the shifting of responsibility is typical in incest cases and creates a presumption that incest victims only discover the necessary connection between their injuries and the wrong done to them (thus discovering their cause of action) during some form of psychotherapy. If the evidence in a particular case is consistent with the typical features of "post-incest" syndrome, then the presumption will arise. The defendant can refute the presumption by leading evidence showing that the plaintiff appreciated the causal link between the harm and its origin without the benefit of therapy.

In this case, the trial judge did not address the critical issue of when appellant discovered her cause of action, in the sense of having a substantial awareness of the harm and its likely cause, and made no finding that appellant had made the necessary connection at any time before entering therapy. Moreover, the presumption outlined above should be applied here. Appellant was a typical incest survivor, and both presumptively and in fact did not make the causative link between her injuries and childhood history until she received therapeutic assistance. Evidence to the contrary was entirely speculative. In the result, the limitations period did not begin to run against her until she received therapy, and this action was commenced before that period expired.

Appellant argued that the limitation period was also tolled by respondent's fraudulent concealment of her cause of action. This point need not be decided, but some comment on the law of fraudulent concealment is provided for the sake of clarity. Fraudulent concealment (when applicable) will toll the limitation of both common law and equitable claims until the time the plaintiff can reasonably discover her cause of action. Incest cases may be amenable to the application of fraudulent concealment as an answer to a limitations defence; incest takes place in a climate of secrecy, and the victim's silence is attained through various insidious measures which condition the victim to conceal the wrong from herself. The fact that the abuser is a trusted family authority figure in and of itself masks the wrongfulness of the conduct in the child's eyes, thus fraudulently concealing the cause of action.

[page10]

Incest also constitutes a breach of the fiduciary relationship between parent and child. Ontario's Limitations Act does not limit actions against a fiduciary, although certain equitable doctrines may bar a claim because of delay. The courts below did not consider appellant's claim in equity, but the issue should now be addressed; a breach of fiduciary duty cannot be automatically overlooked in favour of concurrent common law claims. The relationship between parent and child is fiduciary in nature, and the sexual assault of one's child is a grievous breach of the obligations arising from that relationship. Equity has imposed fiduciary obligations on parents in contexts other than incest, and a duty to refrain from incestuous assaults on one's child is an obvious addition to this category. The three indicia of a fiduciary relationship are all evident in this case, and the non-economic interests of an incest victim are particularly susceptible to protection from the law of equity.

The plaintiff's delay in bringing her claim for breach of fiduciary duty raises three potential hurdles that may bar her claim: limitations legislation, the application of that legislation by analogy, and the equitable doctrine of laches. All of these hurdles, however, are overcome in this case. First Ontario's Limitations Act applies only to a closed list of enumerated causes of action which does not include fiduciary obligations. Equity in some cases will operate by analogy and adopt a statutory limitation period that does not otherwise expressly apply, but this is not such a case. Equity has rarely limited a claim by analogy when the action falls within its exclusive jurisdiction, as in this claim for breach of fiduciary duty. Moreover, even if it is appropriate to draw an analogy to a common law action, the analogy will be governed by the parameters of the equitable doctrine of laches. Finally, any analogy would be nullified by the doctrine

of fraudulent concealment. Even if an analogy could be drawn, it would not be fatal to appellant's claim: as with the limitation in tort, a limitation by analogy would be tolled by the operation of the reasonable discoverability principle.

[page11]

For the respondent to benefit from the defence of laches, acquiescence on the part of the appellant must be demonstrated. Acquiescence in this context consists of delay by a plaintiff despite knowledge that her rights have been violated. Such a delay gives rise to an inference that the plaintiff's rights have been waived. A plaintiff's conduct will be measured objectively: was it reasonable for the plaintiff to have remained ignorant of her legal rights given her knowledge of the facts relevant to a legal claim? In this case, because the appellant mistakenly blamed herself for the incest, it was entirely reasonable for her to have been incapable of appreciating that her rights in equity or in law had been violated. As such, she could not have acquiesced to the respondent's conduct. The doctrine of acquiescence bears a marked similarity to the common law discoverability principle. They share the common requirement of knowledge on the part of the plaintiff. The point of distinction is a residual inquiry in equity: in light of the plaintiff's knowledge, can it reasonably be inferred that the plaintiff has acquiesced to the defendant's conduct? The answer to that question depends on the circumstances of each case, but it would require particularly compelling evidence to demonstrate that an incest victim had "acquiesced" to the sexual assaults made against her.

As for the remedy in this case, the jury has assessed damages in tort, and this award should not be disturbed. An additional remedy in equity should not be awarded in this case, as the policy objectives animating the remedy for this breach of a parent's fiduciary duty are the same as those underlying incestuous sexual assault. Both seek to compensate the victim for her injuries and to punish the wrongdoer.

Per L'Heureux-Dubé J.: The reasons and result of La Forest J. and the comments of McLachlin J. on the nature and quantum of damages associated with a breach of fiduciary duty, as opposed to those underlying the torts of battery and assault, were agreed with.

Per Sopinka J.: The reasons and result of La Forest J. were agreed with except with respect to the creation of a presumption and the shifting of the legal burden of proof.

[page12]

Resort should not be had to a presumption that a plaintiff typical of the syndrome is unaware of the injury done to her until she undergoes therapy. Firstly, the legal effect of presumptions is varied and uncertain as to its evidentiary effect. Secondly, this presumption will create difficulties for the trial judge and the litigants in that it will reverse the ordinary burden of proof without any justification. It is not clear whether the presumption, which would require determination on a prima facie basis, would create merely an evidentiary burden or a legal burden. The former could be blunted by the defendant's leading some evidence restoring the legal burden of proof to the plaintiff. The latter would reverse the legal burden of proof so that the defendant would bear the risk of non persuasion and is the probable result intended because of the use of the term "refute".

There was no reason to reverse the traditional burden of proof. The basic criteria for the allocation of the burden of proof apply to justify maintaining the legal burden of proof with respect to reasonable discoverability on the plaintiff. It is the plaintiff who is seeking an exemption from the normal operation of the statute of limitations asserting that she was not aware of her cause of action for many years after the statutory period would otherwise have commenced to run. Moreover the plaintiff is in the best position to adduce evidence of her lack of awareness and the defendant is not. The appeal should be disposed of as proposed by La Forest J.

Per McLachlin J.: Agreement with the reasons of La Forest J. was qualified.

A presumption that the plaintiff discovers the cause of action when a therapeutic relationship begins is not necessary. The question is a matter of fact to be determined in all the circumstances. A presumption is appropriate in special circumstances, as where the facts are largely in the possession of the opposing party on an issue, but there were no such circumstances here. Further, there was no magic in the commencement of a therapeutic relationship. The commencement of the relationship is only one of a number of factors which should be considered in determining when the limitation period begins to run.

[page13]

The award which the jury made was not adequate. The jury assessed damages for the tort of battery and assault, as requested, and the appellant did not appeal from that award and only asked that the jury's award be reinstated. The question of whether the award was appropriate or not did not arise here.

The measure of damages for assault and battery would not necessarily be the same as compensation for breach of fiduciary duty. The wrong encompassed by the torts of battery and assault may be different from the wrong encompassed by the action for a breach of fiduciary duty. Trustees have always been held to highest account in a manner stricter than that applicable to tortfeasors. While agreeing with La Forest J. that where the same policy objectives underlie two different causes of action similar measures of compensation may be appropriate, the policy objectives or the wrong involved in breach of fiduciary duty of this nature are not necessarily the same as those which underlie the torts of battery and assault.

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By La Forest J.

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APPEAL from a judgment of the Ontario Court of Appeal (1989), 18 A.C.W.S. (3d) 490, dismissing an appeal from a judgment of Maloney J. Appeal allowed.

James W. W. Neeb, Q.C., and Shelly J. Harper, for the appellant.

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Murray E. McGee, for the respondent. Elizabeth McIntyre and Nicole Tellier, for the intervener.

Solicitor for the appellant: James W. W. Neeb, Kitchener. Solicitors for the respondent: Mollison, McCormick, McIntyre, McGee, Kitchener. Solicitors for the intervener: Cavalluzzo, Hayes & Lennon, Toronto, and Mossip, Tellier, Mississauga.

The judgment of La Forest, Gonthier, Cory and Iacobucci JJ. was delivered by

1 LA FOREST J.:-- This case concerns the procedural obstacles facing victims of childhood incestuous abuse who attempt to vindicate their rights in a civil action for damages against the perpetrator of the incest. While the problem of

incest is not new, it has only recently gained recognition as one of the more serious depredations plaguing Canadian families. Its incidence is alarming and profoundly disturbing. The damages wrought by incest are peculiarly complex and devastating, often manifesting themselves slowly and imperceptibly, so that the victim may only come to realize the harms she (and at times he) has suffered, and their cause, long after the statute of limitations has ostensibly proscribed a civil remedy. It has been said that the statute of limitations remains the primary stumbling block for adult survivors of incest, and this has proved to be the case thus far for the appellant in the present action. The appellant commenced this action for damages occasioned as a result of recurrent sexual assaults between the ages of eight and sixteen when she was twenty-eight. A jury found that the respondent committed sexual assault upon the appellant and assessed damages at $50,000, but her action was dismissed on the basis of a statute of limitations.

Background

2 The appellant testified at trial that the abuse began when she was eight when the respondent, her father, asked her about her knowledge of the female genital and breast areas and the male genital area. It progressed to the respondent's touching her body and telling her that "if he played with [her] breasts that they would grow big". Intercourse began when she was between ten and [page18] eleven and continued thereafter two or three times a week. Her cooperation and silence were elicited by various means: the respondent reportedly threatened that disclosure would cause her mother to commit suicide, the family would break up, nobody would believe her, and finally that he would kill her. The appellant had good reason to take these threats seriously, inasmuch as she was told that her mother had been hospitalized for attempting to harm her when she was an infant by cutting her wrists; her father pointed out the scars on her wrist as proof. The appellant's mother, who was also named as a defendant in the action, confirmed the incident, but attributed it to depression. The appellant also gave evidence that her mother regularly exhibited irrational behaviour when she was upset, such as pulling her hair and screaming.

3 In addition to the threats, the respondent induced his daughter to submit to the abuse silently; he rewarded her with pop, potato chips and money. In time, he gave her the responsibility for initiating sexual contact. She was instructed to leave her bedroom light on when she wanted him, and she complied out of fear that he would turn to her younger sister for gratification. Eventually, she turned on the light because "that was the way for [her] to do it". Her mental process during the act of intercourse was to imagine herself as an inanimate object, for example a door handle or carpet. This process took place against an emotional backdrop of fear -- fear of him and fear of discovery.

4 At the age of ten or eleven the appellant tried to tell her mother what was occurring by obliquely referring to a white substance that appeared on her genital area, but she testified that her mother ignored the complaint. Her mother denied that she was unresponsive, and testified that she gave her daughter a book on menstruation. When the appellant was sixteen she told a high school guidance counsellor that her father was having sex with her. She made the disclosure because she thought she [page19] could trust the counsellor and that she would be removed from the home so as to be "safe" from her father. Although she was not certain that having sex with her father was wrong, she knew she did not want him to do it to her any more. She was ultimately referred to a psychologist at the Kitchener-Waterloo Hospital, Dr. McKie, and she recalls that he seemed to disbelieve her complaint since he kept sending her home. His report, dated July 16, 1973, indicates that after interviewing the appellant and respondent separately, both came to see him and told him that "it was all a lie and things are fine now", whereupon no further steps were taken. The appellant does not remember this, but testified that her father brought her to see a lawyer for the local school board and forced her to tell the lawyer that she had been lying about her allegations of incest.

5 Later that year the appellant left home to live with another family as their babysitter. She told her employer of the incest, but nothing came of it. The following year she obtained employment as a waitress, where she met Steven. They were married a short while later. Her evidence was that she married him so that she could visit her siblings at the family home without being assaulted by the respondent. She harboured the belief that she was protected from further incestuous abuse because she thought her husband now "owned" her and therefore enjoyed an exclusive right to have sex with her, and that he had thus replaced her father as her owner. She also disclosed the incest to her husband, and although there was some conflict in the evidence as to what his response was, the matter went no further.

6 Over the next few years the appellant had three children and continued to work at a series of low-paying jobs. In the fall of 1982 the appellant and her husband separated because she could no longer tolerate sexual relations with him. She sought [page20] counselling for depression and her marital problems in the spring of 1983, and was referred to Dr. Voss, a psychologist at the Kitchener-Waterloo Hospital. He read the hospital file on her consultation with Dr. McKie in 1973, and the subject of incest was accordingly raised during one of their sessions. However, the appellant did not want to talk about the incest and Dr. Voss did not feel it prudent to pursue the subject, in light of his professional opinion that the requisite degree of trust between patient and therapist had not been established to deal effectively with the problem, and because her current problems did not appear to be directly connected to her history of incest.

7 Later in 1983 the appellant met Peter, to whom she became engaged to be married. Shortly after they met, she told him of the incestuous abuse because, in her words, she "didn't want to lose him and I wanted him to know right away what I had done". As a result of their discussion, she made enquiries about self-help groups for incest victims and found one in Kitchener. It was during the course of attending meetings of this group in 1984 that the appellant began to recall many of her childhood experiences and to make the connection between that history and her psychological and emotional problems. Until then she believed that her phobias, including a fear of strangers and difficulties coping with her children, were attributable to her own stupidity. She was only able to overcome her overwhelming feelings of guilt for causing the incest once she came to the realization that it was her father who was responsible for the abuse. Beginning in 1985 she has continued in therapy with a marital and family therapist, Ms. Pressman, who also testified at the trial.

8 In Ms. Pressman's opinion, the appellant would have been unaware of the connection between the incest and her psychological and emotional injuries until she understood that she was not responsible [page21] for her childhood abuse, and had assigned the blame to her father. Although she had a constant, if vague, awareness of the fact of incest, the appellant repressed or blocked out much of it and was thus unaware that her level of functioning was related to those earlier events in her life. This repression originally took the form of dissociation, whereby the appellant would imagine herself as some inanimate object during the course of the incestuous assaults. The appellant's later disclosure of the incest to a number of people did not detract from Ms. Pressman's opinion in this regard. Similarly, Dr. Mausberg, a psychiatrist retained by the appellant in contemplation of this litigation, testified that the earlier disclosures indicated some awareness of the incest and its consequences, but it was not until the appellant began therapy that she could make a connection between the two. Although there may at times have been an intellectual awareness of the correlation between cause and effect, the appellant did not have an emotional awareness of the connection. In other words, she was unable to assess her situation rationally. Dr. Mausberg also stressed the great feelings of guilt engendered by the appellant's perceived role in instigating the sexual contact by turning on the light, and how she came to believe that this was part of growing up. Even as she came to realize how untrue this was, she still felt responsible for the abuse. His clinical assessment was that the appellant was suffering major depression resulting from incestuous activity that occurred from childhood into adolescence.

9 The respondent, on the other hand, retained a psychologist, Dr. Langevin, to conduct an assessment of the appellant. He questioned Dr. Mausberg's findings, but conceded that the appellant had suffered depression at different times in her adult life. He doubted that the appellant would repress an emotional awareness of the incest and its consequences while having an intellectual [page22] awareness of it. For him, dissociation would normally entail a lack of awareness of the total cognitive or thought processes and emotions surrounding the anxiety-producing situation. Dr. Langevin did agree that the best response that can be hoped for in an incest victim is for her to fix responsibility for the abuse on the perpetrator.

10 In 1985 the appellant sued her father for damages arising from the incest, or in the alternative for the infliction of mental distress. Further damages were claimed for breach of a parent's fiduciary duty to care for and minister to his child. The claims of mental distress and breach of fiduciary duty were also made against the appellant's mother. Before the trial began, counsel for the respondent moved for dismissal of the action on the ground that it was barred by the passage of time pursuant to s. 45 of the Limitations Act, R.S.O. 1980, c. 240. It reads:

> 45.--(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned,
>
> ...
>
> (j) an action for assault, battery, wounding or imprisonment, within four years after the cause of action arose;

However, s. 47 of the Act postpones the limitation period if the plaintiff is under a legal disability -- i.e., is a minor, mental defective, mental incompetent or of unsound mind, and the appellant had pleaded that she had been of unsound mind until she underwent therapy. It reads:

> 47. Where a person entitled to bring an action mentioned in section 45 or 46 is at the time the cause of action accrues a minor, mental defective, mental incompetent or of unsound mind, the period within which the action may be brought shall be reckoned from the date when such person became of full age or of sound mind.

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> The trial judge postponed the limitations motion until the end of the trial, so that it could be decided in light of all the evidence.

11 The jury found that the respondent had sexually assaulted his daughter, and awarded $50,000 in damages. However, Maloney J. allowed the respondent's limitations application, and found that action statute-barred. He ruled that the appellant had been of sound mind from the age of majority, in that she had been capable of retaining and instructing counsel. Moreover, assuming that her cause of action only accrued when it was reasonably discoverable, Maloney J. found that from the age of sixteen the appellant was aware that she had been wronged and had suffered adverse effects. Accordingly, her cause of action was reasonably discoverable at that time, and the subsequent lapse of time before commencing the action contravened the Limitations Act.

12 By endorsement the Ontario Court of Appeal dismissed an appeal of the limitations decision. Leave to appeal to this Court was granted on November 15, 1990 and the Women's Legal Education and Action Fund (LEAF) was subsequently granted leave to intervene.

Issues

13 Several issues were argued by the appellant, and for the sake of completeness, I will enumerate them all here: (1) incest is a separate and distinct tort which is not subject to any limitation period; (2) incest constitutes a breach of fiduciary duty by a parent and is not subject to any limitation period; (3) if a limitation period applies, the cause of action does not accrue until it is reasonably discoverable; (4) the appellant was of unsound mind pursuant to s. 47 of the Limitations Act; (5) the tort is continuous in nature and the limitation period does not begin to run until the plaintiff is no longer subjected to parental authority and conditioning; and [page24] (6) the equitable doctrine of fraudulent concealment operates to postpone the limitation period.

14 For the reasons that follow, I am of the view that this appeal should be allowed. Incest is both a tortious assault and a breach of fiduciary duty. The tort claim, although subject to limitations legislation, does not accrue until the plaintiff is reasonably capable of discovering the wrongful nature of the defendant's acts and the nexus between those acts and her injuries. In this case, that discovery took place only when the appellant entered therapy, and the lawsuit was commenced promptly thereafter. The time for bringing a claim for breach of a fiduciary duty is not limited by statute in

Ontario, and therefore stands along with the tort claim as a basis for recovery by the appellant. As for the other issues raised by the appellant, I am of the view that incest does not constitute a distinct tort, separate and apart from the intentional tort of assault and battery, and the continuous nature of the tort need not be decided in this case. Similarly, I do not find it necessary to deal with the question of whether the appellant was of unsound mind, although it seems to me that such a pejorative term is inappropriate in this context. Fraudulent concealment was not considered by the courts below, and the respondent argued that additional evidence might have been adduced had the issue been raised in those courts. As such, I make no finding on that issue, but I would not foreclose considering its availability for postponing limitation periods in other cases.

15 The intervener, LEAF, argued that the Limitations Act, in so far as its provisions bar incest claims, violates s. 15 of the Canadian Charter of Rights and Freedoms. It submits that the provisions [page25] bar claims of women in a disproportionate fashion and so constitutes discrimination on the basis of sex. Alternatively, it submits that the Limitations Act should be interpreted in a manner consistent with the Charter in effecting a liberal application of the limitations provisions as they affect incest victims. In view of the result I have arrived at, it is unnecessary to pursue these constitutional arguments.

Recovery in Tort

Incest and the Cause of Action

16 Incest is defined in the Criminal Code, R.S.C., 1985, c. C-46, s. 155, as follows:

> 155. (1) Every one commits incest who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person.

That definition narrowly prescribes the necessary degree of consanguinity and sexual conduct for the purposes of criminal liability. The civil action may well admit of a wider ambit of relationship and sexual activity. However, it is not necessary for the purposes of this case to stray outside of the criminal law definition, since both elements of consanguinity and sexual intercourse are present in this case.

17 There is no question, of course, that incest constitutes an assault and battery, which can be compendiously defined as causing another person to apprehend the infliction of immediate harmful or offensive force on her person coupled with the actual infliction of that harmful or offensive force; see Atrens, "Intentional Interference with the Person", in Linden, ed., Studies in Canadian Tort Law (1988), at p. 392, and Fridman, Fridman on Torts (1990), at pp. 118-19. Although a necessary element of the tort of assault and battery is intention on the part of the defendant with respect to the [page26] consequences of his wrongful act, the following dictum of Cartwright J. in Cook v. Lewis, [1951] S.C.R. 830, at p. 839, concerning onus of proof of intention has not since been doubted:

> ... where a plaintiff is injured by force applied directly to him by the defendant his case is made by proving this fact and the onus falls upon the defendant to prove "that such trespass was utterly without his fault". In my opinion Stanley v. Powell rightly decides that the defendant in such an action is entitled to judgment if he satisfies the onus of establishing the absence of both intention and negligence on his part.

In the present case no evidence of the respondent's intention was adduced, since the theory of the defence was that no assault had occurred. I am therefore satisfied, based on the jury's verdict, that all of the requisite elements of assault and battery were proved. The battery is self-evident from the jury's finding of fact, and the evidence going to the respondent's pattern of conduct makes it abundantly clear that the appellant was conditioned to be alert to the circumstances which presaged the battery, such that she had a reasonable apprehension of imminent offensive contact, thereby constituting an assault.

18 Assault and battery can only serve as a crude legal description of incest, and in order to understand fully the fundamental elements of the tort in this context, it is necessary to examine the unique and complex nature of incestuous abuse and its consequential harms. Considerable expert evidence was presented at trial, and while there was some disagreement concerning the dynamics of incest, there was substantial agreement on the more significant aspects of the phenomenon. Much of the evidence was in accord with the scientific and legal literature on the subject, most of which comes from the United States. For example, Gelinas in her article "The Persisting Effects of Incest" (1983), 46 Psychiatry 312, describes the secrecy conditioning that typifies the incestuous relationship. She observes, at pp. 313-14:

[page27]

> It is easy to gain the compliance of a young child by misrepresenting sex as affection or training, by threats and bribes, and by exploiting the child's loyalty, need for affection, desire to please, and especially trust of the parent.

Similarly, Summit in his article "The Child Sexual Abuse Accommodation Syndrome" (1983), 7 Child Abuse & Neglect 177, at p. 181, describes the child victim as entirely dependent on the abusive parent for whatever reality is assigned to the experience. "Of all the inadequate, illogical, self-serving, or self-protective explanations provided by the adult," he states, "the only consistent and meaningful impression gained by the child is one of danger and fearful outcome based on secrecy."

19 Incest instills feelings of guilt and shame in the child, and these negative connotations become incorporated into the child's self-image; see Finkelhor and Browne, "The Traumatic Impact of Child Sexual Abuse: A Conceptualization" (1985), 55 Amer. J. Orthopsychiat. 530, at p. 532. What is vitally important to recognize at this stage is the sense of responsibility that is conferred on the abused child for both instigating the incestuous activity and maintaining silence to ensure family stability. The child is given the power to destroy the family and the responsibility to keep it together. Dr. Mausberg, in his evidence, thus described it:

> Imagine yourself in the role of a child with an abusive father or sibling and you can't tell the secret as to what happens between the two of you because if you reveal it the family will be destroyed, they will all scatter away, your mother might kill herself or suffer an illness of devastating proportions, your father, who is the perpetrator of this, will reject you and not love you. You, as a child of eight or nine or ten, become in one sense a person of authority in this family, you control what is going to happen to you and everyone else.
>
> ...
>
> Imagine being a child of eight or nine or ten and facing these awesome powers you have been entrusted with [page28] and, at the same time, being so dependent on your father for his love, his money, his shelter, his food, so you can't defy him even if you choose to.

This represents but a sampling of the various psychological and emotional harms that immediately beset the victim of incest. However, much of the damage is latent, only manifesting later in adulthood.

20 The victim's feelings of guilt, helplessness, isolation and betrayal are reinforced when her attempts at disclosure to persons in authority are met with scepticism, incredulity and anger; see Summit, supra, at p. 178, and Finkelhor and Browne, supra, at p. 532. With respect to the long-term damages that can normally be expected, the most commonly observed effects are thus summarized by Handler in "Civil Claims of Adults Molested as Children: Maturation of Harm and the Statute of Limitations Hurdle" (1987), 15 Fordham Urb. L.J. 709, at pp. 716-17:

> The most commonly reported long-term effects suffered by adult victims of incest abuse include depression, self-mutilation and suicidal behavior, eating disorders and sleep disturbances, drug or alcohol abuse, sexual dysfunction, inability to form intimate relationships, tendencies towards promiscuity and prostitution and a vulnerability towards revictimization.

Dr. Langevin, the psychiatrist called by the respondent, conceded that the appellant's clinical pathology might be attributable to incestuous abuse. Her symptoms included depression, hysterical anxiety, family disturbance, suspiciousness, confusion and withdrawal from other people. In short, there is ample evidence that the psychological sequelae from incestuous abuse can be, and in the present case have been, extremely debilitating.

The Limitations Act and Reasonable Discoverability

21 The appellant argues that her cause of action did not accrue until she went through a form of therapy, because her psychological injuries were [page29] largely imperceptible until later in her adult life and thus not reasonably discoverable until she was able to confront her past with the assistance of therapy. During the hearing, counsel for the respondent conceded that the doctrine of reasonable discoverability had application to an action grounded in assault and battery for incest. He submitted, however, that the appellant was aware of her cause of action no later than when she reached the age of majority. In order to determine the time of accrual of the cause of action in a manner consistent with the purposes of the Limitations Act, I believe it is helpful to first examine its underlying rationales. There are three, and they may be described as the certainty, evidentiary, and diligence rationales; see Rosenfeld, "The Statute of Limitations Barrier in Childhood Sexual Abuse Cases: The Equitable Estoppel Remedy" (1989), 12 Harv. Women's L.J. 206, at p. 211.

22 Statutes of limitations have long been said to be statutes of repose; see Doe on the demise of Count Duroure v. Jones (1791), 4 T.R. 301, 100 E.R. 1031, and A'Court v. Cross (1825), 3 Bing. 329, 130 E.R. 540. The reasoning is straightforward enough. 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. In my view this is a singularly unpersuasive ground for a strict application of the statute of limitations in this context. While there are instances where the public interest is served by granting repose to certain classes of defendants, for example the cost of professional services if practitioners are exposed to unlimited liability, there is absolutely no corresponding public benefit in protecting individuals who perpetrate incest from the consequences of their wrongful actions. The patent inequity of allowing these individuals to go on with their life without liability, while the victim continues to suffer the consequences, clearly militates against any guarantee of repose.

[page30]

23 The second rationale is evidentiary and concerns the desire to foreclose claims based on stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim; see Dundee Harbour Trustees v. Dougall (1852), 1 Macq. 317 (H.L.), and Deaville v. Boegeman (1984), 48 O.R. (2d) 725 (C.A.). However, it should be borne in mind that in childhood incest cases the relevant evidence will often be "stale" under the most expedient trial process. It may be ten or more years before the plaintiff is no longer under a legal disability by virtue of age, and is thus entitled to sue in her own name; see Tyson v. Tyson, 727 P.2d 226 (Wash. 1986), at p. 232, per Pearson J. (dissenting). In any event, I am not convinced that in this type of case evidence is automatically made stale merely by the passage of time. Moreover, the loss of corroborative evidence over time will not normally be a concern in incest cases, since the typical case will involve direct evidence solely from the parties themselves.

24 Finally, plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion. This rationale again finds expression in several cases of some

antiquity. For example in Cholmondeley v. Clinton (1820), 2 Jac. & W. 1, 37 E.R. 527, the Master of the Rolls had this to say in connection with limitation periods for real property actions, at p. 140 and p. 577, respectively:

> The statute is founded upon the wisest policy and is consonant to the municipal law of every country. It stands upon the general principle of public utility. Interest reipublic ut sit finis litium, is a favorite and universal maxim. The public have a great interest, in having a known limit fixed by law to litigation, for the quiet of the community, and that there may be a certain fixed period, after which the possessor may know that his title and right cannot be called in question. It is better that the negligent owner, who has omitted to assert his right within the prescribed period, should lose his right, than [page31] that an opening should be given to interminable litigation, exposing parties to be harassed by stale demands, after the witnesses of the facts are dead, and the evidence of the title lost. The individual hardship will, upon the whole, be less, by withholding from one who has slept upon his right ... . [Emphasis added.]

There are, however, several reasons why this rationale for a rigorous application of the statute of limitations is particularly inapposite for incest actions.

25 As I mentioned earlier, many, if not most, of the damages flowing from incestuous abuse remain latent until the victim is well into adulthood. Secondly, and I shall elaborate on this further, when the damages begin to become apparent, the causal connection between the incestuous activity and present psychological injuries is often unknown to the victim; see DeRose, "Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages" (1985), 25 Santa Clara L. Rev. 191, at p. 196. This Court has already taken cognizance of the role that the perpetrator plays in delaying the reporting of incest; see R. v. L. (W.K.), [1991] 1 S.C.R. 1091. That case concerned a stay of criminal proceedings, arising out of alleged childhood sexual abuse, commenced after a lengthy delay. Stevenson J., speaking for the Court, observed, at p. 1101:

> For victims of sexual abuse to complain would take courage and emotional strength in revealing those personal secrets, in opening old wounds. If proceedings were to be stayed based solely on the passage of time between the abuse and the charge, victims would be required to report incidents before they were psychologically prepared for the consequences of that reporting.
>
> That delay in reporting sexual abuse is a common and expected consequence of that abuse has been recognized in other contexts. In the United States, many states have enacted legislation modifying or extending the limitation period for the prosecution of sexual abuse cases, in recognition of the fact that sexual abuse often goes unreported, and even undiscovered by the complainant, for years... . Establishing a judicial statute of limitations [page32] would mean that sexual abusers would be able to take advantage of the failure to report which they themselves, in many cases, caused. This is not a result which we should encourage. There is no place for an arbitrary rule. [Emphasis added.]

Needless to say, a statute of limitations provides little incentive for victims of incest to prosecute their actions in a timely fashion if they have been rendered psychologically incapable of recognizing that a cause of action exists.

26 Further, one cannot ignore the larger social context that has prevented the problem of incest from coming to the fore. Until recently, powerful taboos surrounding sexual abuse have conspired with the perpetrators of incest to silence victims and maintain a veil of secrecy around the activity. The cogency of these social forces would inevitably discourage victims from coming forward and seeking compensation from their abusers. The English Court of Appeal in Stubbings v. Webb, [1991] 3 All E.R. 949 (C.A.), recently acknowledged that the social climate during the mid-1970s was not at all conducive to bringing an action of this nature. That case involved a remarkably similar fact situation to

that in the present case. Although the relevant statute of limitations is quite different from the Ontario Act, the following remarks made by Sir Nicolas Browne-Wilkinson, V.-C., at p. 960, are nevertheless telling:

> The question is whether, in 1975, the plaintiff acted reasonably in not then suing Mr Webb and Stephen Webb for the serious wrongs alleged to have been done to her. In my judgment it is important not to consider the question by reference to the social habits and conventions of 1991. Over recent years, for the first time civil actions have been brought by victims of adult rape against their assailants. As to actions against child abusers, this is apparently the first case in which the alleged victim has sought to sue her abusers. In the present climate and state of knowledge it would in my judgment be very difficult, if not impossible, for a plaintiff coming of age in the late 1980s to establish that she acted 'reasonably' in not starting proceedings alleging child abuse within three years of attaining her majority. But we are concerned with the reasonableness of the plaintiff's behaviour [page33] in the period 1975-78. At that time civil actions based on sexual assaults were unknown in this country. In my judgment, it was accordingly reasonable for the plaintiff not to have considered the injuries done to her sufficiently serious to justify starting proceedings against her adoptive father and brother. In 1975 such proceedings were unthought of and it was therefore reasonable for her not to have started such proceedings.

I would adopt these comments as a reasonable description of the situation in this country at that same time.

27 The foregoing discussion has examined the policy reasons for limitations from the perspective of fairness to the potential defendant. However this Court has also said that fairness to the plaintiff must also animate a principled approach to determining the accrual of a cause of action. In Kamloops (City of) v. Nielsen, [1984] 2 S.C.R. 2, one of the issues that arose was whether the plaintiff's action was statute-barred by the British Columbia Municipal Act, R.S.B.C. 1960, c. 255, where the plaintiff first became aware of the damage after the one year prescription. Wilson J., writing for the majority, observed that the injustice which statute-bars a claim before the plaintiff is aware of its existence takes precedence over any difficulty encountered in the investigation of facts many years after the occurrence of the allegedly tortious conduct.

28 This principle was later adopted in Central Trust Co. v. Rafuse, [1986] 2 S.C.R. 147, where the Court held that the reasonable discoverability rule was as applicable to cases involving professional negligence as it was to actions involving injury to [page34] property. Le Dain J. thus articulated the general rule, at p. 224:

> ... a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence ... .

That essentially mirrors the delayed discovery doctrine developed in the United States, where the rationale most often cited is the plaintiff who is "blamelessly ignorant" of his injury; see Urie v. Thompson, 337 U.S. 163 (1949).

29 American courts have also refined the rule to meet different circumstances and harms. In Raymond v. Eli Lilly & Co., 371 A.2d 170 (N.H. 1977), the court set out the gradations of accrual as follows, at p. 172:

> There are at least four points at which a tort cause of action may accrue: (1) When the defendant breaches his duty; (2) when the plaintiff suffers harm; (3) when the plaintiff becomes aware of his injury; and (4) when the plaintiff discovers the causal relationship between his harm and the defendant's misconduct.

Kenison C.J. rightly observed that in the typical tort case all of these events occur simultaneously so that the moment of accrual is clear. He also reconciled the apparent conflict in American jurisprudence in which some courts have stated the rule in terms of discoverability of injury while most others have framed the rule in terms of the plaintiff's discovery

of the causal relationship between his injury and the defendant's conduct. The former line of cases can be explained on the basis that the relevant injury was of a kind that put the plaintiffs on immediate notice that their rights had been violated. However, many courts have applied the latter rule which requires knowledge of the harm and [page35] its likely cause; see for example Franklin v. Albert, 411 N.E.2d 458 (Mass. 1980).

Application of the Discoverability Rule to Incest

30 In my view the only sensible application of the discoverability rule in a case such as this is one that establishes a prerequisite that the plaintiff have a substantial awareness of the harm and its likely cause before the limitations period begins to toll. It is at the moment when the incest victim discovers the connection between the harm she has suffered and her childhood history that her cause of action crystallizes. I am in complete agreement with Professor Des Rosiers that the causal link between fault and damage is an important fact, essential to the formulation of the right of action, that is so often missing in cases of incest; see "Les recours des victimes d'inceste et d'agression sexuelle" to be published in Legrand, ed., Common law d'un siècle à l'autre (1992). What is more, I am satisfied that the weight of scientific evidence establishes that in most cases the victim of incest only comes to an awareness of the connection between fault and damage when she realizes who is truly responsible for her childhood abuse. Presumptively, that awareness will materialize when she receives some form of therapeutic assistance, either professionally or in the general community. I have come to this conclusion after studying the expert evidence in this case and the American jurisprudence which has wrestled with this problem over the past decade. The presumption will, of course, be displaced when the evidence establishes that the victim discovered the harm and its likely cause at some other time.

31 The psychological manifestations of incest suffered by adult survivors have been the subject of considerable academic study in recent years. Researchers have uncovered behaviourial patterns [page36] commonly referred to as an "accommodation syndrome" or a "post-incest syndrome"; see Summit, "The Child Sexual Abuse Accommodation Syndrome", supra. The academic findings are well summarized by Lamm in "Easing Access to the Courts for Incest Victims: Toward an Equitable Application of the Delayed Discovery Rule" (1991), 100 Yale L.J. 2189, at pp. 2194-95, in the following passage:

> The classic psychological responses to incest trauma are numbing, denial, and amnesia. During the assaults the incest victim typically learns to shut off pain by "dissociating," achieving "altered states of consciousness ... as if looking on from a distance at the child suffering the abuse." To the extent that this defense mechanism is insufficient, the victim may partially or fully repress her memory of the assaults and the suffering associated with them: "Many, if not most, survivors of child sexual abuse develop amnesia that is so complete that they simply do not remember that they were abused at all; or ... they minimize or deny the effects of the abuse so completely that they cannot associate it with any later consequences." Many victims of incest abuse exhibit signs of Post-Traumatic Stress Disorder ("PTSD"), a condition characterized by avoidance and denial that is associated with survivors of acute traumatic events such as prisoners of war and concentration camp victims. Like others suffering from PTSD, incest victims frequently experience flashbacks and nightmares well into their adulthood.
>
> Experts have also noted a strong correlation between incest and long-term damage: severe anxiety and depression, sexual dysfunction, and multiple personality disorder. Additionally, the internalization of the anger and anxiety that the incest victim has not been allowed to express frequently results in a profound self-hatred that causes self-destructive behavior later on: incestuous childhood victimization commonly leads to other abusive relationships, self-mutilation, prostitution, and drug and alcohol addiction.

[page37]

> Finding that the coexistence of these psychological and emotional disorders is unique to and characteristic of incest victims, experts have joined them under the heading "Post-Incest Syndrome". Those suffering from this syndrome will "persistently avoid any situation, such as initiating a lawsuit, that is likely to force them to recall and, therefore, to re-experience the traumas." Although the victim may know that she has psychological problems, the syndrome impedes recognition of the nature and extent of the injuries she has suffered, either because she has completely repressed her memory of the abuse, or because the memories, though not lost, are too painful to confront directly. Thus, until she can realize that her abuser's behavior caused her psychological harm, the syndrome prevents her from bringing suit. Often it is only through a triggering mechanism, such as psychotherapy, that the victim is able to overcome the psychological blocks and recognize the nexus between her abuser's incestuous conduct and her psychological pain. Such understanding may develop in stages over a period of time during which the incest victim breaks through the layers of denial and repression in a painful process. Typically, full recognition that she has been tortiously injured occurs after the victim has reached majority, long after the wrongful acts were committed. [Emphasis added.]

The key role of professional intervention as a triggering mechanism for uncovering the nexus between fault and damage is the subject of recurring comment in the literature; see Allen, "Tort Remedies for Incestuous Abuse" (1983), 13 Golden Gate U. L. Rev. 609, at pp. 630-31, and Nabors, "The Statute of Limitations; A Procedural Stumbling Block in Civil Incestuous Abuse Suits" (1990), 14 Law & Psychology Rev. 153. However, even during therapy misplaced feelings of loyalty towards an incestuous parent can elicit "defense of a parent, resistance with concomitant increase in guilt in the patient, or actual flight from treatment"; see Gelinas, "The Persisting Negative Effects of Incest", supra, at pp. 328-29.

32 While there appears to be a consensus on "post-incest syndrome" within the medical community, the American judiciary has been slow to recognize [page38] the legal ramifications of this doctrine. However, recent decisions exhibit a tendency to mold the delayed discovery rule to accommodate medical reality. At first, only certain aspects of the syndrome were recognized under the rule, but recent decisions demonstrate a wholehearted acceptance of the doctrine. To make sense of these cases I should note that American courts have divided incest claims involving the delayed discovery rule into two categories: (1) those where the plaintiff concedes that she has always known and remembered the sexual assaults, but that she was unaware that other physical or psychological problems were caused by the abuse; and (2) cases where the plaintiff claims that because of the trauma of the experience she had no recollection of the abuse until shortly before an action was commenced. The courts have in fact adopted a "convenient rubric" of "Type 1" and "Type 2" cases; see Johnson v. Johnson, 701 F.Supp. 1363 (N.D Ill. 1988), at p. 1367; Mary D. v. John D., 264 Cal. Rptr. 633 (Cal. App. 6 Dist. 1989), at pp. 636-37. A useful review of the American case law from a Canadian perspective is provided by Professor Des Rosiers, "Limitation Periods and Civil Remedies for Childhood Sexual Abuse" (1992), 9 C.F.L.Q. 43, at pp. 51-56.

33 The starting point in a review of the American experience must be Tyson v. Tyson, supra. This 1986 case is apparently the first in which the delayed discovery rule was asserted by an incest victim. There the Supreme Court of Washington by a narrow majority (5-4) refused to apply the rule. According to the preceding taxonomy of incest victims, Ms. Tyson fell into the second category; she claimed to have blocked all memory of her childhood incestuous abuse, which allegedly occurred between the ages of three and eleven, until she entered therapy at the age of twenty-six. The majority ruled that objective, verifiable evidence of the wrongful act and the resulting damage was a prerequisite to any application of the delayed [page39] discovery rule. In that case the plaintiff's complaints were entirely "subjective" and would not be made less so by the testimony of treating psychologists or psychiatrists. Hence, the majority found that a literal reading of the limitations statute struck the proper balance between the evidentiary problems inherent in

stale claims and the victim's right to bring an action.

34 In a vigorous dissent, Pearson J. opined that "objective, verifiable evidence" had never been a necessary condition for the application of the delayed discovery rule; the true test, he stated, was fundamental fairness in balancing the harm of depriving a victim of her remedy against the prejudice suffered by a defendant who is sued on a stale claim. In striking the balance in incest cases, he proffered the traditional factors applied in other delayed discovery cases. First, the plaintiff was unaware of the breach of any duty owed to her by her father; she knew as a child that she did not want the sexual contact with her father, but she could not know that this constituted sexual abuse causing permanent damage until adulthood when she confronted her childhood experiences. Secondly, the father betrayed his child's trust, and the courts cannot ignore the exploitation of a child for sexual gratification. Thirdly, the defendant had sole control over the facts giving rise to his daughter's claim; the abuser always knows his actions are wrongful, but the victim may never realize this.

35 Pearson J. cited a final factor in applying the delayed discovery rule: the existence of some triggering event that makes the plaintiff aware of the [page40] defendant's potential liability. He found that the plaintiff's psychotherapy was such an event, and made the general observation, at p. 235, that "[o]ften it is only through therapy that the victim is able to recognize the causal link between her father's incestuous conduct and her damages from incest trauma". He rebutted the majority's views regarding stale evidence by noting that the earliest a civil claim could have been brought was at the age of majority of the victim, at which point the evidence would already be stale.

36 A number of decisions since Tyson have preferred Pearson J.'s dissent and have applied the delayed discovery doctrine, at least with respect to Type 2 victims. Initially, in several Type 1 cases, courts refused to apply the rule because the plaintiff had always remembered the abuse. In DeRose v. Carswell, 242 Cal. Rptr. 368 (Cal. App. 6 Dist. 1987), the plaintiff alleged that her step-grandfather sexually abused her between the ages of four and eleven, and argued that the discovery rule should apply to her cause of action because she was unable to recognize the causal connection between the abuse and subsequent emotional difficulties, even though she was aware of the assaults (hence, a "Type 1" victim). Brauer J., writing for the court, noted that an assault by definition is perceived as unconsented to and offensive, and causes harm as a matter of law. Since the plaintiff averred that she felt great fear at the time of the assaults and acceded to the defendant's acts owing to her perception of his greater size and strength, she had suffered cognizable and compensable harm at the time, and therefore the delayed discovery rule did not apply. However, the court explicitly left open the possibility that the discovery rule could apply in Type 2 cases, where a plaintiff alleges that she repressed her memories of the sexual assaults. See also E.W. v. D.C.H., 754 P.2d 817 (Mont. 1988); [page41] cf. Lindabury v. Lindabury, 552 So.2d 1117 (Fla. App. 3 Dist. 1989).

37 Following this lead, several courts faced with Type 2 claims applied the delayed discovery rule. In the 1988 case of Johnson v. Johnson, supra, a federal district court recognized the dichotomy between the two classes of plaintiffs, but seemed to suggest that even in Type 1 cases the rule could be applied. In 1989, a California court of appeal developed the dicta from DeRose, supra, and applied the delayed discovery rule to toll the statute of limitations for a plaintiff who claimed incestuous abuse occurring until the age of five and repression of that memory until entering therapy in adulthood; Mary D. v. John D., supra.

38 The Wisconsin Court of Appeals in Hammer v. Hammer, 418 N.W.2d 23 (Wis. App. 1987), broke new ground by applying the rule to a plaintiff who claimed to know of the sexual assault, but was unaware of the causal link between the abusive activity and later psychological and emotional injuries. In Hammer the plaintiff alleged that she had been sexually abused by her father on an average of three times a week between the ages of five and fifteen. The abuse was accompanied by threats and assertions that she had caused the incestuous activity and that it was her fault. Disclosure of the abuse to her mother was to no avail, and the plaintiff developed coping mechanisms and symptoms of psychological distress, including shame, embarrassment, guilt, self-blame, denial, depression, and dissociation from her experiences. Although the plaintiff never claimed she had forgotten the period of abuse, and despite harbouring some subjective doubts about the normality of her father's actions, "she had no information to a reasonable probability of the nature of her injuries or the facts with respect to their cause" (at p. 26). Indeed, it was only after the triggering event of her

father's [page42] seeking custody of her minor sister that the plaintiff began to consider the nexus between the incest and her ongoing psychological problems. At that point she sought psychological counselling and began to understand the past and present impact of her father's abuse.

39 The court observed that the plaintiff had been misinformed and misled by the authority figure on whom she reasonably relied, and continued, at p. 27:

> The policy justification for applying the statute of limitations to protect defendants from "'the threat of liability for deeds in the past'" is unpersuasive in incestuous abuse cases... . Victims of incest have been harmed because of a "most egregious violation of the parent/child relationship." ... To protect the parent at the expense of the child works an "intolerable perversion of justice." ... Further, "the injustice of barring meritorious claims before the claimant knows of the injury outweighs the threat of stale or fraudulent actions."

As a matter of law, the court found that a cause of action for incestuous abuse will not accrue until the victim discovers, or in the exercise of reasonable diligence should have discovered, the fact and cause of the injury. However, the court stopped short of deciding whether the facts in the case supported the application of the delayed discovery doctrine, preferring to remit this issue to the trial judge. See also Doe v. LaBrosse, 588 A.2d 605 (R.I. 1991).

40 In a 1989 decision, the Supreme Court of North Dakota upheld a trial judgment applying the delayed discovery rule in what appears to be a Type 1 situation; see Osland v. Osland, 442 N.W.2d 907 (N.D. 1987). The Supreme Court agreed with the trial judge who had found that severe emotional trauma experienced by the plaintiff [page43] resulted in her being unable to fully understand or discover her cause of action during the statutory limitations period. Accordingly, the court applied the discovery rule and allowed the action to proceed. In Osland the court expressly disapproved the majority judgment in Tyson, and declined to follow it. However, courts have been far from unanimous in rejecting the Tyson approach. Courts in Washington continue to follow Tyson; see Raymond v. Ingram, 737 P.2d 314 (Wash. App. 1987), and Kaiser v. Milliman, 747 P.2d 1130 (Wash. App. 1988). Courts in some other states also continue to be reluctant to apply the delayed discovery rule in Type 1 cases; see Whatcott v. Whatcott, 790 P.2d 578 (Utah App. 1990). Finally, a Nevada decision has followed an approach similar to the majority in Tyson, by demanding "clear and convincing evidence" of the sexual assault; see Petersen v. Bruen, 792 P.2d 18 (Nev. 1990).

41 In addition, there is another line of cases that falls outside the emerging typology genre. These cases arise in Michigan, and apply the disability provisions of the limitations statute to prevent tolling. The disability definition includes insanity, and these cases extend insanity to cover memory repression by incest victims; see Meiers-Post v. Schafer, 427 N.W.2d 606 (Mich. App. 1988), and Nicolette v. Carey, 751 F.Supp. 695 (W. D. Mich. 1990).

42 A recent case from California appears to reject the dichotomy between Type 1 and Type 2 cases, and suggests a new approach: awareness of the wrongfulness of the defendant's incestuous conduct. In Evans v. Eckelman, 265 Cal. Rptr. 605 (Cal. App. 1 Dist. 1990), the plaintiffs brought an action for childhood sexual abuse allegedly suffered at the hands of their foster parents. The court [page44] found that the discovery rule for an action based on a parent or parental figure's sexual abuse will postpone the accrual of the cause of action until the plaintiff discovers or ought to have discovered the acts of molestation "and the wrongfulness of the conduct". In that case there were no allegations that the plaintiffs suppressed all memory of their childhood experiences, only that the psychological "blocking mechanisms" prevented them from perceiving the psychological injuries and their causal connection to the defendants' acts.

43 The court had this to say in respect of the special circumstances attending cases of incestuous abuse, at pp. 608-609:

> It has been widely recognized that the shock and confusion engendered by parental molestation, together with the parent's demands for secrecy, may lead a child to deny or

> block the traumatic events from conscious memory, or to turn the anger and pain inward so that the child blames himself for the events... . Even where memory of the events themselves is not suppressed, it may be some time before the victim can face the full impact of the acts.
>
> ...
>
> As a practical matter a young child has little choice but to repose his or her trust with a parent or parental figure. When such a person abuses that trust, he commits two wrongs, the first by sexually abusing the child, the second by using the child's dependency and innocence to prevent recognition or revelation of the abuse. This may be accomplished by enforcing secrecy around the acts or even by teaching the child that the sexual acts are normal or necessary to the relationship. As in the professional negligence cases, application of the delayed discovery rule would serve to prevent the molester from using the child's ignorance and trust to conceal the primary tort.

[page45]

The court distinguished the prevailing California precedent, DeRose, supra, on the basis that it had not addressed the central point of whether the plaintiff was aware of the wrongfulness of the defendant's acts. It held that an awareness of wrongdoing is a prerequisite to accrual of the action under the delayed discovery rule.

44 In my view the approach taken by the court in Evans v. Eckelman cuts to the heart of the matter: when does the plaintiff become aware of the wrongful nature of the defendant's acts? Battery consists of wrongful touching, and it is the wrongfulness of the contact and its consequential effects that are the material facts the plaintiff must discover before her cause of action accrues. Much of the expert evidence given at trial in the present case was directed to the question of when the plaintiff, after reaching the age of majority, remembered or became aware of her childhood abuse. There was conflicting evidence as to whether the plaintiff could have an intellectual, but not an emotional awareness of the abuse. To my mind, no useful purpose is served by engaging in this metaphysical debate on the epistemology of discovery. In the end I am satisfied that the issue properly turns on the question of when the victim becomes fully cognizant of who bears the responsibility for her childhood abuse, for it is then that she realizes the nature of the wrong done to her.

45 I would note that a similar approach has recently been taken by a Canadian court. In Gray v. Reeves (1992), 64 B.C.L.R. (2d) 275 (S.C.), Hall J. concluded that the victim's recognition of the nexus between her injuries and the earlier incest is the point when time should begin to run against the victim. In that case the plaintiff was sexually assaulted by her uncle on approximately fifteen occasions between the ages of four and twelve. She commenced action at the age of thirty, after receiving [page46] therapy which identified the true cause of certain psychological problems suffered by the plaintiff during her adult life. This is clearly a "Type 1" case, as the plaintiff always remembered the assaults, had revealed the incestuous abuse to her family, and indeed had fought continuously to have her uncle excluded from family gatherings during her adult life. Nevertheless, the trial judge found as follows, at p. 306:

> Here, the plaintiff Ms. Gray knew from a very early age that the assaultive behaviour of her uncle, the defendant, was disgusting to her. She knew at least from the time when she was a teenager that these acts were wrong and she sought to protect younger children from any assaults by the defendant. I am of the view that the evidence in the case discloses that, although the plaintiff was repelled by the assaults, she had no reason to believe and did not believe that she had suffered any material harm, mental or physical, from the assaults. While she had these feelings of revulsion or repugnance to the activities of the defendant concerning herself or others, I am quite unable to find that she was able, until a point in time after the commencement of her

> therapy with Dr. Way in 1988, to perceive any link between the earlier wrongful conduct of the plaintiff and her depression and inability to establish a satisfactory relationship with a member of the opposite sex.

46 British Columbia's limitations legislation (Limitation Act, R.S.B.C. 1979, c. 236) is very different from the statute before us in the instant case. It creates a form of statutory reasonable discoverability test, and I note with interest that this legislation emphasizes the importance of professional treatment and advice by stating the test (s. 6(3)) as the knowledge of a reasonable person "having taken the appropriate advice". (The meaning of this provision has most recently been considered by British Columbia's Court of Appeal in Levitt v. Carr (1992), 66 B.C.L.R. (2d) 58.) Despite the differences [page47] in legislation, the conclusions of Hall J. in Gray v. Reeves, at p. 309, are worthy of note:

> ... it seems to me that the hypothetical reasonable person in the shoes of the plaintiff here would not have been acting sensibly in commencing an action until such a person came to appreciate that a wrong or wrongs that had occasioned significant harm to her wellbeing could be established.

This is essentially the test I propose in the instant case.

47 It is clear from the evidence and the scientific literature that a misapplied sense of responsibility is instrumental in conditioning the child victim to submit silently to the abuse, while at the same time serving as the catalyst for much of the consequential psychological and emotional damages that emerge over time. More importantly, though, it is the redirection of responsibility for the abuse to whom it properly belongs that initiates the therapeutic process, such that the victim becomes aware of the causal connection between her childhood history and resulting injuries. Summit, supra, put it succinctly in his article, at p. 183:

> Without a consistent therapeutic affirmation of innocence, the victim tends to become filled with self-condemnation and self-hate for somehow inviting and allowing the sexual assaults.

In short, the issue of responsibility plays a pivotal role in both the genesis and the cessation of the harms caused by incestuous abuse.

48 The close connection between therapy and the shifting of responsibility is typical in incest cases. In my view, this observed phenomenon is sufficient to create a presumption that certain incest victims only discover the necessary connection between their injuries and the wrong done to them (thus discovering their cause of action) during some form of psychotherapy. I base this proposition on the scientific evidence presented at trial and to this Court which confirms a post-incest syndrome amongst incest survivors. If the evidence in a particular case is consistent with the typical features [page48] of this syndrome, then the presumption will arise. Of course, it will be open to the defendant to refute the presumption by leading evidence showing that the plaintiff appreciated the causal link between the harm and its origin without the benefit of therapy.

Application to the Present Case

49 After hearing the evidence, the trial judge concluded that from the age of sixteen the appellant was aware that she had been wronged and had suffered adverse effects. I will not expound on the role of an appellate court when reviewing findings of fact. Here, in my view, the trial judge did not address himself to the critical issue -- i.e., when did the appellant discover her cause of action in the sense of having a substantial awareness of the harm and its likely cause? With respect, the trial judge made no finding that the appellant had made the necessary connection at any time before entering therapy.

50 In my view, this is a case in which it can be presumed that the nexus between the appellant's injuries and incest was discovered only when the appellant received therapy. The evidence presented at trial shows the appellant to be a typical incest survivor. Her experiences as a child and later in life correspond closely to the symptoms of post-incest

syndrome. As a child, she was subjected to the threats and bribes that enforce secrecy on the assaults. Her mental defence mechanism was dissociation, typical in incest cases. Later in life, her attempts at disclosure were met with scepticism, denial and evasion, again a typical feature of post-incest syndrome. As an adult she suffers from depression and difficulty with intimate relationships, [page49] which are classic symptoms of the syndrome.

51 Aside from the presumption available to the appellant, the evidence overwhelmingly indicates that she did not make the causative link between her injuries and childhood history until she received therapeutic assistance, and the evidence proffered to the contrary was entirely speculative. In any event there was no direct evidence to overcome the presumption that the appellant's therapy was the triggering event for discovering her cause of action. As such, the statute of limitations did not begin to run against her until that time, and this action was commenced within all relevant statutory limitation periods. On this basis, together with the reasons which follow, I would allow the appeal and restore the jury's verdict both as to liability and damages.

52 I cannot leave this topic without adding my voice to the chorus calling for reform in this area of limitations law. I note that a recent consultation draft prepared by the Attorney General of Ontario has proposed the abolition of limitation periods in cases of incestuous sexual assault: A Consultation Draft of the General Limitations Act, s. 18(h), in "Recommendations for a New Limitations Act", report of the Limitations Act Consultation Group. As well, British Columbia has recently amended its Limitation Act to permit survivors of childhood sexual abuse to pursue legal action at any time; see Limitation Amendment Act, 1992, S.B.C. 1992, c. 44. In light of the existing evidence on the nature and extent of the problems faced by incest survivors, these are welcome developments.

Fraudulent Concealment

53 The appellant raises for the first time in this Court the ground of fraudulent concealment as an alternative basis for postponing the limitations period. The respondent counters that this argument [page50] should be rejected because it was not advanced before the trial judge, and because the Court of Appeal declined to add the issue as a ground of appeal. The respondent argues that the Court of Appeal was correct in so deciding for two reasons. First, the trial might have been conducted differently if the allegation of concealment had been put in issue. As well, the respondent agreed to exclude certain evidence from the record both before the Court of Appeal and in this Court on the basis that fraudulent concealment would not be put in issue.

54 I share the concern of the Court of Appeal that a fresh issue should not be raised for the first time on appeal unless the evidence at trial can fairly support the appellate court's consideration of that issue. It decided this point in a judgment prior to the hearing on the other issues, and a separate judgment was rendered. That judgment has not been appealed to this Court. Moreover, the appellant's application for leave to appeal does not mention fraudulent concealment as a ground of appeal. Indeed, the respondent received notice of this issue only upon receipt of the appellant's appeal factum. Given the respondent's apparent belief that this issue had been abandoned, it would be unfair to entertain the issue at this stage.

55 Although fraudulent concealment is not available to the appellant as an independent ground of appeal, it is still open to this Court to consider the factual question of concealment as it relates to both the reasonable discoverability question considered earlier and to the breach of fiduciary duty to be discussed later. To the extent that concealment is relevant to these issues, it is not unfair to the respondent that it be considered at this stage. At trial, once the jury had found as a fact that sexual abuse had occurred, certain evidence on concealment then became relevant to the limitations motion heard by the trial judge, and it was open to the respondent to refute or challenge this evidence at that time. I am referring here in particular to the plaintiff's testimony that her father had never [page51] admitted the wrongfulness of his conduct to her, and to Dr. McKie's report showing that the respondent had denied the incest and forced the appellant to lie to Dr. McKie to assist in the concealment.

56 While not of assistance to the appellant in this instance, the doctrine of fraudulent concealment may impact on limitations questions in other incest cases. For this reason, I propose to comment on the issues argued before us, with a

view to clarifying the law. In my view, two doctrinal issues must be resolved. The first concerns the scope of fraudulent concealment. Does it apply only to actions in equity, or can it also assist a plaintiff who seeks to postpone a limitation period at common law? The question is of some importance in incest cases, where the plaintiff may claim both in tort and for breach of a fiduciary duty. The second issue is the meaning of fraudulent concealment, and in particular whether incest cases fall within its compass.

57 To understand the scope of fraudulent concealment in modern times, it is necessary to delve into its origins. Historically, both common law and equity took account of fraudulent concealment when applying limitation periods. If the plaintiff was unaware of his cause of action owing to the wrong of the defendant, both courts would refuse to allow a limitations defence. I should perhaps draw attention to the fact (more fully discussed later) that limitation periods did not in earlier times in strictness apply to equity. It was not until 1833 that any English statute imposed express limitations on equitable actions; see Halsbury's Laws of England (2nd ed., vol. 20, para. 1041, note (p)). But equity applied them by analogy in certain circumstances. In both courts, the basis for injecting [page52] fraudulent concealment into the limitations analysis was the underlying jurisdiction over fraud claimed by both common law and chancery. Fraud was more central to equity's jurisdiction, as says the famous couplet attributed to Sir Thomas More: "Three things are apt to be helpt in Conscience, Fraud, Accident and things of Confidence"; see Meagher, Gummow and Lehane, Equity Doctrines and Remedies (2nd ed. 1984), at p. 326. Not surprisingly then, equity developed fraud well beyond its common law parameters. Inevitably, fraudulent concealment in equity came to be considerably broader in scope than its common law equivalent. Before the fusion of the courts of equity and common law, this disparity created problems in cases where a concurrent remedy was available from either court. The problem is thus explained in Halsbury's, supra, para. 771, note (c):

> Before the Judicature Act, 1873 (36 & 37 Vict. c. 66), there was a variance between courts of law and courts of equity as to the effect of the fraudulent concealment of the cause of action in those cases where there was a concurrent remedy both at common law and in equity; the courts of common law holding that in spite of such concealment the statute ran from the time when the cause of action arose, except when the concealment was of itself an actionable wrong ... the courts of equity holding that the statute in such cases ran from the time of discovery only ... .

Thus the application of fraudulent concealment varied depending upon which court entertained the claim. The common law courts would only achieve the same result as in equity in those cases where the concealment itself was actionable fraud. Given [page53] the narrow conception of "fraud" at common law, an equivalent result was relatively rare.

58 After the Judicature Act, the fused courts at first maintained a distinction between equitable and common law fraudulent concealment, but this dichotomy gradually broke down. The sequence of events is well described in Halsbury's, supra, vol. 20, para. 771, note (c). It began with Gibbs v. Guild (1882), 9 Q.B.D. 59 (C.A.), where it was held that the effect of fusion was to cause the equitable rule to prevail in all cases in which before the Judicature Act there had been a concurrent remedy at common law and equity. This settled the issue for concurrent causes of action, but left uncertain the application of the equitable rule in actions falling solely within common law jurisdiction. However, in a series of later cases the courts moved to the broader conclusion that the equitable rule applied in all cases; see Armstrong v. Milburn (1886), 54 L.T. 723 (C.A.); Oelkers v. Ellis, [1914] 2 K.B. 139; Lynn v. Bamber, [1930] 2 K.B. 72. In Legh v. Legh (1930), 143 L.T. 151, Mackinnon J. reviewed this progression of cases, and remarked, at p. 153:

> ... the result of the Judicature Act 1873, s. 24 (sub.-sect. (4) in particular) was that the common law imported the equitable doctrine that where delay had been due not to mere laches on the part of the plaintiff but to the fact that he had been ignorant of the cause of action because of the fraud of the defendant, then the statute would only run against him from the time when he discovered the existence of the cause of action.

An excellent discussion of this history is found in a contemporary text, Brunyate, Limitation of Actions in Equity, c. 2; see also Brunyate, "Fraud and the Statutes of Limitations" (1930), 4 Cambridge L.J. 174. These scholarly works trace the shift towards equity's dominant role, although the author expresses reservations about the technical basis for these developments.

[page54]

59 Canadian courts wholeheartedly adopted the emerging English position, and in several cases the equitable doctrine was imported into the common law. In Underwriters' Survey Bureau v. Massie & Renwick Ltd., [1938] 2 D.L.R. 31 (Ex. Ct.), Maclean J. considered the English cases and applied the equitable doctrine in what was clearly an action at law for conversion and copyright infringement. On appeal to this Court, the application of fraudulent concealment was approved (Massie & Renwick Ltd. v. Underwriters' Survey Bureau, [1940] S.C.R. 218). A similar approach is revealed in Pigott v. Nesbitt Thomson & Co., [1939] O.R. 66 (C.A.), aff'd [1941] S.C.R. 520.

60 In Canada and England, then, the importation of the equitable doctrine into the common law is settled. I am aware, of course, that there appears to be continuing uncertainty in certain parts of the Commonwealth. In Australia, for example, at least one text suggests that fraudulent concealment remains a purely equitable doctrine with no application to the common law; see Meagher, Gummow and Lehane, supra, at pp. 746-49. However, as noted, there are no such reservations here. The English and Canadian authorities demonstrate that concealment at common law long ago merged with the substance of equitable concealment. The least that can be said is that it has developed to the point of being consistent with it. Such mingling of law and equity is entirely appropriate, as I argued in a different context in Canson Enterprises Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534, at pp. 587-88. It is desirable, indeed inevitable, for the two great branches of our judicial law systems to borrow from one another to achieve just and reasonable results and consistency over time.

61 One final point needs to be added to this historical sketch. In 1939 England's Limitation Act, 1939, 1939 (Eng.), c. 21, codified the existing law [page55] of fraudulent concealment, and s. 26 reads as follows:

> 26. Where, in the case of any action for which a period of limitation is prescribed by this Act ...
>
> ...
>
> (b) the right of action is concealed by the fraud of [the defendant or his agent]
>
> ...
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud ... or could with reasonable diligence have discovered it ... .

Thus in England plaintiffs at common law have since 1939 been entitled by statute to benefit from the equitable doctrine of fraudulent concealment. Similar legislation has been enacted in several Canadian jurisdictions (e.g., s. 6 of Alberta's Limitation of Actions Act, R.S.A. 1980, c. L-15) but not in Ontario. In light of this development, a reading of cases since 1939 must be approached with caution; typically, they speak of "fraudulent concealment" in its statutory sense. As we shall see, however, the English courts have applied the old equitable doctrine in interpreting this new legislation. The current situation in England is thus expressed in Halsbury's Laws of England, 4th ed., vol. 28, para. 916, at p. 411:

> Before the fusion of courts of law and equity there was a variance between them as to the effect of fraudulent concealment of a cause of action in those cases where there were concurrent

> remedies at law and in equity; at law the limitation period in personal actions or contract ran from the time when the cause of action arose unless its concealment was an actionable wrong, but in equity time ran only from the date of discovery of a cause of action fraudulently concealed. After the fusion of the courts of law and equity the equitable doctrine applied in all cases, and it has not been expressly negatived by the Limitation Act 1939, although the relevant provisions [page56] of that Act substantially supersede the equitable doctrine.

In the result, whether proceeding under a statute like s. 26 of the English Limitation Act, 1939 or under the common law, fraudulent concealment (when applicable) will toll the limitation of either a common law or equitable claim until the time the plaintiff can reasonably discover her cause of action.

62 There remains the issues of determining the meaning of fraudulent concealment, and its application to cases of incest. In my view, incest cases will often be amenable to the application of fraudulent concealment as an answer to a limitations defence. Incest takes place in a climate of secrecy, and the victim's silence is attained through various insidious measures. As we have seen, these actions by the perpetrator of the incest condition the victim to conceal the wrong from herself. The fact that the abuser is a trusted family authority figure in and of itself masks the wrongfulness of the conduct in the child's eyes, thus fraudulently concealing her cause of action. On this basis, I am satisfied that fraudulent concealment can be applied in incest cases.

63 The leading modern authority on the meaning of fraudulent concealment is Kitchen v. Royal Air Forces Association, [1958] 2 All E.R. 241 (C.A.), where Lord Evershed, M.R. stated, at p. 249:

> It is now clear ... that the word "fraud" in s. 26(b) of the Limitation Act, 1939, is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in Beaman v. A.R.T.S., Ltd., [1949] 1 All E.R. 465, that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define two hundred years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the [page57] two parties concerned, is an unconsicionable thing for the one to do towards the other. [Emphasis added.]

While stated in the context of statutory "fraud", I have no doubt that this formulation is drawn from the ancient equitable doctrine and is applicable to today's common law concept of fraudulent concealment. I note also that Lord Evershed's formulation has been adopted by this Court; see Guerin v. The Queen, [1984] 2 S.C.R. 335. What is clear from Kitchen and Guerin is that "fraud" in this context is to be given a broad meaning, and is not confined to the traditional parameters of the common law action.

64 The factual basis for fraudulent concealment is described in Halsbury's, 4th ed., vol. 28, para. 919, at p. 413, in this way:

> It is not necessary, in order to constitute fraudulent concealment of a right of action, that there should be active concealment of the right of action after it has arisen; the fraudulent concealment may arise from the manner in which the act which gives rise to the right of action is performed. [Emphasis added.]

In my view incest falls within the second category outlined in this passage, i.e., concealment arising at the time the right of action arises. As I have stated, it is the very nature of an incestuous assault that tends to conceal its wrongfulness from the victim.

65 There is an important restriction to the scope of fraudulent concealment, which Halsbury's, 4th ed., vol. 28, para. 919, at p. 413, describes as follows:

> In order to constitute such a fraudulent concealment as would, in equity, take a case out of the effect of the statute of limitation, it was not enough that there should be merely a tortious act unknown to the injured party, or enjoyment of property without title, while the rightful owner was ignorant of his right; there had to be some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts.

[page58]

In cases of incest there is, of course, a grievous abuse of a position of confidence. I will have more to say later about the fiduciary nature of the parent-child relationship, but for now it is enough to say that incest is clearly an abuse of a confidential position. As the authorities make clear, incest is really a double wrong -- the act of incest itself is followed by an abuse of the child's innocence to prevent recognition or revelation of the abuse; see Evans v. Eckelman, supra. I should add that given the nature of the concealment in abuse cases, namely, that the abuser compels the complicity of the victim in denying the harm done to her, it may be that the doctrine can operate in a tort as well as fiduciary context to toll the limitation period because of the deliberate attempts at concealment on the part of the abuser.

66 American authors who have commented on incest and the limitations problem advocate the application of fraudulent concealment in the manner I propose; see DeRose, "Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages", supra, at pp. 197-99; Handler, "Civil Claims of Adults Molested as Children: Maturation of Harm and the Statute of Limitations Hurdle", supra, at pp. 722-29; Rosenfeld "The Statute of Limitations Barrier in Childhood Sexual Abuse Cases: The Equitable Estoppel Remedy", supra, at pp. 216-19; Salten, "Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy" (1984), 7 Harv. Women's L.J. 189, at pp. 208-11. As I understand the American law, fraudulent concealment is there viewed as a sub-set of the larger doctrine of equitable estoppel, by which a person is precluded by his or her own prior conduct from asserting a defence that the person might otherwise have had; see in particular Handler, supra, at p. 723. In Canada such a broad application of equitable estoppel has not thus far been recognized, but I would observe that the underlying premise of the American approach is the same as our own: the courts will [page59] not allow a limitation period to operate as an instrument of injustice.

Recovery for Breach of Fiduciary Obligation

67 The appellant argues that incest constitutes not only the tort of assault and battery, but is also a breach of the fiduciary relationship between parent and child. The appellant submits that Ontario's Limitations Act does not apply to fiduciary duties, and as such the plaintiff's delay is no defence to the fiduciary action. I agree. Incest is a breach of both common law and equitable duties, and the latter claim is not foreclosed by the Act. Certain equitable defences may, however, be available to the respondent.

68 Before turning to these questions in detail, it is useful to first review the history of these proceedings as regards the equitable claim, as it is partially in light of this history that I deem it appropriate to consider the fiduciary question in this case. The appellant's statement of claim seeks damages for incest occasioned as a result of reoccurring sexual assaults. In addition the appellant claims damages for her father's breach of his fiduciary duty to care for and minister to his child. Of course, the proper term for the equitable relief sought would be compensation, but this defect in the pleadings is of no great moment. In the result, the pleadings present neatly compartmentalized concurrent common law and equitable claims.

69 At trial, the judge remitted to the jury only the factual issue of whether sexual assault was committed, along with the assessment of damages for the tort of sexual assault. The claim for breach of [page60] fiduciary duty was not referred to the jury, which was appropriate given s. 121(2) of Ontario's Courts of Justice Act, 1984, S.O. 1984, c. 11,

which requires issues of fact and the assessment of damages regarding claims for equitable relief to be tried without a jury. In this case, it was for the trial judge to decide the issue of fiduciary duty; see 447927 Ontario Inc. v. Pizza Pizza Ltd. (1987), 16 C.P.C. (2d) 277 (Ont. H.C.). However, the trial judge did not rule on this question: my review of the trial transcript suggests that the issue was simply overlooked by counsel and by Maloney J. On appeal, the question of fiduciary obligation was apparently argued, but the Court of Appeal does not refer to the issue in its brief endorsement.

70 Consequently, it is left to this Court to consider the question of fiduciary duty. In my view, the issue must be addressed even though the tort action has survived the limitations defence. It was fully argued by the parties, and there may well be cases where the limitations statute cannot be circumvented but where the fiduciary claim is unaffected by the statute. Moreover, the equitable remedy available to the appellant may vary from the common law award established by the jury. The importance of considering any equitable cause of action has recently been stated by Justice McLachlin in Norberg v. Wynrib, [1992] 2 S.C.R. 226, at pp. 290-91:

> These examples underline the importance of treating the consequences of this relationship on the footing of what it is -- a fiduciary relationship -- rather than forcing it into the ill-fitting molds of contract and tort. Contrary to the conclusion of the court below, characterizing the duty as fiduciary does add something; indeed, without doing so the wrong done to the plaintiff can neither be fully comprehended in law nor adequately compensated in damages. [Emphasis in original.]

[page61]

In Norberg, McLachlin J. and I differed on the path to be followed in upholding recovery. She chose the route of the fiduciary claim whereas I preferred the route afforded by common law tort of battery because in the circumstances of that case there might be difficulties concerning the applicability of fiduciary obligations, an issue I did not find it necessary to decide. I could do this because I did not consider the common law molds to be ill-fitting in that case. Nor, as I will attempt to demonstrate, do I think they are ill-fitting in the present circumstances. Nonetheless, I agree with my colleague that a breach of fiduciary duty cannot be automatically overlooked in favour of concurrent common law claims. The point is simply stated by Cooke P. of the New Zealand Court of Appeal in Mouat v. Boyce, unreported March 11, 1992, at p. 11: "For breach of these duties, now that common law and equity are mingled the Court has available the full range of remedies, including damages or compensation and restitutionary remedies such as an account of profits. What is appropriate to the particular facts may be granted."

71 In the present case, the lower courts have not ruled on the question of fiduciary obligation. As such, this Court must assume the role of finder of fact in equity, but in this case that burden poses no difficulty. We have a jury's verdict on the fact of sexual assault, and it is easy enough to apply that finding to the equitable claim. What remains is the legal issue of whether the assaults constitute a breach of fiduciary duty. I turn now to that issue.

Fiduciary Obligation of a Parent

72 It is intuitively apparent that the relationship between parent and child is fiduciary in nature, and that the sexual assault of one's child is a grievous [page62] breach of the obligations arising from that relationship. Indeed, I can think of few cases that are clearer than this. For obvious reasons society has imposed upon parents the obligation to care for, protect and rear their children. The act of incest is a heinous violation of that obligation. Equity has imposed fiduciary obligations on parents in contexts other than incest, and I see no barrier to the extension of a father's fiduciary obligation to include a duty to refrain from incestuous assaults on his daughter.

73 Over the past decade, this Court has explored the scope of fiduciary obligations, and we have perhaps reached the point where a "fiduciary principle" can be applied through a well-defined method. The process was started in Guerin v.

The Queen, supra, where Dickson J. (as he then was) found that certain obligations owed by the federal government to an Indian Band were fiduciary in nature. In the course of his reasons, Dickson J. confirmed certain broad principles with respect to fiduciary obligations, at p. 384:

> Professor Ernest Weinrib maintains in his article The Fiduciary Obligation (1975), 25 U.T.L.J. 1, at p. 7, that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion." Earlier, at p. 4, he puts the point in the following way:
>
> > [Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.
>
> I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise [page63] the relationship by holding him to the fiduciary's strict standard of conduct.
>
> It is sometimes said that the nature of the fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed.

I would go one step further, and suggest that fiduciary obligations are imposed in some situations even in the absence of any unilateral undertaking by the fiduciary. In the present case, however, it is sufficient to say that being a parent comprises a unilateral undertaking that is fiduciary in nature. Equity then imposes a range of obligations coordinate with that undertaking.

74 The next step in the evolution of the fiduciary principle came with Frame v. Smith, [1987] 2 S.C.R. 99. In this case the dissenting judgment of Wilson J. elaborates on the approach established by Dickson J. in Guerin. Although the majority held that the remedy of fiduciary obligation did not apply in the circumstances of that case, Wilson J.'s mode of approach was later held to apply in the circumstances that arose in Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574; see also the concurring reasons in Canson Enterprises Ltd. v. Boughton & Co., supra. Recognizing that the categories of fiduciary relationships are not closed, Wilson J. proposed the following approach for their identification, at p. 136:

> Relationships in which a fiduciary obligation have [sic] been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

[page64]

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

Even a cursory examination of these indicia establishes that a parent must owe fiduciary obligations to his or her child. Parents exercise great power over their children's lives, and make daily decisions that effect their welfare. In this regard, the child is without doubt at the mercy of her parents.

75 The factual context of Frame v. Smith is of some relevance to the present case. The Court was there considering a family law matter, in which a non-custodial parent claimed that his right of access to his children had been frustrated by the custodial parent. The interest purporting to attract the protection of equity was the parent's relationship with his child, but opposing counsel argued that this personal interest fell outside the traditional categories of fiduciary obligation which, it was argued, had the common feature of protecting purely economic interests. Wilson J. rejected this proposition in the following terms, at p. 143:

> To deny relief because of the nature of the interest involved, to afford protection to material interests but not to human and personal interests would, it seems to me, be arbitrary in the extreme. In contract law equity recognizes interests beyond the purely economic when, instead of awarding damages in the market value of real estate against a vendor who has wrongfully refused to close, it grants specific performance. Other non-economic interests should also be capable of protection in equity through the imposition of a fiduciary duty. I would hold, therefore, that the appellant's interest in a continuing relationship with his or her child is capable of protection by the imposition of such a duty.

Similarly, the non-economic interests of an incest victim are particularly susceptible to protection from the law of equity.

76 In Lac Minerals v. International Corona Resources Ltd., supra, I suggested a further refinement of the process by which fiduciary relationships [page65] could be uncovered. In particular, I identified three senses of the term "fiduciary" in an effort to clarify its import in given situations. The first sense of the term was as used by Wilson J. in Frame v. Smith, which I characterized as follows, at pp. 646-47:

> There the issue was whether a certain class of relationship, custodial and non-custodial parents, was a category, analogous to directors and corporations, solicitors and clients, trustees and beneficiaries, and agents and principals, the existence of which relationship would give rise to fiduciary obligations. The focus is on the identification of relationships in which, because of their inherent purpose or their presumed factual or legal incidents the courts will impose a fiduciary obligation on one party to act or refrain from acting in a certain way. The obligation imposed may vary in its specific substance depending on the relationship, though compendiously it can be described as the fiduciary duty of loyalty and will most often include the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary. The presumption that a fiduciary obligation will be owed in the context of such a relationship is not irrebuttable, but a strong presumption will exist that such an obligation is present. Further, not every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty... . It is only in relation to breaches of the specific obligations imposed because the relationship is one characterized as fiduciary that a claim for breach of fiduciary duty can be founded.

It is this first usage of the term "fiduciary" which arises in the present case. The inherent purpose of the family relationship imposes certain obligations on a parent to act in his or her child's best interests, and a presumption of fiduciary obligation arises.

77 In Lac Minerals I stressed the point, which also emerges from Frame v. Smith, that the substance of the fiduciary obligation in any given case is not derived from some immutable list of duties attached to a category of relationships. In other words, the duty is not determined by analogy with the "established" heads of fiduciary duty. Rather, [page66] the nature of the obligation will vary depending on the factual context of the relationship in which it arises. Recently, I had occasion to return to this point in the context of a doctor-patient relationship in McInerney v. MacDonald, [1992] 2 S.C.R. 138. I there stated, at p. 149:

> In characterizing the physician-patient relationship as "fiduciary", I would not wish it to be thought that a fixed set of rules and principles apply in all circumstances or to all obligations arising out of the doctor-patient relationship. As I noted in Canson Enterprises Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534, not all fiduciary relationships and not all fiduciary obligations are the same; these are shaped by the demands of the situation. A relationship may properly be described as "fiduciary" for some purposes, but not for others.

In certain parent-child contexts, equity has recognized a parental duty to protect the economic interests of his or her child. However, this case law does not limit the range of the obligations that may attach to other aspects of the parent-child relationship.

78 Canadian cases have recognized the parent-child relationship as a traditional head of fiduciary obligation, albeit in obiter. These include Follis v. Albemarle TP., [1941] 1 D.L.R. 178 (Ont. C.A.); Henderson v. Johnson (1956), 5 D.L.R. (2d) 524 (Ont. H.C.), at p. 533, and notably, Lac Minerals, supra, at p. 606, per Justice Sopinka. Similarly, academic authorities have placed the relationship in this class; see Shepherd, The Law of Fiduciaries (1936), at p. 30. As I earlier suggested, the content of the obligation has most often been determined in the context of contractual relations between a parent and child, where it gives rise to a presumption of undue influence. The extensive case law on this point is cited in Meagher, Gummow and Lehane, Equity Doctrines and Remedies, supra, at p. 374. Of course, the intervention of equity will vary when the context changes from that of intra-familial economic relations to the more insidious conduct at issue in this case.

[page67]

79 A similar approach can be found in the United States, where a fiduciary parent-child relationship has been judicially recognized to protect the economic interests of the child: see Menick v. Goldy, 280 P.2d 844 (Cal. App. 2 Dist. 1955); Ohio Casualty Insurance Co. v. Mallison, 354 P.2d 800 (Or. 1960); Fitzgerald v. Newark Morning Ledger Co., 267 A.2d. 557 (N.J. 1970). However, the obligations of a parent go much further, as is evident from the following comments of the Supreme Court of California in Emery v. Emery, 289 P.2d 218 (Cal. 1955), at p. 224:

> Since the law imposes on the parent a duty to rear and discipline his child and confers the right to prescribe a course of reasonable conduct for its development, the parent has a wide discretion in the performance of his parental functions, but that discretion does not include the right wilfully to inflict personal injuries beyond the limits of reasonable parental discipline.

These comments were made in the context of parental immunity from tort actions, but they are equally apposite in describing the fiduciary basis of the obligation. Indeed, the essence of the parental obligation in the present case is simply to refrain from inflicting personal injuries upon one's child.

80 In Evans v. Eckelman, supra, the parent's fiduciary obligation as regards incest was considered, and the court there found that an obligation to protect the child's health and well-being was at stake. The court in turn found that the fiduciary nature of the relationship impacted on the application of the delayed discovery rule to the limitations defence at issue in that case. It stated, at p. 608:

> Two common themes run through the cases applying the discovery rule of accrual. First, the rule is applied to types of actions in which it will generally be difficult for plaintiffs to immediately detect or comprehend the breach or the resulting injuries... .
>
> Second, courts have relied on the nature of the relationship between defendant and plaintiff to explain [page68] application of the delayed accrual rule. The rule is generally applicable to confidential and fiduciary relationships... . The fiduciary relationship carries a duty of full disclosure, and application of the discovery rule "prevents the fiduciary from obtaining immunity for an initial breach of duty by a subsequent breach of the obligation of disclosure".

81 Thus the fiduciary nature of the relationship supports a liberal application of the discovery rule. This usage of the fiduciary relationship is supported by American commentators, who advance fiduciary obligation as a justification for a generous application of the delayed discovery rule: DeRose, "Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long-Term Damages", supra, at pp. 203-208, or as the basis for the doctrine of fraudulent concealment: Hartnett, "Use of a Massachusetts Discovery Rule by Adult Survivors of Father-Daughter Incest" (1990), 24 New Eng. L. Rev. 1243, at pp. 1263-65. See also Jorgenson and Randles, "Time Out: The Statute of Limitations and Fiduciary Theory in Psychotherapist Sexual Misconduct Cases" (1991), 44 Okla. L. Rev. 181.

82 As in Canada, most American jurisdictions have enacted a general limitations provision that encompasses actions in equity: 54 C.J.S. Limitation of Actions s. 36; 51 Am Jur 2d s. 83. As such, establishing a breach of fiduciary obligation will not circumvent limitations legislation as conveniently as is the case in Ontario. Indeed, as we shall see, Ontario is relatively unique in this regard. As fiduciary duties are caught by the legislation in most States, the commentaries and court decisions referred to above have restricted themselves to an assessment of the impact of the fiduciary relationship within the statutory limitations model. In this case, of course, we are not so limited.

83 By way of summary, fiduciary obligation has apparently not been raised in previous incest cases as an independent head of liability. However, it is [page69] clear that such an option is available subject to statutory and other limitation defences specific to equitable claims. It is to these defences that I now turn.

Defences

84 As with the appellant's claim in tort, her delay in bringing the claim for breach of fiduciary duty raises several possible defences. The first is limitations legislation; the second is the application of that legislation by analogy, and finally there is the equitable doctrine of laches. In my view, none of these defences is made out in this case, and the appellant's claim should stand. As will become apparent, many of the factors activating the reasonable discoverability principle in tort are also applicable in assessing these equitable defences. While there is some overlap, there are also different considerations that arise solely in the realm of equity.

Limitations Legislation

85 Ontario's Limitations Act is one of the few remaining limitations statutes in Canada that is not made applicable to civil actions in general. Such provisions capture any common law or equitable claim, and reference can be made to six provincial statutes in this regard: Limitation Act, R.S.B.C. 1979, c. 236, s. 3(4); Limitation of Actions Act, R.S.A. 1980, c. L-15, s. 4(1)(g); The Limitation of Actions Act, R.S.S. 1978, c. L-15, s. 3(1)(j); Statute of Limitations, R.S.P.E.I. 1988, c. S-7, s. 2(1)(g); The Limitation of Actions Act, R.S.M. 1987, c. L150, s. 2(1)(n); Limitation of Actions Act,

R.S.N.B. 1973, c. L-8, s. 6. In Ontario, by contrast, the Act applies only to a closed list of enumerated causes of action. Counsel for both parties have apparently conceded that this list does not include fiduciary obligations, and it is therefore unnecessary to consider this question in great depth. However, [page70] some comment on the issue may be helpful in understanding the next defence under consideration, namely, limitation by analogy to the statute.

86 Section 2 of the Ontario Limitations Act reads as follows:

> 2. Nothing in this Act interferes with any rule of equity in refusing relief on the ground of acquiescence, or otherwise, to any person whose right to bring an action is not barred by virtue of this Act.

This section makes clear that the Act does not exhaust the defences available to a defendant because of the passage of time. Thus, certain actions expressly made subject to the Limitations Act may not yet be out of time under the terms of that statute, but may be precluded by equitable defences that apply notwithstanding the terms of the Act. The section also gives rise to the inference that there is a category of equitable claims not subject to the Act at all, and that the equitable defences survive in those cases. Such is the case here. The Act does not apply to fiduciary obligations, but the respondent may nonetheless argue that the equitable defence of laches is available to the respondent.

87 Part II of the Act limits certain actions against trustees, and pursuant to s. 42 the Part applies to express or statutory trusts. This obviously does not encompass fiduciary obligations. However, s. 43 defines "trustee" to include a "trustee whose trust arises by construction or implication of law". However, this definition does not include a fiduciary obligation; a trust is a distinct category of equitable obligation. As Dickson J. observed in Guerin, supra, at pp. 386-87, it is a concept separate and apart from fiduciary relationship, although the two arise from the same equitable source. In Canson, supra, at p. 578, I commented on this distinction from a remedial perspective. Consistently with this approach, cases considering the scope of the term "trustee" under s. 43 of the Act have limited its [page71] application to express or constructive trustees; see Soar v. Ashwell, [1893] 2 Q.B. 390 (C.A.); Taylor v. Davies, [1920] A.C. 636.

88 In an abundance of caution, counsel for the appellant cited s. 43(2) of the Act, which has the effect of denying protection to a trustee where the action is based on the trustee's fraudulent breach of trust. This really goes to fraudulent concealment, discussed earlier, and it is unnecessary to consider at this stage because Part II of the Act clearly does not apply to fiduciary relationships.

Statutory Limitation by Analogy

89 While a breach of fiduciary duty is not expressly limited by Ontario's Limitations Act, can it be said that equity should apply the Act by analogy to bar the appellant's claim? That is, should the limitation period applicable to tortious assault be applied on the fiduciary side because both claims arise out of the same facts? There is a short answer to this question. Having already found that the limitation period was tolled by the reasonable discoverability principle, analogous application of the statute is, of course, not fatal to the appellant's claim in equity. But even apart from this, I think the same result would follow. While there is no doubt that in some cases equity will operate by analogy and adopt a statutory limitation period that does not otherwise expressly apply, in my view this is not such a case. And this for several reasons. First, equity has rarely limited a claim by analogy when a case falls within its exclusive jurisdiction, as in this claim for breach of fiduciary duty. Moreover, even if it is appropriate to analogize from the common law, the analogy will be governed by the parameters of the equitable doctrine of laches. More will be said about laches later when it will become evident that it is of no assistance to the respondent. Finally, any [page72] analogy drawn in this case would be nullified by the doctrine of fraudulent concealment.

90 The concept of limitation by analogy is as old as limitation statutes themselves, and some appreciation of its history is helpful in understanding the true scope of the doctrine. In this regard, Brunyate's Limitation of Actions in Equity, supra, is again an invaluable source. As he explains, at pp. 1-22, the first English statutes of limitations applied only to actions at common law, and it was only centuries later in 1833 that some equitable actions were so limited; see

Limitation Act, 1623, (Eng.), 21 Jac. 1, c. 16; The Real Property Limitation Act, 1833, (Eng.), 3 & 4 Will. 4, c. 27. In the interim, the chancery courts were often called upon to decide purely legal claims within an equitable proceeding, and a practice evolved whereby the statutes could be applied even though the proceeding was technically in equity. In the seminal case of Hovenden v. Annesley (1806), 2 Sch. & Lef. 607, 9 R.R. 119, at p. 630 and p. 120 respectively, Lord Redesdale explained the practice in this way:

> But it is said that courts of equity are not within the statutes of limitations. This is true in one respect; they are not within the words of the statutes, because the words apply to particular legal remedies: but they are within the spirit and meaning of the statutes, and have always been so considered. I think it is a mistake in point of language, to say that courts of equity act merely by analogy to the statute; S. they act in obedience to it. The statute of limitations, applying itself to certain legal remedies, for recovering the possession of lands, for recovering of debts, & c. Equity, which in all cases follows the law, acts upon legal titles, and legal demands, according to matters of conscience which arise, and which do not admit of the ordinary legal remedies: nevertheless, [page73] in thus administering justice, according to the means afforded by a court of equity, it follows the law.

In the result, when acting within its auxiliary jurisdiction, equity decided legal claims as an incident of a larger equitable proceeding, or exercised its supervisory jurisdiction, it was compelled to "follow the law" and apply the statutory limitation period.

91 Over time, Lord Redesdale's remarks were used as the basis for a broader jurisdictional approach to the doctrine of limitation by analogy. Brunyate described the emerging method, at pp. 11-12, of his text:

> Suits within the auxiliary jurisdiction of equity are within the very words of the Statute of Limitations so that in applying the statute to them the Court is acting in obedience to it; suits within the concurrent jurisdiction are perhaps within the words of the statute (there is some doubt whether they were included or not); suits within the sole jurisdiction are not within the words of the statute and to them the statute is applied if at all by analogy.

Brunyate criticizes this new approach as a misreading of Hovenden v. Annesley, but the approach appears to have survived the Judicature Act. Typical is the often-quoted test established by the House of Lords in Knox v. Gye (1872), L.R. 5 H.L. 656, at pp. 674-75:

> ... where the remedy in Equity is correspondent to the remedy at Law, and the latter is subject to a limit in point of time by the Statute of Limitations, a Court of Equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation.
>
> ...
>
> Where a Court of Equity frames its remedy upon the basis of the Common Law, and supplements the Common Law by extending the remedy to parties who cannot have an action at Common Law, there the Court of Equity acts in analogy to the statute; that is, it adopts the [page74] statute as the rule of procedure regulating the remedy it affords.

In other words, concurrent actions in equity will be subjected by analogy to the limitations statute. However, equity in this instance is not bound to follow the law, and its residual discretion may be employed through the doctrine of laches. Brunyate thus described this distinction, at p. 16:

> Thus the substantial difference between cases where the Court acts in obedience to a Statute of Limitations and cases where it acts by analogy with the statute is that in the

former the limitation is peremptory whereas in the latter it is part of the law of laches.

92 Today, the doctrine retains certain remnants of its old jurisdictional foundations, even though the distinction between the exclusive, concurrent and auxiliary jurisdictions is now technically obsolete. Fortunately the notion of acting in "obedience" to the statute appears to have fallen into disfavour; see Halsbury's Law of England, 4th ed., vol. 16, para. 934, at p. 837, notes 2 and 3; Meagher, Gummow and Lehane, supra, at p. 744. I have grave doubts about the continuing vitality of this aspect of the doctrine, for it seems distinctly inequitable for a court of conscience to be compelled to apply by inference or analogy a statutory provision that takes no account of the justice of each case.

93 The surviving authorities maintain a blurred distinction between concurrent and exclusive actions in equity. From the outset it has been difficult to maintain a principled distinction, since even some early cases arising solely in equity were subjected to the limitations period; see Brunyate, supra, at p. 20. Nonetheless, it is appropriate to view concurrent actions as being most susceptible to the analogy doctrine; after all, these actions have historical roots in the common law. At the same time [page75] actions arising solely in equity will rarely be comparable to a common law analogue.

94 The present case involves a breach of fiduciary duty, which falls solely within the realm of equity. As such, it is not in my view readily amenable to limitation by analogy to some common law action. However, even if an analogy could be drawn that is not to say that it must be applied. As I noted earlier, equity retains a residual discretion on this point, which is the point of distinction from acting in obedience to the statute. In this respect the analogy takes on the character of laches, a point explicitly recognized by Brunyate. A more detailed consideration of laches follows, but for now it is enough to note the following proposition advanced by Brunyate, supra, at p. 17:

> Where a Court of Equity is applying the statute as part of the law of laches it may reasonably allow any exceptions that are allowed in the law of laches... . since delay by a plaintiff who has been ignorant of his right of action will not amount to laches, we should expect that, where the Court is acting by analogy to the statute, time will not run until the plaintiff is aware of his right of action.

This reasoning would appear to be the basis of the judgment in Metropolitan Bank v. Heiron (1880), 5 Ex. D. 319 (C.A.).

95 In a similar vein, any analogy that might be drawn in this case is also refuted by the respondent's fraudulent concealment of the appellant's cause of action. I have already discussed fraudulent concealment as a discrete response to the limitations problem in incest cases, and held that it was not procedurally available for that purpose in this case. Here, however, I do not raise fraudulent concealment to counter the express application of the statute, but in relation to the analogy doctrine. In my view it would be unfair to consider the analogy without at the same time considering all possible [page76] responses to it. In this case, the evidence overwhelmingly suggests that the respondent's incestuous conduct, together with his later acts of concealment, were sufficient to constitute fraudulent concealment. In the result, any analogous limitation period applicable to this case will be tolled by this concealment.

Laches

96 Historically, statutes of limitation did not apply to equitable claims, and as such courts of equity developed their own limitation defences. Limitation by analogy was one of these, but the more important development was the defence of laches. While laches must be considered here as in any delayed equitable claim, in my view it does not afford the respondent redress.

97 The leading authority on laches would appear to be Lindsay Petroleum Co. v. Hurd (1874), L.R. 5 P.C. 221, in which the doctrine is explained as follows, at pp. 239-40:

> ... the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done

> that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. 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 [page77] cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

This explanation was approved by Lord Blackburn in Erlanger v. New Sombrero Phosphate Co. (1878), 3 App. Cas. 1218 (H.L.), where, after quoting the above passage, he comments, at pp. 1279-80:

> I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry.

In turn, this formulation has been applied by this Court; see Canada Trust Co. v. Lloyd, [1968] S.C.R. 300; Blundon v. Storm, [1972] S.C.R. 135.

98 The rule developed in Lindsay is certainly amorphous, perhaps admirably so. However, some structure can be derived from the cases. A good discussion of the rule and of laches in general is found in Meagher, Gummow and Lehane, supra, at pp. 755-65, where the authors distill the doctrine in this manner, at p. 755:

> It is a defence which requires that a defendant can successfully resist an equitable (although not a legal) claim made against him if he can demonstrate that the plaintiff, by delaying the institution or prosecution of his case, has either (a) acquiesced in the defendant's conduct or (b) 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... .

Thus there are two distinct branches to the laches doctrine, and either will suffice as a defence to a claim in equity. 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 [page78] 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.

99 In this case, there is no question of the respondent's "altering his position" because of the appellant's delay. Such considerations obviously do not arise in a case such as this. Further, there is nothing about the delay's here rendering further prosecution of the case unreasonable. Therefore, if laches is to bar the appellant's claim, it must be because of acquiescence, the first branch of the Lindsay rule.

100 Acquiesence is a fluid term, susceptible to various meanings depending upon the context in which it is used. Meagher, Gummow and Lehane, supra, at pp. 765-66, identify three different senses, the first being a synonym for estoppel, wherein the plaintiff stands by and watches the deprivation of her rights and yet does nothing. This has been referred to as the primary meaning of acquiescence. Its secondary sense is as an element of laches -- after the deprivation of her rights and in the full knowledge of their existence, the plaintiff delays. This leads to an inference that

her rights have been waived. This, of course, is the meaning of acquiescence relevant to this appeal. The final usage is a confusing one, as it is sometimes associated with the second branch of the laches rule in the context of an alteration of the defendant's position in reliance on the plaintiff's inaction.

101 As the primary and secondary definitions of acquiescence suggest, 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 [page79] 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.

102 It is interesting to observe that in practical terms the inquiry under the heading of acquiescence comes very close to the approach one takes to the reasonable discoverability rule in tort. As we have seen, the latter focuses on more than mere knowledge of the tortious acts -- the plaintiff must also know of the wrongfulness of those acts. This is essentially the same as knowing that a legal claim is possible. That the considerations under law and equity are similar is hardly surprising, and is a laudable development given the similar policy imperatives that drive both inquiries.

103 In the present case, was it reasonable for the appellant to know the facts of her abuse and yet be unable to determine that her father was in the wrong and that a suit in equity could be launched? I believe that in the circumstances of the typical incest survivor the failure to know that one has been wronged is entirely reasonable. I have already discussed the medical evidence which indicates a post-incest syndrome of denial, memory repression, and self-guilt. The very existence of this syndrome is evidence that the reasonable incest survivor is incapable of appreciating her rights in equity or in law, and as such is incapable of acquiescing in the conduct that has breached those rights.

104 As is now apparent, the considerations outlined in detail under the common law discoverability doctrine must also be considered under the rubric of acquiesence. However, I would not wish to be taken as suggesting that an inquiry under the common law will reach the same result as in equity in every case. Rather, there is an important distinction [page80] between the two that has not yet been considered. As I have stated, both doctrines share the common requirement of knowledge on the part of the plaintiff. However, a consequence of that knowledge is that the reasonable discoverability inquiry is at an end, and the statutory limitations period begins to run. In equity, however, there is a residual inquiry: in light of the plaintiff's knowledge, can it reasonably be inferred that the plaintiff has acquiesced in the defendant's conduct? That question depends on the circumstances of each case, but in my view it would require particularly compelling evidence to demonstrate that an incest victim had "acquiesced" in the sexual assaults made against her. In this case I need not consider this second inquiry, as the appellant did not have real knowledge of the wrongfulness of the respondent's conduct until shortly before commencing this action. However, I see nothing in the facts of this case to suggest that the appellant truly acquiesced in her father's abuse.

Remedies

105 The jury in this case found that the respondent had sexually assaulted the appellant, and assessed general damages of $10,000 and punitive damages of $40,000. Though the punitive damages are within the general range of such awards, the general damages seem rather low. The jury, however, had the whole matter before it, and its award should not lightly be disturbed. At all events, the quantum was not disputed on this appeal. However, as I have found that a breach of fiduciary duty has also occurred, it raises the issue whether some additional remedy in equity is necessary to compensate the appellant fully and properly.

106 Recently, I have had occasion to consider the relationship between equitable and common law [page81] remedies, and in particular compensation for breach of fiduciary obligation; see Canson Enterprises Ltd. v. Boughton & Co, supra. In equity there is no capacity to award damages, but the remedy of compensation has evolved. The distinction between damages and compensation is often slight, and as I noted in Canson, the courts have tended to

merge the principles of law and equity when necessary to achieve a just remedy. There I was speaking of the relationship between remedies for tortious misstatement and breach of fiduciary duty, but the underlying principles are equally applicable in this case. Of particular relevance are my comments beginning at p. 581, and particularly the following passages at pp. 581 and 586-87 respectively:

> The truth is that barring different policy considerations underlying one action or the other, I see no reason why the same basic claim, whether framed in terms of a common law action or an equitable remedy, should give rise to different levels of redress.
>
> ...
>
> Only when there are different policy objectives should equity engage in its well-known flexibility to achieve a different and fairer result. The foundation of the obligation sought to be enforced ... is "the trust or confidence reposed by one and accepted by the other or the assumption to act for the one by that other." That being so, it would be odd if a different result followed solely on the manner in which one framed an identical claim. What is required is a measure of rationalization.

The question in this appeal is whether there are different policy objectives animating the breach of a parent's fiduciary duty as compared with incestuous sexual assault. In my view, the underlying objectives are the same. Both seek to compensate the victim for her injuries and to punish the wrongdoer. The jury award of general damages was made with full knowledge of the injuries suffered by the appellant and her rehabilitative needs. The [page82] same concerns would apply in assessing equitable compensation, and as such I would decline to provide any additional compensation for the breach of fiduciary obligation. The punitive damages award should also not be varied in equity. Of course, equitable compensation to punish the gravity of a defendant's conduct is available on the same basis as the common law remedy of punitive damages; see Aquaculture Corp. v. New Zealand Green Mussel Co., [1990] 3 N.Z.L.R. 299, at p. 301.

107 In the result, I am of the view that the jury award of $50,000 is an appropriate remedy for both the equitable and the common law claims.

Disposition

108 For the foregoing reasons, I would allow the appeal, set aside the judgment of the trial judge and order that judgment be entered in favour of the appellant in the amount of $50,000.

The following are the reasons delivered by

109 L'HEUREUX-DUBÉ J.:-- Although I agree with Justice McLachlin's comments as regards the remedies, i.e., the nature and quantum of damages associated with a breach of fiduciary duty as opposed to those which underlie the torts of battery and assault, a question which, as she notes, is not before us, I fully agree with Justice La Forest's reasons and I concur in the result.

The following are the reasons delivered by

110 SOPINKA J.:-- I agree with the result reached by my colleague Justice La Forest and with his reasons with one exception. I would not resort to the use of a presumption that a plaintiff who is typical [page83] of the syndrome is unaware of the injury done to her until she undergoes therapy. There are two reasons for this position. The first is based on the inadvisability, in general, of using presumptions because of the uncertainty as to their legal effect. The second rests on the difficulties which this presumption will create for the trial judge and the litigants in a case of this kind.

111 In McCormick on Evidence, 3rd ed., the author states at p. 965 that "presumption is the slipperiest member of the family of legal terms, except its first cousin the burden of proof." The reason for this is that the evidentiary effect of the many different types of presumptions is so varied that their use almost invariably leads to confusion. It is usually

preferable to define the legal result sought to be achieved instead of using a label that will mislead rather than define.

112 My colleague provides a partial definition of the evidentiary effect of the presumption of awareness that he advocates but I am of the opinion that it will create difficulties in the conduct of a trial and reverse the ordinary burden of proof without any justification. The presumption proposed would arise when the evidence shows that the plaintiff displays features consistent with those that are typically associated with the syndrome. This would require a determination at least on a prima facie basis. Upon this determination being made it would be presumed that the plaintiff was unaware of the elements of her cause of action until she had the benefit of therapy. The defendant would be able to refute this presumption by leading evidence. Presumably from that point on the legal burden of proof is restored to the plaintiff. It is not clear whether this creates an evidentiary burden merely, or a legal burden. The former would only require the defendant to lead some evidence tending to blunt the presumption while the latter would reverse the legal burden of proof so that the defendant would bear the risk of non persuasion. I [page84] would conclude that the latter is the result intended by reason of the use of the term "refute".

113 Apart from the practical problem of shifting the legal burden of proof on the basis of an assessment of the evidence in the middle of a trial, I question the justification for reversing the legal burden of proof from the plaintiff to the defendant in respect of the issue of reasonable discoverability. The rationale for the rule that the burden of proof rests with the plaintiff is two-fold: first the legal burden is generally imposed on the party who asserts a proposition. Secondly, the legal burden with respect to an issue is placed on the party who is in the best position to prove the issue. Since the plaintiff is presumed to know her case and the defendant does not, the burden rests with the plaintiff to prove the elements of the cause of action. The legal burden may be reversed, however if the rational for its allocation is absent. See for example National Trust Co. v. Wong Aviation Ltd., [1969] S.C.R. 481.

114 The basic criteria for the allocation of the burden of proof apply to justify maintaining the legal burden of proof with respect to reasonable discoverability on the plaintiff. It is the plaintiff who is seeking an exemption from the normal operation of the statute of limitations asserting that she was not aware of her cause of action for many years after the statutory period would otherwise have commenced to run. Moreover the plaintiff is in the best position to adduce evidence of her lack of awareness and the defendant is not. The lack of awareness will be established largely on the basis of the plaintiff's own testimony bolstered by the evidence of experts whose testimony will likewise depend on personal information supplied by the plaintiff. In most of these cases the defendant will have ceased all contact with the plaintiff for many years and have no knowledge of the plaintiff's circumstances during that period. Moreover, the definition of awareness which my colleague adopts is highly subjective and the second rationale for the [page85] allocation of the burden of proof applies a fortiori. I, therefore, see no reason to reverse the traditional burden of proof in this case. In other respects, however, I fully agree with the reasons of my colleague and would dispose of the appeal as he proposes.

The following are the reasons delivered by

115 McLACHLIN J.:-- I agree with the reasons of my colleague Justice La Forest, subject to the following comments.

116 I would question whether it is necessary to introduce the notion of a presumption of the plaintiff's discovering a cause of action when a therapeutic relationship begins (pp. 35 and 47). First, I would prefer to leave the question as a matter of fact to be determined in all the circumstances. A presumption is appropriate in special circumstances, as where the facts are largely in the possession of the opposing party on an issue. I see no such circumstances here. Second, I see no magic in the commencement of a therapeutic relationship. In particular, I am concerned that some incest survivors may not discover their cause of action until after lengthy therapy or several therapeutic relationships, and that such a presumption might inure to their disadvantage. I would prefer to view the commencement of the relationship as one of a number of factors which should be considered in determining when the limitation period begins to run.

117 Third, I would not wish to be taken as sharing the view that the award which the jury made was adequate. The

jury was asked only to assess damages for the tort of battery and assault. It did so, and the appellant has not appealed from that award, asking only that the jury's award be reinstated. In these circumstances the question of whether the award was appropriate or not does not arise on this appeal. I would dispose of the appeal [page86] as proposed by La Forest J., but on the ground that the question of the quantum of the award was not before us.

118 Having said that, I add that were I to enter on the matter of the quantum of damages, I would find myself unable to agree that the measure of damages for battery and assault would necessarily be the same as compensation for breach of fiduciary duty. As I see it, the question is whether the wrong encompassed by the cause of action is the same. The wrong encompassed by the torts of battery and assault may be different from the wrong encompassed by the action for a breach of fiduciary duty. The latter encompasses damage to the trust relationship, for example, which the former does not. The action for breach of fiduciary duty may also be more concerned with imposing a measure which will deter future breaches; as I noted in Canson Enterprises Ltd. v. Boughton & Co., [1991] 3 S.C.R. 534, at pp. 587-88, trustees have always been held to highest account in a manner stricter than that applicable to tortfeasors. In short, while agreeing with my colleague that where the same policy objectives underlie two different causes of action similar measures of compensation may be appropriate (pp. 80-81), I would not conclude that the policy objectives or the wrong involved in breach of fiduciary duty of this nature are necessarily the same as those which underlie the torts of battery and assault.

119 Subject to these observations, I concur in the reasons of La Forest J.

4

Case Name:

Jacques v. Hipel Estate (Trustee of)

IN THE MATTER OF the Estate of George Garfield Hipel, late of the City of Cambridge, in the Regional Municipality of Waterloo, deceased
AND IN THE MATTER OF the Estate of Norman Otto Hipel, late of the City of Cambridge, in the Regional Municipality of Waterloo, deceased
AND IN THE MATTER OF the Estate of Olive Victoria Hipel, late of the City of Kitchener, in the Regional Municipality of Waterloo, deceased
AND IN THE MATTER OF the Estate of Mabel Helen Hipel, late of the City of Cambridge, in the Regional Municipality of Waterloo, deceased
Between
Norma Irene Jacques, Plaintiff, and
The Canada Trust Company, Executor and Trustee of the Estate of Norman Otto Hipel, deceased, and the Estate of George Hipel, deceased, Defendants

[2011] O.J. No. 3951

2011 ONSC 5259

70 E.T.R. (3d) 149

2011 CarswellOnt 9000

108 O.R. (3d) 220

Court File No. E-564-05

Ontario Superior Court of Justice

D. Parayeski J.

Heard: December 1-4, 7-10, 2009;
January 18-22 and 25-28, 2010.

Judgment: September 7, 2011.

(60 paras.)

Civil litigation -- Civil procedure -- Estoppel -- Estoppel in pais (by conduct) -- Acquiescence -- Laches or delay -- Action by daughter against executor of father's estate for damages dismissed -- Father died in 1953, leaving life interest in income from net estate to wife with remainder to be divided equally between daughter and son -- Wife died in 1978 -- Daughter claimed she never received share of estate -- Daughter's claim statute-barred due to expiration of limitation period and by operation of doctrine of laches -- Claim was discoverable through reasonable and simple inquiry in 1978 or 1979 -- Daughter had knowledge of claim details as early as 1955 or 1956 -- Doctrine of fraudulent concealment inapplicable -- Limitations Act 1990, ss. 23(1), 43(2) -- Limitations Act 2002, s. 5(1).

Civil litigation -- Limitation of actions -- Non-statutory limitation periods -- Laches and acquiescence -- Time -- Discoverability -- Action by daughter against executor of father's estate for damages dismissed -- Father died in 1953, leaving life interest in income from net estate to wife with remainder to be divided equally between daughter and son -- Wife died in 1978 -- Daughter claimed she never received share of estate -- Daughter's claim statute-barred due to expiration of limitation period and by operation of doctrine of laches -- Claim was discoverable through reasonable and simple inquiry in 1978 or 1979 -- Daughter had knowledge of claim details as early as 1955 or 1956 -- Doctrine of fraudulent concealment inapplicable -- Limitations Act 1990, ss. 23(1), 43(2) -- Limitations Act 2002, s. 5(1).

Wills, estates and trusts law -- Proceedings -- Practice and procedure -- Limitation periods -- Action by daughter against executor of father's estate for damages dismissed -- Father died in 1953, leaving life interest in income from net estate to wife with remainder to be divided equally between daughter and son -- Wife died in 1978 -- Daughter claimed she never received share of estate -- Daughter's claim statute-barred due to expiration of limitation period and by operation of doctrine of laches -- Claim was discoverable through reasonable and simple inquiry in 1978 or 1979 -- Daughter had knowledge of claim details as early as 1955 or 1956 -- Doctrine of fraudulent concealment inapplicable -- Limitations Act 1990, ss. 23(1), 43(2) -- Limitations Act 2002, s. 5(1).

Action by the plaintiff, Norma, against the defendant, the Canada Trust Company, for damages in connection with the administration of the Hipel Estate. Hipel died in 1953 and was survived by his wife Olive, his son George, and his daughter Norma. His will left his wife a life interest in the income from his net estate with the remainder to be divided equally between George and Norma. Olive died in 1978. Norma claimed that she never received her share of her father's estate and asserted her claim by means of an action commenced in 2005. The original executor's file was no longer in existence. The defendant submitted that it was possible Norma received her share in 1966 under an agreed-upon alteration following a fire destroying her family residence and business. Alternatively, the defendant submitted that the claim was statute-barred under the Limitations Act or by application of the doctrine of laches. Norma asserted that she was not aware of her claim until investigation by her daughter in 2004.

HELD: Action dismissed. Norma never received her share of the estate under the terms of the will. The claim was not founded upon fraud or fraudulent breach of trust, and thus the six-year limitation period was applicable. The claim was prima facie statute-barred, as it was discoverable by way of reasonable and simple inquiry in 1978 or 1979 shortly after Olive's death. In addition, the claim was barred under the acquiescence branch of the doctrine of laches and the consequent prejudice to the defendant caused by the delay. Reasonable inquiry anytime after 1955 of 1956 would have easily led Norma to the particulars of her claim. The doctrine of fraudulent concealment did not overcome operation of the limitation period and the doctrine of laches, as the alleged conduct of the defendant was akin to negligent administration of the Estate rather than wilful or conscious wrongdoing. Provisional damages were assessed at $500,000.

Statutes, Regulations and Rules Cited:

Limitations Act, S.O. 1990, Chapter L.15, s. 2, s. 3(1), s. 23(1), s. 43(2)

Limitations Act, 2002, S.O. 2002 Chapter 24, s. 5(1)

Court Summary:

Issues dealt with as identified by Justice Parayeski releasing the decision:

* Historical estate limitation period
* Laches
* Doctrine of fraudulent concealment
* Historical damages for breach of executor's duties to a beneficiary

Counsel:

Mr. David M. Smith, for the Plaintiff.

Mr. Ross F. Earnshaw, for the Defendant, The Canada Trust Company, Executor and Trustee of the Estate of Norman Otto Hipel, Deceased.

REASONS FOR JUDGMENT

1 **D. PARAYESKI J.**:-- Normal Otto Hipel, a provincial politician, businessman, and gentleman farmer died on February 16th, 1953. He was survived by his wife Olive, his son George, and his daughter Norma (the plaintiff). His will was simple. He left a life interest in the income from his entire net estate to his wife. Upon her death, the remainder of the estate was to be divided equally between George and Norma. Olive died on March 15th, 1978.

2 Norma says that she never received her share of her father's estate, and asserts her claim by means of this action commenced in 2005.

3 The defendant the Canada Trust Company acknowledges that it is responsible in law for the acts or omissions of the Waterloo Trust Company, having taken it over in the corporate sense. Waterloo Trust's file has been lost in its entirety, save for a single file divider. Court records show that no formal passing of accounts ever took place.

Was the plaintiff's share as a remainderman paid to her?

4 At the time of Norman's death, Norma was married to David Jacques. They lived an impoverished life in Preston. Norma's husband had difficulty maintaining steady employment. Nancy Dasent, one of the daughter's of this union, testified that her father abused Norma for not being able to get financial help from her mother Olive. There is evidence that Olive did not approve of Norma's marriage.

5 In 1962, Norma's family relocated to Macey's Bay, where they owned and operated a modest general store. In 1966, the store and its adjacent living quarters burned to the ground. The fire destroyed virtually all of the family's possessions, personal and business. David Jacques suffered a mental breakdown of some kind in the fire's aftermath. The family borrowed money from Joseph Jacques, David's brother, who ran a more successful business in nearby Honey Harbour.

6 During the clean-up following the fire, the children stayed with various relatives, and then returned to help with the

rebuilding. They worked alongside the adults doing heavy physical labour in an effort to rebuild before the onset of winter. There is conflicting evidence with respect to how much of the work was done by volunteers and how much was done by paid workers. Building supplies were purchased from Atlas Block and Coldwater Lumber. Atlas Block was never paid.

7 The store reopened in stages. Living conditions even after the store reopened were primitive. Barry Jacques, one of the sons spoke of the humiliation of having to wear donated clothing recognized by other school children.

8 It is unclear whether there was any fire insurance on the premises when they burned. There was such insurance at the time of purchase, with the vendor/mortgagee being the beneficiary thereof.

9 Norma borrowed $5,000 from her mother Olive in 1966. She borrowed a further $5,000 from N.O. Hipel Limited in January of 1967. This is confirmed from correspondence between George and Harry Willoughby, and from the general ledger of N. O. Hipel Limited. At his death, Norman was the majority shareholder in that corporation.

10 The defendant takes the position that it is possible that Norma was given her share of her father's estate shortly after the fire, with the terms of the will being altered by agreement between her, George, and Olive in accordance with the *Saunders v. Vautier* doctrine. This, the defendant argues, would have financed the rebuilding and restocking of the business and allowed for the discharge of the vendor take back mortgage, all of which did happen. Of course, with Waterloo Trust's file no longer in existence, there is no copy of any agreement to the early distribution or any release available. Rather, the defendant points to circumstantial evidence in the form of a letter from George to the Canadian Imperial Bank of Commerce dated June 10th, 1963 and to letters from Norma to her then solicitor dated December 13th and 16th, 1966. In the letter to the CIBC, George indicates that "Mrs. N.O. Hipel [Olive] has decided that the estate should be divided while she is still living". In the letters from Norma, she contemplates having title to the Macey's Bay property transferred to her alone. This transfer, the defendant argues, is logically consistent with the notion that it was Norma's inheritance that funded the rebuilding and restocking of the store and the payment of the vendor take back mortgage.

11 Norma argues that the family's ongoing poverty, the loans from Olive and N.O. Hipel Limited described above, the non-payment to Atlas Block, and the fact that in her letters to her lawyer she speaks of trying to take out a mortgage all militate against the defence that she was given her share of the estate in or around 1966.

12 Relying upon the available evidence, I am satisfied on the balance of probabilities, that the plaintiff at no time received her share of her father's estate under the terms of her will.

13 I make this finding notwithstanding the considerable weakness in Norma's own testimony which stems, in part at least, from her having suffered a debilitating stroke in May of 2004.

14 Since distribution in accordance with the will is one of the fundamental duties of an estate trustee, it is liable to the beneficiary in the face of not having done so.

Is the plaintiff's claim statute barred?

15 The plaintiff asserts that her claim was discovered in June of 2004 when her daughter Nancy Dasent ascertained that a claim existed. If that is the case, the *Limitations Act*, 2002, S.O. 2002 Chapter 24, would govern. The action was started in 2005, and was therefore brought in time. I am not satisfied that the "new" Act applies. Rather, I am of the view that the claim was, or reasonably could have been, discovered before the "new" Act came into force on January 1st, 2004.

16 Under the terms of the predecessor *Limitations Act*, S.O. 1990, Chapter L.15, there are two possibly applicable limitations periods. One is found in s.2 3(1) of the "old" Act; the second is in its s. 43(2). S. 23(1) of the "old" Act, states that "No action shall be brought ... to recover any legacy ... but within 10 years next after a present right to receive

it accrues". Discoverability is not applicable to this section. The plaintiff argues that the section does not apply because:

a) the term "legacy" does not include a residual interest in an estate; and
b) this limitation period does not apply to her claim for breach of trust and breach of fiduciary duty.

17 There is conflicting authority as to whether the term "legacy" includes that which Norma seeks through this action. While the breach of trust and duty damages that the plaintiff seeks to recover undoubtedly overlap and encompass her claim to recover her interest in the estate's residue, I am satisfied that there is a sufficient distinction that s.23(1) "old" Act does not apply.

18 I am equally satisfied that s. 43(2) of the "old" Act does apply. The plaintiff agrees that her claim, as pleaded, is not "founded upon a fraud or fraudulent breach of trust" to which the (defendant) was party or privy. Accordingly, the six year limitation period under s. 43(2) of the "old" Act does apply.

19 I accept the plaintiff's submission that the discoverability principle applies to actions governed by this section. The defendant appears to take the same position, albeit as an alternative one.

20 S. 5(1) of the "new" *Limitations Act* codifies the concept of discoverability as follows:

5(1) the claim is discovered on the earlier of:

a) The day on which the person with the claim first new:

(i) That the injury, loss or damage had occurred;
(ii) That the injury, loss or damage was caused or contributed to by an act or omission;
(iii) That the act or omission was that of the person against whom the claim is made;
(iv) That having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it;

b) The day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

21 The plaintiff says that she did not know of the relevant factors until 2004, when her daughter investigated for her. That is not the end of the analysis, however. One must inquire when someone with Norma's abilities and in her circumstances first *ought* to have known these things.

22 Mr. Sturdy testified that it would have been standard practice in 1953 for beneficiaries, such as Norma, to have been given a copy of the application for probate, including the will when that application was prepared and filed. Norma denies having ever received a copy of the will, or anything else of the time at the time of the application for probate, or at least does not remember having received anything like that.

23 However, on January 25th, 1955, Norma executed a deed transferring some real property owned by the estate. That deed contained recitals that, *inter alia*, showed that Olive and Waterloo Trust were executors of Norman's estate, gave details of the letters probate, including their location, and set out the fact that Norma had an interest in the relevant land.

24 On November 19th, 1956, Norma executed a second deed transferring another piece of real property owned by the estate. The recitals in this deed showed, *inter alia*, that under the terms of Norman's will Olive was given a life interest

in the subject lands and that after her death Norman's estate was "to be divided equally between his son George Hipel and his daughter Norma Jacques".

25 The plaintiff was made aware of Olive's death within a few days of its occurring on March 15th, 1978. There is no evidence to suggest that Norma was in any way incapacitated in 1953, 1955, 1978 or 1979. Throughout, she was living a life of poverty, with a husband who abused her for not getting financial help from Olive. It seems reasonable that someone in that position would be especially keen to understand where, if anywhere, she stood in respect of her father's estate. The recitals in the deeds are written in simple, clear terms. Norma testified that she always read documents before signing them. It was telling that she began her response to her signatures on the deeds by calling them forgeries, only to resile in the face of expert evidence that they were not, and then to take the position that she didn't understand what they meant. She may well may not understand what there meanings now, post stroke, but I do not accept that she did not understand what they meant when she signed the deeds. Armed with that understanding, I find that a person in Norma's situation and with her abilities could, with any reasonable effort, have easily apprised herself of the elements set out in s. 5(1) of the "new" *Evidence Act* within a short period of time after Olive's death, if not earlier.

26 I pause to note that by the time of Olive's death in 1978, the defendant had, even if one were to accept the plaintiff's argument that Norman's shares in N.O. Hipel Limited had not been included in the probate inventory or succession duty returns, or that those shares had been improperly or imprudently sold to George, became more actively involved in the company and the estate. Reasonable inquiry in 1978 or 1979 would likely have uncovered all of the evidence underlying these allegations, one way or the other. Consultation with any remotely competent solicitor could have commenced a simple inquiry that would have revealed much.

27 I also note, at this point, that I accept the defendant's argument that the plaintiff's allegation that she remained ignorant of the fact that Norman's shares in N.O. Hipel Limited formed part of the estate, and is therefore somehow sheltered from application of any limitation period, is specious. Norma did not need to know the exact nature of the assets in the estate; it is sufficient that she knew, or ought to have known that she had entitlement as a beneficiary.

28 The defence asserts that Norma could have learned all that was necessary within a year of Olive's death, and I accept that as reasonable. Accordingly the limitation period began to run in March of 1979, and thus expired six years later in March of 1985. The action was not commenced until 2005. The action is *prima facie* statute barred.

Does the doctrine of laches apply as well?

29 The doctrine itself has been defined by the Supreme Court of Canada in its 1992 decision in M(K) v. M(H), reported at [1992] S.C.J. No. 85 at paragraph 9B. Laforest, J., described the current law as follows:

> Thus there are two distinct branches of the laches doctrine, and either will suffice as a defence to a claim in equity. What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of the 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 much be resolved as a matter of justice between the parties, as is the as with any equitable doctrine.

30 Whether a defendant is entitled to the equitable relief of laches is:

a) discretionary; and
b) not available by merely demonstrating that there has been delay on the part of the plaintiff.

31 In order for this court to exercise its discretion in its favour, the defendant must demonstrate that Norma, by delaying the commencement of her action, either:

a) acquiesced in the defendant's conduct, or

b) (i) caused the defendant to alter its position in reasonable reliance on her acceptance of the *status quo*; or

(ii) otherwise permitted a situation to arise which it would be unjust to disturb.

32 Under the first branch of the doctrine of laches, as defined in the *M(K) v. M(H)* decision, (*supra),* knowledge by the plaintiff of her rights is critical to determining whether she has acquiesced in them. The standard is objective, i.e.: "the question is whether it is reasonable for the plaintiff to be ignorant of her legal rights given her knowledge of the underlying facts relevant to a possible legal claim". I have already found the plaintiff had, by means of her having read and executed the deeds referred to above, knowledge that she was a remainderman in respect of one half of her father's estate. Reasonable inquiry anytime after 1955 and or 1956 could have easily lead to the particulars she now says she was missing until her daughter undertook investigation in 2004. I reject the plaintiff's apparent assertion that reasonable inquiry would still have left Norma ignorant of the fact that shares in N.O. Hipel Limited formed part of the estate. She testified that she knew that N.O. Hipel Limited was "his" [Norman's] company, although she didn't know the details of shareholding. Her repeating on many occasions in the submissions made on her behalf that these shares were hidden and not discoverable does not constitute evidence of that flawed proposition.

33 The plaintiff's claim is barred by operation of the first branch of the laches doctrine, i.e. acquiescence. This branch can, and does, stand on its own to operate as a bar to this action.

34 The second branch of the doctrine of laches does not depend upon acquiescence, with its component of knowledge, on the part of the plaintiff. Rather, it focuses on prejudice to the defendant.

35 In the present case, the defendant argues that it has been prejudiced in its defence by means of the loss of its file (or, more accurately, the file of Waterloo Trust) and other documents relating primarily to N.O. Hipel Limited and by the death of multiple witnesses.

36 The plaintiff not only blames the defendant for the loss the of the Hipel estate file, she goes further to suggest that its loss was deliberate so as to cover up Waterloo Trust's alleged negligence qua executor. Files go missing from time to time in any business or profession. Sometimes they do so quite innocently. Other times they are indeed disposed of to eliminate damning evidence. The plaintiff's cynicism in respect of the loss of the file, however reasonable it might appear to her in the context of this action, does not constitute evidence that the file was deliberately lost. I similarly reject the plaintiff's suggestion that a 1971 letter from the Clement Eastman *et al*. law firm to Schiedel Construction is proof that Waterloo Trust had no estate file whatsoever as early as that year. The letter indicates that upon inquiry of Waterloo Trust, Mr. Eastman had only been provided by it a copy of a federal consent to a share transfer. Mr. Eastman went on in the letter to say that he didn't have either an Ontario consent or probate document. While it is true that the estate file would likely have contained a copy of the probated will, the plaintiff's interpretation is an exaggeration. Obviously Waterloo Trust did have some documentation in 1971, and moreover, there is no evidence of the extent of the effort made on behalf of Waterloo Trust to find the complete file at that time. Not all requests from lawyers precipitate exhaustive searches.

37 While legislative changes in 1991 made it mandatory for trust companies maintain "records relating to the fiduciary activities of the company" presumably indefinitely, the legislation that predates that year is somewhat less definitive.

38 Of course, in addition to statutory record keeping obligations, there are such obligations at common law. The defendant acknowledges the general proposition that records, including records pertaining to the administration of a closed estate should be kept for some period of time, but argues that the common law does not impose that obligation in perpetuity. I agree with the defence submission that none of the cases cited by the plaintiff in respect of the common law obligation involved a request for documents delayed for the 27 years involved here (2005-1978 = 27 years).

Regardless of whether the defendant bears ultimate responsibility for having lost its file, there are other documents which were not produced which give me concern. These records were not the responsibility of Waterloo Trust. These include the complete financial records of N.O. Hipel Limited. While some of those records were located and produced at trial, they are far from complete. The valuation gymnastics that both expert witnesses had to perform in order to come up with their conclusions as to the present value of Norma's share in the estate are ample proof of that.

39 Also missing are the Ontario succession duty return files, the federal estate tax return file, the Canada Revenue Agency T3 trust returns, and any files kept by the co-executor Olive and some, if not most, of George Hipel's files. Some of those might have formed part of Waterloo Trust's file, but others clearly didn't.

40 I turn to the issue of the death of key witnesses. These include, Patrick Flynn, Norman's solicitor who died also in 1978, Harry Syer of Waterloo Trust, Harry Willoughby, secretary-treasurer of N.O. Hipel Limited, and personal accountant to George Hipel, who died in the early 1990s, George Hipel (the plaintiff's brother and co-beneficiary), who died in December of 2004, Kenneth Dunn, an accountant who had the N.O. Hipel Limited account, who died before this litigation commenced, H.G. Willoughby and W. C. Beattie, both directors of N.O. Hipel Limited just before Norman's death, who are also deceased, as is Arthur Hipel, who was a director of that company as of March 31st, 1953.

41 Inasmuch as those who died well before this trial commenced include those whom the plaintiff implicitly suggests were in collusion to act against her, i.e. George Hipel, Patrick Flynn, Olive Hipel, Harry Willoughby and Harry Syer, their not being available at witnesses has potentially prejudiced the defendant.

42 Time has also taken a toll on the ability of the plaintiff herself to give fulsome evidence. It is obvious that the effects of her stroke have impaired her memory and have rendered her subject to suggestion. This was apparent from her testimony regarding her execution of the deeds described above.

43 Under all of these circumstances, I find that indeed the delay in bringing this case has created or permitted a situation to arise which it would be unjust to disturb. The plaintiff's claim is barred under the second branch of the doctrine of laches as well.

Does the doctrine of fraudulent concealment avoid both the tolling of the limitation period and the operation of the doctrine of laches?

44 The general proposition, which I accept, is that when a defendant has a special relationship with the plaintiff and has been guilty of willful or conscious wrongdoing, and such wrong doing is unknown to the plaintiff due to knowing or reckless concealment by the defendant, the court will not either invoke laches or toll a limitation period.

45 As co-executor of an estate in relation to which the plaintiff was a beneficiary, the defendant was a fiduciary to her, and thus had a "special relationship" with her.

46 The more difficult question is whether the defendant has been guilty of willful or conscious wrongdoing and has knowingly or recklessly concealed that wrong doing from the plaintiff. Unless she can establish both factors, the plaintiff cannot rely upon the doctrine of fraudulent concealment. I am satisfied that she has not lead sufficient evidence of those factors to entitle her to do so. Even if the term "fraudulent" is to be given a broad interpretation in the context of considering this doctrine, the plaintiff has not convinced me that the defendant has engaged in willful and conscious wrong doing. What she alleges comes to negligence in the administration of the estate, perhaps even very serious negligence, but that is not enough. None of the cases she cites equate negligence with willful and conscious wrongdoing.

47 Notwithstanding the pleading of "equitable fraud", the plaintiff's evidence, vis á vis the defendant does not reach the level of proving concealment amounting to something unconscionable as is required according to the *Guerin v. Canada* case cited (reported at [1984] 2 S.C.R. 335.

48 I am of the view that the doctrine of fraudulent concealment, not having been proven, does not assist the plaintiff.

49 Having found that the plaintiff's claim is statute-barred, prescribed by both categories of equitable laches, and not "saved" by the doctrine of fraudulent concealment, I shall now briefly address the plaintiff's main allegations with regard to the defendant's failure to properly administer the estate short of the issue of distribution.

50 In the context of my ruling relative to distribution, the thrust of these allegations is more related to the issue of damages than that of liability. Unfortunately, it is not possible, on the evidence before me, to say what the impact of any given shortcoming, if proven, had on the value of the plaintiff's unpaid entitlement.

51 I address the following points in the order in which they are set out in both parties' closing submissions. Nothing is intended by me in following that order of presentation.

1) The alleged failure to disclose Normans shares in N.O. Hipel Limited on the probate inventory.

The plaintiff alleges that the defendant failed to include shares in N.O. Hipel Limited owned by the testator at the time of his death in the probate inventory that was submitted with the application for probate.

It is trite to say that an executor has an obligation to identify estate access. Where those assets include shares in a private corporation, there is a duty to identify, value and administer the shares. At the time of his death, Norman Hipel owned controlling interest in N.O. Hipel Limited. The plaintiff asserts that when Olive and Waterloo Trust applied for probate they failed to recognize this fact, and that they the proceeded to administer the estate, for a time at least, as though George was the controlling shareholder. The will, not unusually, does not identify the various assets which Norman owned. The application for probate contained a pre-printed "probate inventory". Under the heading "bank stock and other stocks" a value of $54,450 was given. It was agreed by all witnesses who gave relevant evidence at the trial that if the value of N.O. Hipel shares Limited were included anywhere in the inventory it would have been under that heading.

The probate application was prepared by the estate solicitor, Patrick Flynn. Mr. Flynn had acted for Norman in his personal capacity. The application was sworn to by both Olive and a representative of Waterloo Trust.

The plaintiff argues that inasmuch that: a) the face value of Norman's shares in 1949 was some $71,510.00; and b) that there was a surplus in the company of some $61,610.00; and c) that shares worth $500.00 in Sheidel Construction were included, the $54,450.00 shown on the inventory could not possibly have included the N.O. Hipel Limited shares. Of course, this proposition relies upon the notion that probate value and face value plus the shareholders' interest in the surplus must all be the same.

In October of 1953 the succession duty office increased the value of the estate for tax purposes by $17,752.50 in respect of "personalty" and $1,700 regarding "realty". There is no available breakdown of either figure. If one adds the $17,752.50 to the $54,450 shown on the inventory submitted as part of the application for probate as relating to stocks, the total is $72,202.50, $500.00 dollars of which relates to the Sheidel corporation shares. If that is deducted from the grand total one is left with a possible value for the N.O. Hipel Limited shares of some $71,702.

The defendant counters the argument that the N.O. Hipel Limited shares were not recognized by the executors as being estate assets, and were thus not included in the probate application or amended succession duty return by saying that to find this as a fact, the court must accept the following:

1. that the trust officer from Waterloo Trust, one Harry Syer, overlooked the fact that Norman held shares in a company that bore his own name;
2. that Robert Flynn, who swore the probate application, overlooked the same thing despite having known Norman politically and having acted for him personally;
3. that Olive who herself was a shareholder in N.O. Hipel Limited, failed to notice her husband's interest in that same corporation when she attested to the probate application;
4. that the succession duty assessors overlooked the possibility that Norman owned shares in a company that bore his own name; and
5. that if the $54,750 as shown on the application for probate does not include the N.O. Hipel Limited share value, Norman must have owned other stocks worth that amount, in respect of which there is no evidence whatsoever.

Based upon the evidence lead at trial, and the closing submissions of counsel, I am not satisfied that the plaintiff has proven, on the balance of probabilities, that the N.O. Hipel Limited shares owned by Norman at his death were left off the relevant probate inventory.

2) The alleged failure to pay necessary estate taxes.

There is no evidence to support this allegation unless one assumes that the value of the N.O. Hipel Limited shares were either not declared in the application or were not caught by the subsequent assessment. For the reasons given above, I reject this proposition. Moreover, since there is no evidence that any taxing authority is seeking payment at this late date, nothing flows from the failure to pay any such taxes in practical terms.

3) The failure to pay Norman's debt to N.O. Hipel Limited at his death into the estate.

The defendant makes no response to this allegation. Accordingly, I assume that it concedes the point. That being said, I fail to recognize the practical ramifications of this allegation.

4) The failure to take custody of N.O. Hipel Limited.

Frankly, I am uncertain as to what the plaintiff means by the term "custody" in this context. If it means a broad taking of control, as I assume it does, then I agree with the submissions of the defendant that so doing, especially early on in the administration of the estate, would have been beyond its discretion and power. George and Olive both participated in the company before and after the death of Norman. The wishes of these people would have had to have been taken into account. I also accept the defendant's submission that the defendant could not have forced a sale

of the company against the wishes of George and Olive, especially given that Olive was a co-executor and a minority shareholder. That much evidence with respect to complete details as to how the company was being operated is unavailable is yet another problem raised by the delay in bringing this action.

5) The failure to withdraw any of the surplus held by N.O. Hipel Limited for the benefit of the plaintiff.

In the absence of evidence from management as to why the surplus was kept in the corporation, I am unable to conclude that it should have been withdrawn. Certainly there is no evidence of bad faith on the part of the defendant. Lastly, it is certainly possible, as is argued by the defendant, that any such withdrawal would have been treated as income, in which case it would have accrued to Olive and not to the remaindermen, as the plaintiff it urges it should have been. There is an obvious conflict between Olive and the plaintiff on this point.

6) The failure to transfer Norman's shares in N.O. Hipel Limited to the estate.

I am of the view that it would have been prudent for this to have been done. I agree with the plaintiff's position that the shares held by Norman could not be voted upon, at least technically, unless this was done. That said, the practical ramifications from this failure to transfer are unclear. It is certainly possible that the co-executor, Olive did attend meetings and purported to vote the estates shares.

7) The failure to know that the estate owned shares in N.O. Hipel Limited.

I have already discussed this issue at part one, above. The plaintiff, despite repeated bald assertions that the defendant did not know that the estate owned the shares, has not presented compelling or sufficient evidence to prove that proposition. She bears the onus to do so. Her interpretation of a letter from Harry Syer to George wherein he refers to N.O. Hipel Limited as George's company does not constitute the evidence she lacks.

8) The failure to sit on the board of director's of N.O. Hipel Limited.

While, in hindsight at least, it might have been prudent for a representative of the estate, separate from Olive, to sit on the corporation's board of directors, I am not convinced that it was essential. Absent more fulsome evidence on the management of the company overall, I am of the view that it was not negligent for the defendant to fail to take a place on the board.

9) The failure to oversee the operation of N.O. Hipel Limited.

While the plaintiff did lead evidence in support of her allegations that the corporation might have acted contrary to her interests, this does not necessarily constitute adequate proof of a failure to oversee as is suggested. In any event, this generalized complaint does not, in and of itself lead to

damages.

10) The failure to attend a shareholder's meeting of N.O. Hipel Limited until 1962.

It is factually true that no representative of Waterloo Trust attended such meetings until 1962. It is also true that the limited corporate financial documentation presented at trial as evidence shows that until 1961 the corporation appeared to be operating relatively well. Once this reversal was noticed, Waterloo Trust did attend the meetings. Accordingly, the plaintiff has not proven negligence in this instance.

11) The failure to sell N.O. Hipel Limited when it was profitable.

The estate's shares in N.O. Hipel Limited were sold to George in April of 1965. The limited corporate financial documentation does not reveal the share price. The plaintiff asks this court to interpret this to mean that George paid nothing for the shares or certainly less than they might have been worth. This is asking too much, again, based upon the available evidence. Without knowing the actual price paid, it is not possible to conclude that the sale was improvident. It may well have been, but this is for the plaintiff to prove on the balance of probabilities, and not for the defendant to disprove.

It is possible of course that both George and Olive might not have wanted to sell when the company was profitable. The latter was a shareholder and a co-executor.

Without relevant evidence, we shall never know whether they would have cooperated with Waterloo Trust had it wanted to sell then. Their wishes were entitled to some deference by that co-executor.

Moreover I am not convinced the plaintiff has proven, to the degree necessary, to meet the onus upon her, that N.O. Hipel Limited failed due to mismanagement on the part of the defendant. Even well managed companies fail when their products and service lines no longer meets market needs. Coal and ice supply was a declining business in the 1960s and beyond. Even efforts to branch out into arena and homebuilding, as it appears N.O. Hipel Limited did, did not guarantee success in perpetuity. The "firing" of the company by its accountant, and the letter from George to CIBC, which was not necessarily good business promotion, does not convince me that mismanagement was primarily the cause of N.O. Hipel running into trouble. Evidence was lead that its patents were either expiring or were being eclipsed by new technology.

12) The allowing of N.O. Hipel Limited to plummet in value from the death of Norman.

The limited financial records available, i.e. the general ledger and the UDIOH filing documents, show general growth of the company's surplus account until 1961 (with one roughly $7,000 decline in 1956). I shall not repeat here my observations regarding the harsh economic fact that even well managed companies do fail.

Punitive Damages

52 The plaintiff has failed to lead evidence sufficient to convince me that she's entitled to punitive damages on any scale. Mere proof of the breach of a fiduciary duty is not enough to merit this extraordinary remedy. While the defendant was negligent and failed the plaintiff in several respects, she has not proven that its conduct was "malicious, oppressive and highhanded", as is necessary in accordance with the Supreme Court of Canada decision in *Whiten v. Pilot Insurance*, [2002] 1 S.C.R. 595, cited by her. The plaintiff's submissions on this topic are overblown.

Damages for the failure to distribute the plaintiff's share in the estate to her

53 Although the plaintiff's claim is to be dismissed on the basis of the tolling of the applicable limitation period and both types of laches, it is necessary for me to endeavour to fix a value as of trial for the share of the estate of her father that was not paid to Norma. That is an extraordinarily difficult task given the lack of appropriate and complete financial information, that brought on, in large part at least by the delay in the bringing of this action. The task is hard notwithstanding the evidence of two expert witnesses. The same lack of evidence hampered both of them. That the opinion of an expert is only as good as the assumptions upon which it is predicated is axiomatic. Perhaps predictably, the expert retained by the plaintiff took a relatively liberal approach to valuation, whereas the expert hired by the defendant took a more conservative one.

54 There are a considerable number of assumptions made by the plaintiff's expert that I do not accept as being reasonable. These include the following:

1) that the N.O. Hipel Limited shares owned by Norman at his death were not included in the probate inventory submitted at the time of the application for probate, nor were they included in the figure amended upon assessment;
2) that the $53,958.00 worth of "bank stocks and other stocks" shown on the probate inventory were assets held by Norman other than his shares in N.O. Hipel Limited;
3) that N.O. Hipel Limited had goodwill worth $100,000.00 as at 1953;
4) that N.O. Hipel Limited would have enjoyed uninterrupted and steady growth at nine percent *per annum* from the date of death to the date of trial;
5) that the sale of the estate shares to George in 1965 ought to be ignored because the company had been so badly mismanaged that the sale of the thusly devalued shares should be overlooked; and
6) that Olive drew no income from the estate during her lifetime, and, accordingly that all income would have simply accumulated in the estate for eventual distribution to the remaindermen.

55 My views on the validity of each assumption enumerated above is set out below using the same numbering system:

1) I have already ruled that the plaintiff has not lead sufficient evidence to prove that Norman's shares in N.O. Hipel Limited were left out of the inventory and/or reassessment;
2) there is no evidence that Norman held shares other than those in N.O. Hipel Limited. I am asked by the plaintiff to assume that a man of his stature must have done so. I am not prepared to make that assumption without some evidence;
3) while I can accept that a company that had been in existence in a small community since the 1920's had some good will at the time of Norman's death. I cannot accept a figure of $100,000.00 which the expert was instructed by plaintiff's counsel to use. This does not meet the evidentiary burden to prove damages that rests upon any plaintiff;

4) the assumption that N.O. Hipel Limited could have and would have enjoyed nine percent annual growth from 1953 to the date of trial is so utterly out of touch with business reality, even for companies that maintain market share, that it is simply unreasonable.

The nine percent annual growth rate is based upon a snapshot view of company performance in the five years preceding Norman's death. With respect this is little more than arbitrary;

5) as stated previously in this decision, I do not accept that the plaintiff has proven that the decline in N.O. Hipel Limited's fortunes were solely the result of mismanagement that the defendant could have overcome. This assumption is also unreasonable; and

6) while Olive appears to have been a lady of some means, she lived modestly after Norman's death according to the evidence. The plaintiff's daughter testified that she understood, at a young age, that her grandmother's (i.e. Olive's) money was in trust, that it was managed by Waterloo Trust, and that it couldn't simply be drawn out at will. This suggests that, to some extent at least, Olive was likely dependent upon income from Norman's estate;

To be fair to the expert retained by the plaintiff, she did speak plainly about her being unable to give a comprehensive valuation because of the lack of evidence, documentary and otherwise. She could not use the capitalized earnings approach, and instead had to use the somewhat less reliable adjusted book value approach to valuation. She did not do so out of choice.

56 Based upon all of the foregoing I am of the opinion that the value arrived at by the plaintiff's expert is significantly unrealistically high. The plaintiff has not adequately proven damages at that level.

57 I am simultaneously of the view that the approach taken by the defendant's expert is also flawed, albeit to a lesser degree. For example, he assigns no value to goodwill in N.O. Hipel Limited as of the time of Norman's death, or that if there was such any good will it was evaluate and included in the "stocks" valuation shown on the probate inventory. I do not accept this as reasonable even though I do accept that there is some merit to the argument that the people who prepared that inventory likely would have been familiar with the operation with N.O. Hipel Limited, including its intangible good will value. The flaw is that good will is not normally considered part of share value.

58 Lastly on this topic, the defendant's expert used the statutory pre judgment interest rate of 2.8 percent *per annum* from the date of the sale of the estate's shares in N.O. Hipel Limited to the date of trial. This rate may be too low under the circumstances. It generates a value of $242,000.00 as of the date of trial.

59 Based upon what evidence I do have, I am prepared to assess damages at a figure that is closer to that of the defence expert than that of the plaintiff. That figure is $500,000.00 as of the date of trial.

Conclusion

60 For the reasons stated above, the plaintiff's claim is dismissed. If the parties cannot agree upon costs, they may make written submissions to me in that regard. Each set of such submissions should not be more than three type written pages in length, and have attached to it a costs outline. The successful defendant has 30 days from the date of the release of this decision to submit its costs proposal. The plaintiff has 30 days thereafter to submit her costs proposal. All such material should be sent to my attention at the John Sopinka Courthouse in Hamilton.

D. PARAYESKI J.

cp/e/qlrxg/qlvxw/qlana/qljxr/qlhcs/qlhcs

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Case Name:

Martin v. Goldfarb

Between
Robert E. Martin, Plaintiff, and
Clifford Goldfarb and Farano Green, Defendants

[2006] O.J. No. 2768

[2006] O.T.C. 629

149 A.C.W.S. (3d) 1122

2006 CanLII 23152

Court File No. 99-CV-176075A

Ontario Superior Court of Justice

P.M. Perell J.

Heard: June 19, 22-23, 26-29, 2006.
Judgment: July 7, 2006.

(160 paras.)

Legal profession -- Barristers and solicitors -- Liability -- Standard of care and negligence -- The plaintiffs' action against the defendant solicitors for breach of fiduciary duty was dismissed -- Although the defendants for the most part conceded liability, the claim was statute-barred by issue estoppel, and furthermore, the plaintiff had failed to prove the amount of the losses alleged suffered by the corporations for which he was the assignee.

Limitation of actions -- Non-statutory limitation periods -- Laches -- The plaintiffs' action against the defendant solicitors for breach of fiduciary duty was dismissed -- Although the defendants for the most part conceded liability, the claim was statute-barred by issue estoppel, and furthermore, the plaintiff had failed to prove the amount of the losses alleged suffered by the corporations for which he was the assignee.

Limitation of actions -- Topics -- Professions and occupations -- Legal profession -- Barristers and solicitors -- Torts -- Negligence -- The plaintiffs' action against the defendant solicitors for breach of fiduciary duty was dismissed -- Although the defendants for the most part conceded liability, the claim was statute-barred by issue estoppel, and furthermore, the plaintiff had failed to prove the amount of the losses alleged suffered by the corporations for which he was the assignee.

Professional responsibility -- Professional duties -- Fiduciary duties -- The plaintiffs' action against the defendant

solicitors for breach of fiduciary duty was dismissed -- Although the defendants for the most part conceded liability, the claim was statute-barred by issue estoppel, and furthermore, the plaintiff had failed to prove the amount of the losses alleged suffered by the corporations for which he was the assignee.

Professional responsibility -- Professions -- Legal -- Lawyers -- The plaintiffs' action against the defendant solicitors for breach of fiduciary duty was dismissed -- Although the defendants for the most part conceded liability, the claim was statute-barred by issue estoppel, and furthermore, the plaintiff had failed to prove the amount of the losses alleged suffered by the corporations for which he was the assignee.

Tort law -- Negligence -- Fiduciary duty -- The plaintiffs' action against the defendant solicitors for breach of fiduciary duty was dismissed -- Although the defendants for the most part conceded liability, the claim was statute-barred by issue estoppel, and furthermore, the plaintiff had failed to prove the amount of the losses alleged suffered by the corporations for which he was the assignee.

Tort law -- Interference with economic relations -- Breach of fiduciary obligation -- The plaintiffs' action against the defendant solicitors for breach of fiduciary duty was dismissed -- Although the defendants for the most part conceded liability, the claim was statute-barred by issue estoppel, and furthermore, the plaintiff had failed to prove the amount of the losses alleged suffered by the corporations for which he was the assignee.

The action was dismissed -- In 1988 the defendant law firm acted on behalf of the plaintiff, a wealthy entrepreneur -- The plaintiff subsequently lost his fortune, allegedly due to the activities of Nigel Axton, a convicted fraudster and disbarred lawyer -- The plaintiff now acted as the assignee of two of his corporations, and sought to have the defendants pay common law damages or equitable compensation of roughly $14 million -- He brought a claim for compensation against the defendants, alleging solicitor's negligence and a breach of fiduciary duty, claiming that the defendant Goldfarb failed to disclose Axton's background to him, which allowed Axton and his cronies to eradicate his assets and those of his corporations -- HELD: The action was dismissed, as (a) the technical defence of issue estoppel succeeded, and it barred or precluded the corporations' claims, and (b) the plaintiff had failed to prove the amount of the losses suffered by the corporations -- The claim for solicitor's negligence was statute barred because it was known to exist in 1989 and was not pursued until 1999 -- However, the claim for breach of fiduciary duty was not barred under the doctrine of laches, as the plaintiff had not acquiesced, nor had the defendants altered their position or suffered any prejudice from the delay -- The action was to be dismissed for cause of action estoppel -- The claims of the corporations should now being advanced could and should have been advanced in the 1990 action, as they were the same as the cause of action advanced by the plaintiff -- The factors of consistency, judicial economy, conclusiveness, finality, and the avoidance of repeat or duplicative litigation in the administration of civil justice all demanded that this complaint be made simultaneously by Martin on his own behalf and on behalf of his corporations and not consecutively with one action in 1990 and another action in 1999 -- The corporations' claims also failed because deducting the losses from "pre-Goldfarb and non-Axton" might also reduce their claims to zero -- The plaintiff failed to establish the values of the corporations at the point where Goldfarb breached his fiduciary duty -- There were substantial losses that the plaintiff could not connect to the breach.

Statutes, Regulations and Rules Cited:

Limitations Act, R.S.O. 1990, c. L-15, s. 45(1)(g)

Ontario Rules of Civil Procedure, Rule 21

Counsel:

William G. Dingwall, Q.C. for the Plaintiff

Geoffrey D.E. Adair, Q.C. for the Defendants

REASONS FOR JUDGMENT

P.M. PERELL J.:--

Introduction and Overview

1 The events that are the subject matter of this action are almost nineteen years old, and they already have been the subject of two trials and two appeals to the Court of Appeal for Ontario. This is the third trial about the same circumstances and about the same claims for common law damages or equitable compensation. Not surprisingly, the defendants plead the technical defences of limitation periods, *laches*, cause of action estoppel (*res judicata*) and abuse of process.

2 In 1988, eighteen years ago, the defendants Clifford Goldfarb, who is a lawyer, and the law firm Farano, Green, with which Mr. Goldfarb was associated, acted for the plaintiff, Robert Edward Martin, who is now 78 years of age. He was then a wealthy 60-year old entrepreneur with a net worth alleged to be in excess of $18 million, having made his fortune by buying and selling land and by owning and operating a golf club and nursing, retirement, and group homes.

3 Mr. Martin, who is now a night watchman living modestly in Florida, lost his fortune, allegedly because of the activities beginning in 1987 of Nigel Stephen Axton, a convicted fraudster and disbarred lawyer.

4 In the action now before the court, Mr. Martin, as the assignee of two of his corporations, Martinvale Estates Limited ("Martinvale Estates") and Newmarket Golf and Country Club Limited ("Newmarket Golf Club") seeks to have Mr. Goldfarb and the law firm Farano, Green pay common law damages or equitable compensation to restore the lost fortune.

5 In accordance with an assignment agreement with Richter & Partners Inc., the Trustee in Bankruptcy of both Martinvale Estates and Newmarket Golf Club, the recovery of any compensation in this action is payable to Mr. Martin and the Trustee as follows: (a) the first $50,000 to the Trustee; (b) the next $500,000 to Mr. Martin; and (c) the balance allocated 25% to the Trustee and 75% to Mr. Martin.

6 In support of this claim for compensation, Mr. Martin alleges solicitor's negligence and a breach of fiduciary duty. The fundamental allegation against Mr. Goldfarb is that while acting for Mr. Martin and his corporations, Mr. Goldfarb failed to disclose Mr. Axton's background to Mr. Martin, which, in turn, allowed Mr. Axton and his cronies to take, imperil, and ultimately eradicate the assets that comprised the fortune of Mr. Martin and of his corporations, Martinvale Estates and Newmarket Golf Club, all of whom were petitioned into bankruptcy in September 1990.

7 Assuming liability is established, the theory of the causation and quantification of Mr. Martin's claim for compensation is that: (a) Martinvale Estates and Newmarket Golf Club owned assets, primarily land; (b) the assets had an "equity" value of $13,959,764 (which is determined by deducting the value of genuine encumbrances from the fair market value of the land); (c) the corporations lost their assets because of the activities of Mr. Axton and his associates through a business enterprise known as the FP Group of Companies; (d) but for Mr. Goldfarb's failure to warn about Mr. Axton, the corporations would not have lost their assets; and (e) therefore, the equity value of the lost assets should now be restored to Mr. Martin as the assignee of the corporations.

8 I will refer to this theory of causation and quantification of the claim for compensation as the "before-and-after" theory because it posits that before Mr. Goldfarb's breach of fiduciary duty, the assets of Martinvale Estates and Newmarket Golf Club, net of genuine liabilities, had a value of $13,959,764 and after Mr. Goldfarb's breach of fiduciary duty their value was zero. Mr. Martin, as the assignee of Martinvale Estates and Newmarket Golf Club,

therefore, claims damages or equitable compensation of $13,959,764.

9 Mr. Martin also makes a separate case for compensation in the amount of $875,000 for one particular example of Mr. Axton's pilfering of assets known as the 412-414 Jarvis Street, Toronto, transaction. Mr. Martin alleges that Mr. Goldfarb's involvement and breach of fiduciary duty with respect to this particular transaction caused Martinvale Estates to suffer an $875,000 loss. This claim, however, would be subsumed if the court accepted the before-and-after theory. Put somewhat differently, if the approximately $14 million claim is not proven, then Mr. Martin, nevertheless, claims the lesser sum of $875,000 based on a breach of fiduciary duty linked to the 412-414 Jarvis Street, Toronto, transaction.

10 The first step in Mr. Martin's claim for damages or equitable compensation is, of course, to establish Mr. Goldfarb's liability and the vicarious liability of his law firm, Farano, Green, and at the opening of the trial, Mr. Martin brought a motion for summary judgment pursuant to Rule 21 of the *Rules of Civil Procedure* on the claim for breach of fiduciary duty. That motion was successful, and I granted a summary judgment that the defendants breached their fiduciary duty to Martinvale Estates and Newmarket Golf Club.

11 However, this summary judgment was without prejudice to the defences of limitation periods, *laches*, cause of action estoppel, abuse of process, causation, and contributory negligence, and the summary judgment was without prejudice to the determination of the quantification of the quantum of Mr. Martin's claim for damages or equitable compensation.

12 The outcome of the motion for summary judgment was that the trial began with a finding of breach of fiduciary duty, which, in any event, had largely been admitted in the defendants' statement of defence. Liability for breach of fiduciary duty had also been conceded in the first of the appeals to the Court of Appeal. The finding of liability in the immediate action, however, was subject to the collection of technical defences and to the quantification of the plaintiff's claim.

13 I digress to note that at the beginning of trial, I was advised that third party proceedings brought by the defendants against Aleksandra Kurowska-Barrie, another lawyer who was involved in Mr. Axton's activities, had been settled and that Ms. Kurowska-Barrie was withdrawing her defence to the main action. Accordingly, I dismissed the third party claim without costs, but I reserved judgment on the matter of Mr. Martin's claim for costs against Ms. Kurowska-Barrie for the withdrawal of her defence to the action now before the Court.

14 At the trial, the case for Mr. Martin was comprised of his testimony, the testimony of Fred Roth, an appraiser, and the testimony of Perry Phillips, a chartered accountant, along with reading in portions of Mr. Goldfarb's evidence from the earlier trial. The case for Mr. Goldfarb and Farano, Green was comprised of reading in the examination, cross-examination, and re-examination of Arthur Shaw, who was a consultant in the health care industry and familiar with the regulation, operation, and financial aspects of nursing homes and retirement centres and who had reviewed some of the business activities of Mr. Martin's corporations.

15 Given the *in limine* determination of liability for breach of fiduciary duty, the trial was in the main an assessment of the claims for compensation of Martinvale Estates and Newmarket Golf Club. At the trial, Mr. Martin's tactical and strategic approach was to rely on the before-and-after theory and to argue that the law associated with breach of fiduciary duty shifted the onus of proof onto the defendants to prove that Martinvale Estates and Newmarket Golf Club had not suffered a loss.

16 At the trial, the tactical and strategic approach of Mr. Goldfarb and Farano, Green was to rely on the technical defences and to attack the before-and-after theory. They argued that the plaintiff's theory failed both as a matter of causation and quantification. They also argued that Mr. Martin was contributorily negligent.

17 The approach of the defendants was entirely negative in the sense that they did not offer a competing qualification of the losses suffered by the corporations. The defendants denied that the onus was on them to prove that no losses had

been suffered from their breach of fiduciary duty. Rather, they asserted that Mr. Martin had the onus of proving that the corporations had suffered a loss and that he had failed to meet this onus.

18 As I will explain below in detail, in my opinion, the approach of Mr. Martin failed and the approach of Mr. Goldfarb and Farano, Green largely succeeded. I conclude that Mr. Martin's action should be dismissed because: (a) the technical defence of issue estoppel succeeded, and it bars or precludes the corporations' claims; and (b) in any event, Mr. Martin has failed to prove the quantum of the losses, in any, suffered by Martinvale Estates and Newmarket Golf Club.

19 The latter conclusion may be restated as follows. In my opinion, Mr. Martin proved: (a) a breach of fiduciary duty; and (b) that the breach could have caused Martinvale Estates and Newmarket Golf Club to suffer a loss; however, he failed to prove the amount of any loss suffered by Martinvale Estates and Newmarket Golf Club.

20 In order to explain these conclusions, I must discuss all of a complicated procedural history, a complex factual matrix, and several difficult legal issues including the matters of onus of proof and causation. I will also discuss the defendants' submission that Mr. Martin's claim for compensation should be reduced by the principles of contributory negligence. Having regard to my other conclusions, it is not necessary to come to a decision on this point, and I will comment only briefly about this argument.

21 I will begin the discussion by setting out what is admitted in the defendants' statement of defence. Then, I will describe the histories of the immediate action and its predecessor action, which included the two trials and the two appeals. This review of the history of the actions, which includes an analysis of the judgments, is necessary not only because it explains how the current action comes before the Court but also because in order to determine the merits of the technical defences of limitation periods, *laches*, cause of action estoppel, and abuse of process, it is necessary to understand all the proceedings that have adjudicated the claims arising from the events of nineteen years ago. Next, I will discuss the technical defences. Then, I will make my main findings of fact and consider the problems of causation and quantification of common law damages or equitable compensation. Here, the prior decisions of the Court of Appeal are authorities with respect to several legal issues that arise in the current action, including the issues of causation and quantification of loss. Lastly, I will make a brief comment about the plea of contributory negligence and then I will conclude the judgment.

Additional Introductory Matters

22 Before completing the introduction and overview and commencing the discussion proper, it is helpful to address three general matters. First, I mention that although I have read and will discuss the judgments in the 1990 Action, in making my finding of facts, I have done so on the basis of the evidence presented at this trial and not based on findings made by Lederman J. in the earlier action. For factual matters, I have proceeded without the restraint of any issue estoppel arising from the earlier action. My conclusion, which I will explain below, that the immediate action should be dismissed for cause of action estoppel, is an application of a different branch of *res judicata*.

23 Second, it is helpful at the outset to comment briefly about the credibility and reliability of the witnesses at the trial and about how I treated their testimony. Those comments follow:

(a) I found Mr. Martin to be credible but not wholly reliable. He was credible because I believe he was honest and attempted to speak truthfully. His evidence, however, was not wholly reliable because, as he repeated almost *ad nauseam*, his memory of the events, which was not good at the first trial, which occurred almost eight years after the events, was worse at this trial, with the passage of ten more years. Moreover, I got the impression that Mr. Martin did very little, if anything, to prepare for this trial. When showed exhibits or the transcript of his evidence from the prior trial, he was able to refresh his memory, but it would have been preferable had he not waited until his cross-examination to

exercise this capability.

(b) I accept the evidence of Mr. Roth about the market value of the lands he appraised as of January 22, 1990. There was no reason not to accept Mr. Roth's evidence. His appraisal of the market value of lands owned by the Newmarket Golf Club and of an adjoining property owned by Martinvale Estates was not challenged in cross-examination or by a competing appraisal of the property. As will, however, be seen below, the problem with Mr. Roth's testimony was not its truth but its utility. As I will explain, what was required was an appraisal of the lands as of around August 1988 not an appraisal as of January 1990.

(c) I found Mr. Phillips, who was asked to identify the loss in equity of Martinvale Estates and Newmarket Golf Club to be a credible witness, once again, in the sense that he was honest and attempted to speak truthfully. However, there were problems of reliability and utility with respect to his testimony. Beginning with utility, the thrust of Mr. Phillips testimony was essentially to present the mathematics of the before-and-after theory and of the 412-414 Jarvis Street, Toronto, transaction. His testimony was thus essentially argument and not evidence, and it suffered from some errors and omissions in the calculations that were identified during cross-examination. More fundamentally, the value of Mr. Phillips' testimony suffered because there were serious weaknesses in the application of the before-and-after theory. These weaknesses will become clearer when I discuss the problems of causation and quantification later in these Reasons for Judgment.

(d) I obviously could not form any impression of the credibility or reliability of Mr. Goldfarb, who did not testify at the trial. Portions of his evidence from the prior trial were read into the record as admissions. By and large, these admissions were relevant only to the issue of liability for breach of fiduciary duty and made little contribution to resolving the issue of the quantification of the losses of Martinvale Estate and Newmarket Golf Club.

(e) I also could not form any impression of Arthur Shaw because I only had the transcript of his testimony from the first trial. In any event, in reaching my conclusions, his evidence had little influence.

24 As the third preliminary matter, in my opinion, it is helpful at the outset to demarcate four months as benchmarks for the discussion that follows:

(a) The first month is November 1987, which is the approximate date when Mr. Martin met a man who was then known to Mr. Martin as Nigel or Nigel Stephens, but who was in truth Mr. Axton.

(b) The second month is August 1988, which is the month when Mr. Martin and his corporations retained Mr. Goldfarb to act on some transactions.

(c) The third month is August 1989, which is the date when Mr. Martin realized that he and his corporations had been victimized by Mr. Axton and when Mr. Martin finally learned about Mr. Axton's nefarious background.

(d) The fourth month is September 1990, when Mr. Martin, Newmarket Golf Course, and Martinvale Estates were petitioned into bankruptcy.

The Admissions from the Pleadings

25 In the statement of defence in this action, it is admitted that:

(a) Mr. Martin was the sole shareholder of Martinvale Estates and a 75% shareholder of Newmarket Golf Club;

(b) In 1988 and 1989, Mr. Goldfarb and Farano, Green were retained to act from time to time for Martinvale Estates or Newmarket Golf Club on some real estate and commercial

transactions;

(c) Mr. Goldfarb had at all material times knowledge that Mr. Axton had been convicted of fraud in the Province of Ontario;

(d) Mr. Goldfarb was aware that Mr. Axton was associated in some capacity with what came to be known as the FP Group of Companies;

(e) Mr. Goldfarb was aware that Mr. Axton was associated in some capacity with Garth Anthony, Cathy Headon, and Al Disterheft;

(f) Mr. Goldfarb was aware that the FP Group of Companies, Mr. Anthony, Mr. Headon, or Mr. Disterheft were in some manner associated with Mr. Martin, Martinvale Estates, and Newmarket Golf Club in connection with some of the real estate and commercial transactions for which the defendants were retained to act;

(g) Mr. Goldfarb and Farano, Green did not advise Mr. Martin, Martinvale Estates, and Newmarket Golf Club as to the true identity and background of Mr. Axton; and,

(h) Mr. Martin brings this action as assignee of the claims of Newmarket Golf Club and Martinvale Estates pursuant to an assignment in writing from Richter & Partners the discharged trustee of the bankrupt estates. The assignment was approved by the Bankruptcy Court on July 30, 1999.

The History of Mr. Martin's Actions against Mr. Goldfarb and Farano, Green

26 On January 11, 1990, Mr. Martin commenced action 90-CQ-044653 (the "1990 Action") against Clifford Goldfarb, Aleksandra Kurowska-Barrie, and Farano Green claiming damages in the amount of $10 million for solicitor's negligence and, in a subsequently amended statement of claim, for breach of fiduciary duty.

27 The amended statement of claim in the 1990 Action pleaded that "the defendants, knowing that the plaintiff [Mr. Martin] relied upon the veracity of Axton and his associates, never warned the plaintiff of the past background of Axton nor did they disclose these facts to the plaintiff" and that "had the defendants disclosed this information to the plaintiff, he would not have entered into the arrangement with the F.P. Group of companies to permit them to be his financial consultants and advisors."

28 The statement of claim in the 1990 Action pleaded further that "as a result of the breaches of fiduciary duty and negligence of the defendants, the plaintiff became insolvent in a short span of time" and that "the plaintiff estimates his damages to be, directly and indirectly, approximately $10,000,000." [my emphasis added] The indirect damages would appear to be a reference to the damages of Martinvale Estates and Newmarket Golf Club and other corporations associated with Mr. Martin.

29 The 1990 Action was tried between September and December 1996, and by judgment dated May 7, 1997, Lederman J. concluded that the Mr. Goldfarb and Farano, Green had breached their fiduciary duty as of July 28, 1988. Lederman J.'s judgment is reported at (1997), 31 B.L.R. (2d) 265 (Ont. Gen. Div.).

30 Numerous aspects of the 1990 Action need to be highlighted for the purposes of the action now before the Court, particularly for the analysis of the technical defences and for the discussion of the causation and quantification of the claim for equitable compensation. I highlight the following:

(a) The plaintiff in the 1990 Action is just Mr. Martin, but his $10 million claim for damages included the claims of Martinvale Estates and Newmarket Golf Club. As will be revealed, the Court of Appeal will ultimately hold that Mr. Martin could not assert claims that belonged to his corporation, but the allegation of breach of fiduciary duty and the claims of the associated corporation, including the assessment of the quantum of the claim for compensation, were adjudicated by Lederman J. Thus, from the commencement of the 1990 Action, it was known that Mr. Martin's associated corporations had claims for

solicitor's negligence or breach of fiduciary duty against the defendants.

(b) Lederman J. notes in his reasons for judgment that Martinvale Estates and Newmarket Golf Club had been petitioned into bankruptcy but no attempt was made under s. 38 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 to request the trustee to bring the action or to obtain leave of the Court to bring the action on behalf of the bankrupt estates. In other words, no explanation was offered as to why Martinvale Estates and Newmarket Golf Club were not added as parties to the 1990 Action.

(c) Before and during the trial of the 1990 Action, the defendants took the position that Mr. Martin could not personally assert the claims of his associated corporations. However, in a legal conclusion that was later overruled by the Court of Appeal, Lederman J. held that this objection could not be raised by the defendants. Lederman J. reasoned that because the status issue had been raised in an interlocutory motion that challenged the pleadings, which motion was decided by Wright J., there was an issue estoppel precluding the defendants from raising this defence at the trial.

(d) Mr. Martin's position about the assessment of damages in the 1990 Action was that he was entitled to be put in as good a position as he would have been had Mr. Goldfarb advised him about Mr. Axton, which advice would have ended his engagement with the FP Group, which eventually led to his bankruptcy. Mr. Martin repeats this position at the current trial.

(e) The defendants' position about the assessment of damages in the 1990 Action was that: first, Mr. Martin suffered no loss because he had little or no equity in the projects; and second, if he suffered a loss it emanated from causes independent of Mr. Axton, including losses associated with: (i) the Kingston Road project; (ii) the Jarvis Street project; (iii) a nursing home project in St. Petersburg, Florida; (iv) a joint venture with one Dr. Kerr, Mr. Martin's friend and another entrepreneur with respect to developing a plastic engine or pump; and (v) the collapse of the real estate market in Ontario in 1990. The defendants repeat this position at the current trial.

(f) In resolving the competing positions of the parties to the 1990 Action, Lederman J. analyzed the Supreme Court of Canada's decisions in *Canson Enterprises Ltd. v. Boughton & Co.* (1991), 85 D.L.R. (4th) 129 (S.C.C.) and *Hodgkinson v. Simms* (1994), 117 D.L.R. (4th) 161 (S.C.C.). I will have something brief to say about these decisions later in these Reasons for Judgment.

(g) Lederman J. concluded that where there is a breach of fiduciary duty, the plaintiff bears the onus of proving that a loss was caused by the breach. The victim must establish a loss and adduce evidence to quantify the loss. In Lederman J.'s view, it was not the case that a loss was presumed with the onus being on the defendant to rebut the presumed losses. Rather, the victim of a breach of fiduciary duty must prove a loss and then the onus falls on the fiduciary to show the loss would have been happened anyway.

(h) After acknowledging: (i) the difficulties of proof that confronted Mr. Martin; (ii) that the evidence adduced by Mr. Martin was "not the most satisfactory;" and (iii) that the causes of loss included the breach of fiduciary duty but also "a combination of Mr. Martin's own conduct in his acquisitions before the defendants' duty arose, acquisitions made subsequent to the duty arising and other intervening events, including the economic downturn", Lederman J. concluded that given the breach of fiduciary duty, he ought to do the best he could on the available evidence, even if it amounted to "guesswork" and even if the result was "arbitrary at best." This generous approach to Mr. Martin's claim was ultimately criticized by the Court of Appeal.

(i) Mr. Martin was awarded damages of approximately $6 million and pre-judgment interest of approximately $3 million for a total award of approximately $9 million.

31 Mr. Goldfarb and Farano, Green appealed the judgment granted in the first trial, and by order dated August 26, 1998, the Court of Appeal for Ontario set aside Lederman J.'s judgment with respect to the assessment of damages. The Court of Appeal's judgment written by Finlayson J.A. (Carthy J.A. and Then J., *ad hoc* concurring) is reported as *Martin v. Goldfarb* (1998), 41 O.R. (3d) 161 (C.A.).

32 Numerous aspects of the judgment of the Court of Appeal need to be highlighted for the purposes of the action now before the Court, particularly for the analysis of the technical defences and for the analysis of causation and quantification of loss. I highlight the following:

(a) The Court of Appeal stated that there were three issues on the appeal: (i) the causal connection between Mr. Goldfarb's breach of fiduciary duty in failing to alert Mr. Martin about Mr. Axton and the damages suffered by Martin's corporations; (ii) Lederman's J.'s failure to distinguish between Mr. Martin's personal losses and the losses suffered by the corporations he controlled; and (iii) the lack of cogent evidence to support the $9 million judgment.

(b) In resolving the issue of causation, like Lederman J., the Court of Appeal analyzed the Supreme Court of Canada's decisions in *Canson Enterprises Ltd. v. Boughton & Co.* (1991), 85 D.L.R. (4th) 129 (S.C.C.) and *Hodgkinson v. Simms* (1994), 117 D.L.R. (4th) 161 (S.C.C.).

(c) The Court of Appeal concluded that causation was established because Mr. Goldfarb's breach of fiduciary duty denied Mr. Martin the opportunity to review his relationship with Mr. Axton and the Frog Pond Group in the light of the knowledge that he should have had of Mr. Axton's background.

(d) The Court of Appeal held, however, that since there was no finding that Mr. Goldfarb was complicit in Mr. Axton's fraud, there was no basis for directly attributing to Mr. Goldfarb all of the consequences of Mr. Axton's conduct after July 28, 1988. The Court of Appeal held that all of Mr. Martin's losses could not be attributed to Mr. Goldfarb's breach of fiduciary duty. Finlayson J.A. stated at p. 179:

> There is a causal connection between the breach of duty and the harm done, but the harm cannot be quantified by the "before" and "after" approach advocated by Martin. He is not entitled to blame his solicitors for his total ruin. It is not at all clear that his initial decisions to expand and "go public" were not fatal to the financial health of his corporations. Moreover, he must show a direct personal loss that is attributable to transactions that his corporations entered into following July 28, 1988.

(e) The Court of Appeal concluded that Lederman J. had erred by treating the losses of Mr. Martin's corporations, including Martinvale Estates and Newmarket Golf Club, as losses recoverable by Mr. Martin. This treatment ignored the legal status of a corporation distinct from its shareholders and the rule from *Foss v. Harbottle* (1843), 2 Hare 460, 67 E.R. 189 that where a wrong is occasioned to a corporation, a shareholder has no claim for damages in respect of that wrong. See *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165.

(f) The Court also noted that this treatment of the claims was unfair to the creditors of the corporations. Finlayson J.A. stated at p. 180:

> This point is in no manner an academic one. The corporate losses are translated

> into losses to those who looked to the corporate assets for payment of loans and trade debts. Upon a realization of these assets in a bankruptcy, the creditors are paid first, in order of priority, and the shareholders are paid last. By purporting to compensate Martin for what are in fact and law the losses of the corporations, the trial judge permitted Martin to jump to the front of the queue to the prejudice of all creditors of these corporations: see *R. v. Ruhland* (1998), 123 C.C.C. (3d) 262 (Ont. C.A.) at p. 269.

(g) The Court of Appeal concluded that Martin was entitled to only those losses he incurred personally in respect of transactions involving Axton that occurred after July 28, 1988. As already noted above, the Court also concluded that it was an error to conclude that differentiating the losses of the corporations from Mr. Martin's personal losses was precluded by an issue estoppel arising from an interlocutory motion about the pleadings in the action.

(h) The Court of Appeal concluded that the burden lay on Mr. Martin to prove the quantum of the losses suffered personally as a consequence of Mr. Goldfarb's breach of fiduciary duty.

(i) The Court of Appeal concluded that the identification and quantification of Mr. Martin's personal damages and of the damages generally was wholly unsatisfactory and remitted the matter back to Lederman J. to determine the proper award of damages.

(j) The Court of Appeal noted that the generous approach of Lederman J. to the assessment of damages was not appropriate. Finlayson J.A. stated at p. 187:

> I have concluded that it is a well established principle that where damages in a particular case are by their inherent nature difficult to assess, the court must do the best it can in the circumstances. That is not to say, however, that a litigant is relieved of his or her duty to prove the facts upon which the damages are estimated. The distinction drawn in the various authorities, as I see it, is that where the assessment is difficult because of the nature of the damage proved, the difficulty of assessment is no ground for refusing substantial damages even to the point of resorting to guesswork. However, where the absence of evidence makes it impossible to assess damages, the litigant is entitled to nominal damages at best.

(k) Finlayson J.A. commented about the before-and-after theory used by Mr. Martin to quantify the losses. Finlayson J.A. stated at pp. 187-188:

> The respondent called no evidence that would assist in proving and identifying losses on a transaction by transaction basis. Instead, Martin testified and gave evidence of having a net worth of approximately $18 million as of August 1, 1988. His position at trial was that he had been rendered insolvent by October of 1989 as a result of the previously described machinations of Axton. ....

Even accepting that it was appropriate for Martin to equate his personal losses to the aggregate of the losses suffered by his corporations because of the diminution of his equity interest in the corporations as shareholder, the record does not disclose any reliable evidence of what were the values of these corporations before July 28, 1988. Without that

initial aggregate figure, we have no benchmark from which to deduct pre-Goldfarb and non-Axton transactions to arrive at the aggregate loss suffered at the hands of Axton.

(l) The Court of Appeal observed that the quality of evidence advanced by Mr. Martin to quantify the losses was unsatisfactory. Finlayson J.A. stated at p. 189:

> There is simply no excuse for such a shoddy proffer of evidence by a plaintiff in an action is which he seeks damages in the millions. Assuming without acknowledging that Martin is entitled to be directly compensated for the loss of his corporate assets as a means of recognizing the reduced value of his equity interest in the various companies, the means to value those assets prior to July 28, 1988 was fully within the control of Martin. We have in evidence the unaudited financial statements of these corporations, and with respect to all of them, their underlying worth was in real estate consisting of nursing homes, the golf course and other land. The explanation that Martin is bankrupt because of the activities of Axton and cannot afford to retain forensic experts to put together a credible estimate of damages does not justify his counsel dumping on the trial judge the responsibility for pulling a figure out of the air.

33 The situation at the end of 1998 was that the Court of Appeal: (i) confirmed that there had been a breach of fiduciary duty; and (ii) confirmed that by denying Mr. Martin or his corporations the opportunity to end their dealings with Mr. Axton, the breach could cause damage; but (iii) concluded that the claims that Mr. Martin had had litigated were not his to claim; and (iv) directed that Mr. Martin's personal claims were to be assessed at a new trial.

34 Mr. Martin sought leave to appeal to the Supreme Court of Canada. Mr. Martin's application for leave to appeal was dismissed with costs on February 18, 1999.

35 In May 1999, Mr. Martin entered into an Assignment Agreement with Richter & Partners as discharged trustee of the bankrupt estates. The agreement assigned to Mr. Martin any cause of action possessed by Martinvale Estate or Newmarket Golf Club. The assignment was approved by Cumming J. by order dated July 30, 1999.

36 On September 8, 1999, Mr. Martin commenced the action now before the Court. The current action replicates the allegation of negligence and breach of fiduciary duty and it relies on the identical factual circumstances that were the subject matter of the original trial before Lederman J. and the problems of causation and quantification are the identical problems of which the Court of Appeal spoke.

37 In December 2001, Lederman J. presided over the second trial of Mr. Martin's claim for compensation, now for his own personal losses. The claim for the losses of Martinvale Estate and Newmarket Golf Club was left for the action commenced in 1999, which is the action now before the Court.

38 By judgment dated January 3, 2002, Lederman J. dismissed Mr. Martin's action due to his failure to prove any personal claim. Lederman J.'s judgment is reported at [2002] O.J. No. 6 (S.C.J.). He stated that the quality of evidence presented on the assessment was no better than adduced in the original proceeding and was insufficient to found any claim for direct personal loss.

39 Mr. Martin appealed a second time to the Court of Appeal. The Court of Appeal's judgment is reported at (2003), 68 O.R. (3d) 70 (C.A.). The Court of Appeal dismissed his second appeal on November 20, 2003.

The Technical Defences

40 The above background of some of the facts and of the history of the 1990 Action is sufficient to address the technical defences advanced by Mr. Goldfarb and Farano, Green to the action now before the Court. The technical defences would preclude Mr. Martin from asserting the claims of Martinvale Estates and Newmarket Golf Club.

41 The defences of *laches*, limitation periods, cause of action estoppel, and abuse of process are especially technical in the immediate circumstances because there was a seven-day trial that I have decided on the merits against Mr. Martin. However, if I am wrong in dismissing the action on its merits, then the defendants would be entitled to rely on their technical defences.

42 As I will explain, it is my opinion that the defences of limitation periods and *laches* do not apply but that Mr. Martin's action on behalf of the corporations is barred by cause of action estoppel. Because of my conclusion about cause of action estoppel, it is not necessary to say much about the doctrine of abuse of process, which has come to be used as an alternative when the technical elements of cause of action estoppel are not satisfied.

The Limitation Period Defence and Laches

43 The first technical defence to consider is whether a limitation period precludes the claims. The question to be determined is whether Mr. Martin's claim on behalf of Martinvale Estates and Newmarket Golf Club is barred by the *Limitations Act*, R.S.O. 1990, c. L-15 or by analogy to the Act. The second technical defence, which is closely related to the first, is that of *laches*.

44 The claim of Martinvale Estates and Newmarket Golf Club sounds both in solicitor's negligence, which has a six-year limitation period under s. 45(1)(g) of the *Limitation Act*, and also in breach of fiduciary duty, which has no limitation period under that Act, but which cause of action may be barred by a limitation period by analogy: *Canadian Microtunnelling Limited v. Toronto (City)*, [2002] O.J. No. 1399 (S.C.J.), affd. [2004] O.J. No. 4823 (C.A.); *Companhia de Seguros Imperio v. Heath (REBX) Limited*, [2001] 1 W.L.R. 112 (C.A.); *Coulthard v. Disco Mix Club Ltd.*, [1999] 1 All E.R. 457 (H.C.).

45 A claim for solicitor's negligence was brought in the 1990 Action by Mr. Martin personally, but it could have also been brought by the corporations, although the decision to do so would then have rested with the corporations' trustee in bankruptcy, unless the claim was assigned to Mr. Martin, as it now has been.

46 The claims for solicitor's negligence and for breach of fiduciary duty on behalf of the corporations were not brought until the immediate action commenced in September 1999, which was 11 years after Mr. Goldfarb's misconduct and 10 years after Mr. Martin discovered the true character of Mr. Axton. The claim for solicitor's negligence was barely mentioned during the trial, and from the nature of the argument that I heard, it seems to have been conceded that the claim for solicitor's negligence is statute barred. I conclude that the claim for solicitor's negligence is indeed statute barred because the corporations' cause of action for solicitor's negligence was known to exist in or about 1989 and it was not pursued until 1999.

47 The more difficult question is whether the claim for breach of fiduciary duty, an equitable cause of action, should be barred by a limitation period by analogy. Here, I conclude that the claim for breach of fiduciary duty is not barred.

48 There is a fulsome discussion of the application to claims of breach of fiduciary duty (an equitable claim) of limitation periods by analogy in the judgment of La Forest, J. in the Supreme Court of Canada's judgment in *H. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6. The facts of the case, which involved an action by a daughter against her father for damages for incest, need not concern us here, and the significance of the case is that it recognizes that there is a long tradition of courts of equity applying statutory limitation periods by analogy, particularly when the equitable court's jurisdiction was concurrent or auxiliary with the jurisdiction of the common law courts but also where equity was exercising an exclusive jurisdiction, as it would be in situations of fiduciary obligations.

49 As I read, La Forest J.'s judgment, the source of equity's jurisdiction to apply a limitation period by analogy was as

a manifestation of the doctrine of *laches* and it included a residual discretion to take into account the justice and equity of any particular case. In para. 96 of his judgment, La Forest J. states:

> Historically, statute of limitation did not apply to equitable claims, and as such courts of equity developed their own limitation defences. Limitation by analogy was one of them, but the more important development was the defence of *laches*.

50 Referring to the leading cases of *Lindsay Petroleum Co. v. Hurd* (1874), 5 L.R.P.C. 221 and *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218 (H.L.), where the doctrine of *laches* is explained, La Forest J. states in para. 98 of his judgment:

> The rule developed in *Lindsay* is certainly amorphous, perhaps admirably so. However, some structure can be derived from the cases. A good discussion of the rule and of *laches* in general is found in Meagher, Gummow and Lehane, *supra*, [*Equity Doctrines and Remedies* (Sydney: Butterworths: 1984)] at pp. 755-65, where the authors distill the doctrine in this manner, at p. 755:
>
> > It is a defence which requires that a defendant can successfully resist an equitable (although not a legal) claim made against him if he can demonstrate that the plaintiff, by delaying the institution or prosecution of his case, has either (a) acquiesced in the defendant's conduct or (b) 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 ....
>
> Thus there are two distinct branches to the *laches* doctrine, and either will suffice as a defence to a claim in equity. 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.

51 I note in particular the last two sentences of this passage from La Forest J.'s judgment, which make it clear that to establish the defence of *laches*, a defendant must establish either: (a) that the plaintiff's delay in advancing his or her equitable claim amounts to acquiescence, that is, the delay amounts to an acceptance of the defendant's misconduct; or (b) that the delay would make the prosecution of the claim unjust for some reason, including the defendant having altered his or her position in reasonable reliance that the plaintiff would not be pursuing the claim.

52 In the case at bar, Mr. Goldfarb did not testify and the defendants did not provide or point to any evidence that would establish acquiescence by Mr. Martin or the corporations. The reality is that there was no acquiescence; rather, Mr. Martin sought to pursue the corporations' claims, until the Court of Appeal's application of the rule from *Foss v. Harbottle*, *supra*, established that he could not do so.

53 Further, the defendants did not show that they had altered their position or suffered some prejudice that would establish *laches*. The prejudice that the defendants can point to is that of been twice or thrice vexed with the prosecution of the same claims and with having to respond to the same evidence. This prejudice is more a matter of *res judicata* than a matter of *laches*.

54 I conclude that it would not be appropriate to apply a limitation period by analogy or the doctrine of *laches* to bar the corporations' claim for breach of fiduciary duty.

Res Judicata as a Defence: Cause of Action Estoppel and the Abuse of Process Defence

55 The idea of *res judicata* ("a matter adjudicated") is a matter of public policy, and it presents the legal rule that a final judgment on the merits by a court of competent jurisdiction is binding and determinative of the rights of the parties or their privies in all later suits with respect to fundamental issues decided in the former suit (issue estoppel) and with respect to causes of actions and defences that were decided (cause of action estoppel) or could and ought to have been decided in the former suit (the rule from *Henderson v. Henderson* (1843), 67 E.R. 313, 3 Hare 100).

56 The leading cases about issue estoppel are: *Angle v. Minister of National Revenue* (1975), 47 D.L.R. (3d) 544 (S.C.C.); *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460; *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 (H.L.); *Thoday v. Thoday*, [1964] P. 181 (C.A.).

57 The leading cases about cause of action estoppel and about the rule from *Henderson v. Henderson* are: *Grandview (Town) v. Doering, supra*, [1976] 2 S.C.R. 621; *Hoque v. Montreal Trust Co. of Canada* (1997), 162 N.S.R. (2d) 321 (C.A.), leave to appeal to the S.C.C. refused, [1997] S.C.C.A. No. 656, 167 N.S.R. (2d) 400n; *Maynard v. Maynard*, [1951] 1 D.L.R. 241 (S.C.C.); *Fenerty v. Halifax (City)* (1920), 50 D.L.R. 435 (N.S.C.A.); *Hoystead v. Commissioner of Taxation*, [1926] A.C. No. 155.

58 The general idea behind *res judicata* is that as a matter of justice and good sense, if a claim, defence, or issue has been adjudicated, then the adjudication is binding on the parties to the proceedings and their privies, and, therefore, the claim, defence, or issue should not be re-adjudicated in a second proceeding. There should be an end to litigation, and a party and his or her privies should not be harassed with duplicative proceedings. These ideas are linked to Latin maxims such as: "*interest reipublicae ut sit finis litium"* ("it is in the public interest that there should be an end to litigation"); and *nemo debet bis vexari si constet curiae quot sid pro una et eadem causa* ("no man ought to be twice troubled or harassed if it appears to the court that it is for one and the same cause").

59 The effect of the rule of *res judicata* is preclusive. It prevents a party and his or her privies from asserting a position, a claim, or defence. Issue estoppel precludes a litigant from asserting a position that is inconsistent or contrary to a fundamental point decided in a past proceeding in which the litigant or his or her privies participated. Cause of action estoppel precludes a litigant and his or her privies from asserting a claim or a defence that it asserted (cause of action estoppel) or had an opportunity of asserting in past proceedings (the rule from *Henderson v. Henderson*).

60 The public policy or rationale for the doctrine of *res judicata* is that the preclusive effect of the rule advances consistency, judicial economy, conclusiveness, finality, and the avoidance of repeat or duplicative litigation in the administration of civil justice, most especially in situations where a party or privy to a party has had his or her day in court. In *Danyluk v. Ainsworth Technologies Inc., supra*, Binnie J. stated at p. 473:

> The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of the allegations when first called upon to do so. A litigant to use the vernacular, is only entitled to one bite at the cherry ..... An issue, once decided, should generally not be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

61 The rule of *res judicata* applies to parties and their privies. The idea behind privity is that a participant in the second proceeding should be bound by the determination in a previous proceeding because of his or her relationship, called privity, with a party in that prior proceeding. Conversely, a third party cannot benefit or be burdened by an estoppel. For the third party, the past proceedings are *res inter alios acta* ("a thing done between others").

62 Privity, which is not a precise concept, can be established by blood (heirs and successors), title (for example, landlord and tenant), or community of interest. More generally, privity is established if there is a sufficient degree of identification between persons such that it would be just to hold that the decision to which one is a party should be

binding in proceedings to which the other is a party: *Bank of Montreal v. Mitchell* (1997), 143 D.L.R. (4th) 697 (Ont. Gen. Div.), affd. (1997), 151 D.L.R. (4th) 574 (C.A.); *Machlin v. Tomlinson* (2000), 46 O.R. (3d) 550 (S.C.J.); *Banque Nationale de Paris (Canada) v. Canadian Imperial Bank of Commerce* (2000), 195 D.L.R. (4th) 308 (Ont. C.A.); *Las Vegas Strip Ltd. v. Toronto (City)* (1997), 30 O.R. (3d) 286 (Gen. Div.), affd. (1997), 32 O.R. (3d) 651 (C.A.); *Gleeson v. J. Wippel & Co. Ltd.*, [1977] 3 All E.R. 54 (Ch. D.); Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2nd ed. (Toronto: LexisNexis Butterworths, 2004), pp. 151-55.

63 In the immediate case, I conclude that Martinvale Estates and Newmarket Golf Club are privies of Mr. Martin. While corporate law may treat his corporations as distinct legal entities, for the purposes of the litigation before the Court, the reality is that one could hardly find a greater degree of identification than between Mr. Martin and Martinvale Estates and Newmarket Golf Club. Moreover, they all share the grievance that is at the heart of all the proceedings, which is that Mr. Goldfarb did not tell Mr. Martin about Mr. Axton.

64 Related to the rule of *res judicata* is the doctrine of abuse of process, which, in turn, is related to the Court's inherent jurisdiction to control its own proceedings. The doctrine of abuse of process does a variety of things including precluding a person from asserting a cause of action, defence, or position when to do so would manifestly be unfair to a party or would bring the administration of justice into disrepute among right-thinking people.

65 The leading cases about the doctrine of abuse of process in the context of duplicative litigation are: *Toronto (City) v. C.U.P.E., Local 79* (2003), 232 D.L.R. (4th) 385 (S.C.C.); *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A), at para. 55 *per Goudge J.A.*, dissenting (approved [2002] 3 S.C.R. 307); *House of Spring Gardens Ltd. v. Waite*, [1990] 2 All E.R. 990 (C.A.); *Demeter v. British Pacific Life Insurance Co.* (1984), 43 O.R. (2d) 33 (H.C.J.), affd. (1984), 48 O.R. (2d) 266 (C.A.); *Hunter v. Chief Constable of the West Midlands Police*, [1982] A.C. 529 (H.L.); *Las Vegas Strip Ltd. v. Toronto (City)* (1997), 30 O.R. (3d) 286 (Gen. Div.), affd. (1997), 32 O.R. (3d) 651 (C.A.).

66 Some authorities have suggested that cause of action estoppel and issue estoppel are subclasses of the doctrine of abuse of process because the duplicative proceeding is abusive and should be precluded on this ground. Other authorities have viewed the doctrine of abuse of process as supplementary to cause of action estoppel and issue estoppel. In any event, the doctrine of abuse of process has been used to preclude repetitious or duplicative claims, defences, or positions that do not satisfy the technicalities of a cause of action estoppel.

67 In the case at bar, Mr. Goldfarb and Farano, Green rely on cause of action estoppel and abuse of process to preclude the claim for breach of fiduciary duty advanced by Martinvale Estates and Newmarket Golf Club. The defendants argue that the claim of the corporations could and should have been finally adjudicated by Lederman J. as a part of the 1990 Action and not in this proceeding.

68 There is an irony and a subtlety in this argument. As the above history of the proceedings reveals, the 1990 Action did in fact adjudicate the claims of the corporations, but the Court of Appeal negated that adjudication because of the rule from *Foss v. Harbottle* and, in effect, the Court ruled that the only claim that was before the Court for adjudication was the personal claim of Mr. Martin, who could not advance the claims of the corporations unless they were made parties to the proceedings.

69 Had the claims of the corporation been adjudicated to a final determination, then there could have been an instance of cause of action estoppel if a subsequent proceeding was brought to re-litigate those claims. However, since a final adjudication of the corporations' claims did not occur in the 1990 Action, the defendants argue that the adjudication of the corporations' claim could and ought to have occurred as a part of the 1990 Action.

70 All that would have been required for an adjudication of the corporations' claims in the 1990 Action was their joinder as parties to the action, which perhaps might even have been done as late as the appeal to the Court of Appeal or the second trial before Lederman J. Thus, the defendants rely on the rule from *Henderson v. Henderson* and the doctrine of abuse of process and submit that the corporations' claims are now precluded because they could and should have

been adjudicated as a part of the 1990 Action.

71 The rule from *Henderson v. Henderson* is an extension of the policies that underlie *res judicata*, and it adds the idea that parties and privies are obliged to bring forward their whole case with respect to a matter in dispute to avoid duplicative litigation. The often quoted statement of this extension of *res judicata* comes from the judgment of Wigram, V.C. in *Henderson v. Henderson* (1843), 3 Hare 100 at p. 115 where he stated:

> The plea of *res judicata applies*, except in a special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties exercising reasonable diligence, might have brought forward at the time." [emphasis added]

72 The problem with Wigram, V.C.'s statement is that it begs the question of when a point "properly belongs" to the subject of the litigation. There are two parts to the problem. First, there is the issue of whether, the cause of action could have been brought forward and second, there is the problem of whether it should have been brought forward.

73 A very helpful case for understanding the ambit of the rule from *Henderson v. Henderson* is *Hoque v. Montreal Trust Co. of Canada, supra*. In this case, Dr. Haque and his companies were indebted to Montreal Trust under a loan agreement. In 1993, Montreal Trust alleged default and commenced a foreclosure action. By this time, Dr. Haque was a bankrupt, and although his trustee in bankruptcy took advice about the existence of counterclaims and set-offs, it decided not to defend the foreclosure proceeding. In 1994, Dr. Haque obtained an assignment of his estate in bankruptcy's claims against the trust company, and he sued the trust company for damages alleging, amongst other things, that the loan agreement was unconscionable and that in enforcing its security, the trust company had committed acts of trespass and conversion. He also alleged that the trust company had disclosed confidential information and had acted in an abusive and disrespectful manner causing him financial loss and mental distress. The trust company moved for an order dismissing Dr. Hoque's action on the grounds of *res judicata*.

74 Reversing the decision of the chamber's judge, the Nova Scotia Court of Appeal barred all of Dr. Hoque's claims except the claims relating to breach of confidence and abusive conduct. Cromwell J.A., writing the judgment for the Court, stated that the rule from *Henderson v. Henderson* did not apply simply because a cause of action or defence "could" have been asserted in the past proceeding; rather, it applied when a cause of action or defence "should" have been asserted in the past proceeding.

75 Cromwell J.A. stated that in determining whether a matter should have been raised, a Court should consider a variety of factors. Factors favouring the application of the rule from *Henderson v. Henderson* included: the second proceeding being in essence a collateral attack against the earlier judgment; the second proceeding relying on evidence that could have been discovered for the past proceeding with reasonable diligence; the second proceeding relying on a new legal theory that could have been advanced for the past proceeding; and whether, in all the circumstances, the second proceeding constituted an abuse of process.

76 Factors favouring not applying the rule from *Henderson v. Henderson* included: the second proceeding being a separate and distinct cause of action and whether the first judgment was on default because there was authority that *res judicata* should be applied more carefully and in a more limited way when it is based on a default.

77 Applying these factors, Cromwell J.A. concluded that most of Dr. Hoque's claims were precluded but that claims relating to breach of confidence and abusive conduct stood independent of the foreclosure adjudication and could be advanced without inconsistency to the validity and the enforcement of the trust company's security.

78 Returning to the circumstances of the case at bar and the defendants' plea of *res judicata*, in my opinion, the claims of the corporations now being advanced could and should have been advanced in the 1990 Action. All that was required for that to occur was the joinder of the corporations to the 1990 Action.

79 No explanation was offered as to why the joinder of the corporations could not have occurred in the 1990 Action. No explanation was offered as to whether proceedings were or were not or could or could not have been brought in the bankruptcy proceedings to pursue the corporations' claims for breach of fiduciary duty. No explanation was offered as to why the assignment of the claims of the corporation that Mr. Martin obtained in 1999 in order for him to have carriage of the action now before the court could not have been obtained some time between 1990 and 1996, when the 1990 Action was tried.

80 During the 1990 to 1996 period, Mr. Martin was put on notice that the defendants were taking the position that Mr. Martin could not advance the claims of his corporation without having them as parties before the Court. Even if he believed that he could advance their claims without joining them to the 1990 Action, one would have thought that out of an abundance of caution and to negate the threat to his own action, he would have obtained the assignment of the corporations' claims. The current action demonstrates that he was able to obtain the necessary assignments.

81 The corporations' cause of action was one and the same as the cause of action advanced by Mr. Martin. The damages suffered by each, if any, may have been different, but the source of Mr. Goldfarb's and Farano, Green's liability was the singular fact that Mr. Goldfarb breached his fiduciary duty by not telling Mr. Martin about Mr. Axton. Mr. Martin was the person to make this complaint, and the factors of consistency, judicial economy, conclusiveness, finality, and the avoidance of repeat or duplicative litigation in the administration of civil justice, all demand that this complaint be made simultaneously by Mr. Martin on his own behalf and on behalf of his corporations and not consecutively with one action in 1990 and another action in 1999.

82 I therefore conclude that Mr. Martin's action should be dismissed on the grounds of cause of action estoppel.

83 Because of my conclusion that the rule from *Henderson v. Henderson* applies, it is not necessary for me to opine about whether it would manifestly be unfair or it would bring the administration of justice into disrepute among right-thinking people to allow Martinvale Estates and Newmarket Golf Club to advance the claims that could and should have been advanced in the 1990 Action. Resort to the doctrine of abuse of process is redundant in the circumstances of the case at bar.

Findings of Fact and the Problems of Causation and Quantification

84 Assuming my conclusions about the technical defences are incorrect, I would still dismiss Mr. Martin's action on the ground that although he proved a breach of fiduciary duty and that the breach could cause damages, he failed to prove that Martinvale Estates and Newmarket Golf Club actually did suffer a loss from the breach of fiduciary duty.

85 In order to explain this alternative ground for dismissing Mr. Martin's action, it is necessary to set out my findings of fact from this trial and then to discuss why Mr. Martin's arguments about common law damages or equitable compensation have failed. In particular, I will explain why his before-and-after theory for the global assessment of damages has fatal flaws and why he failed to prove any loss, including any loss from the Jarvis Street transaction.

The Rise and Unfortunate Fall of Mr. Martin, Martinvale Estates and Newmarket Golf Club

86 Mr. Martin father was an American attorney who moved to Canada, where Mr. Martin was born. Mr. Martin's parents operated small businesses in Southern Ontario, including several nursing and group homes, and eventually Mr. Martin's father, along with a partner, developed a golf course in Newmarket.

87 When Mr. Martin was about nineteen or twenty years of age, a car accident disabled his father, and Mr. Martin was asked to leave school to come to the aid of his family. Mr. Martin did so, and thus his formal education ended. Mr. Martin began to manage and to assist in the operation of his father's businesses.

88 It would seem that not long after leaving school, Mr. Martin married his childhood sweetheart. She operated a beauty salon business in London, Ontario, and Mr. Martin ran a company that manufactured beauty supplies. He also

assisted his father in constructing the golf course in Newmarket.

89 Mr. Martin's parents were operating nursing homes and group homes for mental patients, and Mr. Martin was offered the opportunity to purchase some of these enterprises, beginning with a nursing or group home in Newmarket, Ontario and later a nursing home in Bradford, Ontario. He accepted the offer, and began to own and operate or to rent to other operators what I will call "care facilities." He also operated some residential rental properties.

90 Most of the properties and the care facility businesses were owned by Mr. Martin through Martinvale Estates. The nursing homes in Newmarket and Bradford were eventually owned by T.L.C. Nursing Centres Inc. Some of the care facilities were bought and sold; others were bought and refurbished or expanded. Mr. Martin's holdings grew.

91 Mr. Martin's rudimentary business plan was two-fold. The first part of the plan was to operate the care facilities with close attention to expenses because revenue streams were often subject to government regulation that restricted the number of residents or the prices that could be charged. Mr. Martin said that it often took some time, but the goal was to make each enterprise profitable. The second and more important part of the plan was that the landholdings for the care facilities and the land holdings associated with the golf course were to be held as long-term investments. Mr. Martin apparently sold several care facilities at substantial profits, and he re-invested the money in land and care facilities. Mr. Martin was and remains confident that in the long term, land values always increase.

92 Sometime in the 1980s, Mr. Martin inherited Newmarket Golf Club, which owned the clubhouse portion of the golf course. Mr. Martin also inherited adjoining golf course lands, which were put under the ownership of Martinvale Estates. Mr. Martin bought out his father's minority interest partner, whom Mr. Martin believed was mismanaging the course and pilfering funds. This buy-out was at a very favourable price. With one Max Thompson, a professional golfer, as a new minority partner, Mr. Martin improved the performance of the golf course and additional revenues were earned by encouraging the use of the course and its clubhouse with its dining facilities as a venue for golf tournaments.

93 Around 1986 or 1987, Mr. Martin decided to expand his business empire. A Mr. George Crothers, a member of the golf club suggested to Mr. Martin that he could raise money for his businesses through the mechanism of a reverse takeover of a dormant public corporation. Although Mr. Martin had no experience at the helm of a public corporation, Mr. Martin followed up on his suggestion, and he was assisted by Mr. Gunnar Helgason, who was associated with a venture capital firm known as Pagun Capital and by a lawyer at the Toronto law firm of Blaine, McMurtry.

94 In a corporate reorganization T.L.C. Nursing Centres Limited ("T.L.C.-Ltd.") sold its assets to T.L.C. Nursing Centres Inc., ("T.L.C.-Inc.") which was incorporated on March 9, 1987. T.L.C.-Inc. became the wholly owned subsidiary of T.L.C. Properties Inc. ("T.L.C.-Properties"), which was the public corporation established by the reverse takeover.

95 Around the time of the reverse takeover, Mr. Martin also followed up on an employee's suggestion that there was a rest home being constructed in Sudbury called Champlain Lodge that Mr. Martin ought to acquire. Mr. Martin was impressed with this project, which was nearly completed when the developer ran out of funds. Mr. Martin's advisors suggested that the Sudbury Project could be acquired by a limited partnership syndication. In the syndication, one of Mr. Martin's corporations would be the general partner.

96 Although he had no experience with syndications, once again, Mr. Martin agreed with a suggestion to expand his enterprise and to take on greater risks than had been his custom, and a limited partnership was created. Mr. Martin testified that the performance guarantees of the general partner to the limited partnership were onerous, but that the syndication of the Sudbury property was, nevertheless, a successful venture, and he testified that he made a considerable profit and he benefited by a management contract. Mr. Martin's testimony during cross-examination, however, made me doubt whether his corporation ever did realize a profit from the Sudbury project.

97 Mr. Martin decided to look for a similar syndication project in Toronto, and his search led him to Garth Anthony, who owned a nursing home on Kingston Road in Toronto. Mr. Anthony, who was a real estate agent, however, was not

prepared to sell the nursing home, but he was prepared to sell two apartment buildings that he owned across the street from the nursing home, which could be redeveloped for a nursing home. The address of these apartments was 500-504 Kingston Road.

98 Mr. Martin agreed to purchase 500-504 Kingston Road with a purchase price of $3.4 million, and he did so through T.L.C.-Properties. The purchase of 500-504 Kingston Road took place in the fall of 1987, and during this transaction, Mr. Martin first met Mr. Goldfarb, who was acting for Mr. Anthony.

99 Mr. Martin's plan was to syndicate the 500-504 Kingston Road property in a similar fashion to the project in Sudbury. However, the Toronto project had serious difficulties because it was necessary to hire contractors for a major reconstruction and it was necessary to vacate the existing tenants from the apartments. Mr. Martin hired a company known as Burbrook Developments (1987) Inc. ("Burbrook") to be the contractor. This company was associated with Mr. Anthony. Burbrook would act as general contractor for a fixed price of $1.6 million to renovate and convert the property to a retirement home facility. Another corporation associated with Mr. Anthony would arrange for the eviction of the tenants. Construction was to be completed by the end of 1998.

100 Mr. Martin understood that Burbrook was a company owned by Mr. Anthony or a group with which Mr. Anthony was associated, known as the FP Group, (the FP being the initials for "Frog Pond"). The other associates of this group were Cathy Headon, a mortgage broker, Al Disterheft, and a man using the name Nigel Stephens.

101 It would seem that Mr. Anthony must have introduced Mr. Martin to Mr. Disterheft, Mr. Axton and Ms. Headon, whose ability to arrange mortgages impressed Mr. Martin. He was having difficulty raising a mortgage to finance the construction of the 500-504 Kingston Road project, and Ms. Headon was able to find a mortgage, notwithstanding that the security provided by the property was temporally being diminished by the state of renovation and by removal of the tenants.

102 Mr. Martin initially thought that the man he knew as Nigel or Nigel Stephens was a contractor, and it was only much later, and too late, that he learned that Nigel was Nigel Stephen Axton.

103 It appears that from the outset of their association, Mr. Martin was taken in by the members of the FP Group, who increasing provided him with financial and business advice. Mr. Martin was becoming very busy. He had businesses spread out across the province, and he had a new venture in St. Petersburg, Florida, where he planned to purchase a large nursing home. Sometime in 1988, he began flying to Florida for several days each week.

104 The busy Mr. Martin was prepared to listen and to accept the advice of the F.P. Group. One item of advice offered was that Mr. Martin could obtain quicker legal services if he hired a new lawyer. They suggested that Mr. Goldfarb at the firm Farano, Green should be hired. Mr. Martin was thus introduced to Mr. Goldfarb by Mr. Axton. As already noted, it is admitted that Mr. Goldfarb was aware of Mr. Axton's background and did not inform Mr. Martin about what he knew. It is admitted that in this regard that Mr. Goldfarb breached his fiduciary duty to Mr. Martin.

105 Mr. Goldfarb was retained for what was supposed to be the third syndication project, the first being the project in Sudbury and the second being 500-504 Kingston Road. More particularly, Mr. Goldfarb was retained to act on the purchase of a property at 412-414 Jarvis Street in the City of Toronto.

106 Although Mr. Martin had known Mr. Anthony and Mr. Axton for only about 6 to 8 months and notwithstanding that their business connection for 500-504 Kingston Road project was already a troubled one with serious problems associated with removing the tenants, obtaining a building permit, complying with the zoning standards, completing the construction, and determining the number of beds permitted for the nursing home, the 412-414 Jarvis Street purchase was to be a joint venture between Mr. Martin's enterprise and the F.P. Group.

107 The agreement of purchase and sale was signed by Burbrook and Martinvale Estates as purchaser, each as to an undivided 50% interest. By direction, the purchaser of the Jarvis Street property was 412-414 Jarvis Street Properties

Limited, which was a corporation owned by Martinvale Estates and Burbrook, each as to a 50% interest.

108 Unknown to Mr. Martin, the purchase of 412-414 Jarvis Street was what is sometimes described as a "flip." It was a transaction where the ultimate purchaser is unaware that an intermediate purchaser has turned over the property for a profit at inflated purchase price beyond the genuine market value of the property.

109 In this particular case, the registered owner of 412-414 Jarvis Street was 708534 Ontario Limited, which agreed to sell the property to Zomba Inc. for $3,250,000. Zomba Inc., in turn, had agreed to sell the property for $3,675,000 to Burbrook and Martinvale Estates. Thus, Zomba made $425,000.00 from "flipping" the property.

110 The $3.6 million purchase price of the Jarvis Street property was fully financed. A first mortgage of $1.8 million was assumed. 708534 Ontario Limited took back a second mortgage for $1.0 million and Frog Pond Capital Corp. advanced $875,000.00, of which $450,000 was paid to 708534 Ontario Limited and $425,000 went to Zomba Inc. The loan of $875,000 from Frog Pond Capital Corp. was secured by a third mortgage on the 412-414 Jarvis Street property.

111 Mr. Martin testified that Mr. Goldfarb did not discuss the details of this transaction with him and the reporting letter was sent only to Mr. Anthony. Mr. Martin said he would not have agreed to purchase the Jarvis Street property, if he had known that the purchase price had been marked up. Mr. Martin testified that he had no idea that the property had been flipped and that he thought that his partner, Mr. Anthony, and his lawyer, Mr. Goldfarb, would have protected him.

112 Although he was not aware of the flip, Mr. Martin was aware that Frog Pond Capital Corp. was borrowing the $875,000 to fund the third mortgage loan to finance the purchase of Jarvis Street. The lender to Frog Pond Capital Corp. was the Royal Bank. As security for the loan from the Royal Bank, Frog Pond Capital Corp. assigned the third mortgage to the Royal Bank. Additional collateral security for the Royal Bank was provided by assignment of mortgages.

113 Martinvale Estates mortgaged a property in the Township of Georgina to Frog Pond Capital Corp. Inc., which mortgage was assigned to the Royal Bank, in order to support the borrowing from the Royal Bank. Thus, Martinvale Estates incurred a contingent liability. I foreshadow the discussion below, to note that there was no evidence presented to me that Martinvale Estates was ever called on to make any payment on this contingent liability. It is possible that the Royal Bank was repaid. I simply do not know.

114 In any event, Mr. Martin was now deeply involved with Mr. Anthony and the others at the FP Group including Mr. Axton. The FP Group was involved with Mr. Martin in the construction and the proposed development and syndication of both the Kingston Road and the Jarvis Street properties. The Jarvis Street project had a similar set of problems as the Kingston Road project, including difficulties associated with reconstruction and the eviction of existing tenants. It is convenient to note here that both projects were significant cash drains and neither project was ever completed by Mr. Martin or his corporations.

115 Members of the FP Group began to make other acquisitions with Mr. Martin, including what was described as the CBC Building in Toronto. Mr. Martin understood that he had paid half of the purchase price and that Mr. Anthony, Mr. Axton, and Ms. Headon had paid the other half. He testified that he later learned that he had in fact paid the whole price.

116 In any event, through his various corporations, Mr. Martin was in an expansionary mood, and for the purposes of this trial it is helpful to divide the projects into two classes. In the first class are transactions where Mr. Axton and his cronies were not involved or were only very modestly involved, perhaps to the extent of being kept advised and of making suggestions or recommendations to Mr. Martin, but with management and control remaining with him. The following transactions can be placed in the first class of what may be called non-Axton transactions:

(a) T.L.C. St. Petersburg, Florida -- This was a project beginning in or about January 1988 by a Martin corporation along with a corporate partner from Pennsylvania. The aim of the

project was to acquire a very large nursing home in St. Petersburg that had fallen on hard times. The state government had imposed a moratorium that had the effect of reducing occupancy (and the associated income stream) for this nursing home from 273 patients to 100 patients. Mr. Martin hoped to have the moratorium lifted.

(b) The Dr. Kerr investments -- This was a project by one Dr. Kerr to develop a plastic engine. Mr. Martin apparently made a commitment to provide funding or to purchase rights from Dr. Kerr.

117 In the second class of transactions are transactions in which the FP Group played some substantive role. Included in this group were Hawkesbury Villas, Preston Springs, and University Avenue, Windsor.

118 Whether it was from the pressures of expansion or for other reasons, Mr. Martin's business were not performing well during the 1988 period. The financial statements of Martinvale Estates financial statements for the year ending November 1988 reveal a loss from operations before depreciation of approximately $1.0 million. (This loss was covered by the sale of several properties.) The consolidated financial statements for T.L.C.-Properties for the year ending December 1988 (which include accounting for T.L.C.-Inc. and for the Kingston Rd. subsidiary, amongst other subsidiaries) reveal a loss before depreciation and before a provision for a loss on Kingston Rd. of approximately $800,000. The notes to the T.L.C.-Properties statement indicate that there was a substantial amount of debt and a significant deficiency in assets and that "the future of the company will depend upon its ability to attain profitable operations and receive continued financial support in the form of loans and guarantees from related parties." The financial statement of Martinvale Estates indicates that it had loaned approximately $1.5 million to affiliated corporations, including T.L.C.-Properties.

119 I was not provided with the 1988 financial statements for Newmarket Golf Course. Its statement for the year ending December, 1987 reveals a net loss before depreciation of approximately $55,000.

120 Mr. Martin increasingly placed his business affairs under the steerage of the FP Group. He hired the group to be his financial and business advisers on a healthy monthly retainer, and he established an office in their new premises on Bay Street, which were a marked improvement from their former shabby offices on Dupont Street in Toronto.

121 Axton, Anthony, and Headon were now sporting very expensive vehicles, and in hindsight, it may be that all of their success was being financed by exorbitant or unmerited fees or worse by their pilfering funds and assets belonging to Mr. Martin or his corporations.

122 Mr. Martin allowed Mr. Axton and his cronies to have almost total control over many of his business affairs. He was taken in by what may have been schemes and deceptions and by a myriad of corporations associated with the FP Group. Mr. Martin was told what he or his corporations owed and he was told how he ought to make payments, including payments to the FP Group. Mr. Martin did not second guess what he was told, and he would sign documents without checking whether he might be signing more than what had been explained to him by Ms. Kurowska-Barrie, who was the in-house lawyer for the F.P. Group.

123 Mr. Martin was even scolded for managing his own businesses. He received a memorandum from "Nigel" dated December 2, 1988. The memorandum states:

> Please help us to help you. Why are you paying us to help you when you act on your own without our advice, or worse yet, question our advice when we give it? You have great strengths in your knowledge of your business. Let us do the organization, push the paperwork, arrange the cheques and money transfers so that you wont (sic) have overdrafts in some accounts with funds in others. Listen to Cathy, she can tell you how to keep the bank happy, she has ways of finding out, and also she can obtain all the funds you require.

124 Mr. Martin succumbed, and he testified that he would simply sign without reading the blizzard of documents that

were placed before him. Mr. Martin said he trusted Mr. Axton and his associates, and he admitted that in hindsight it was a foolish thing to do. The purport of his testimony is that he did not know what was happening, and Mr. Axton took advantage of him.

125 Mr. Martin was undoubtedly very foolish and very gullible, but I formed the impression that he was not quite as ignorant or naïve as he portrayed. He was and is an intelligent man and even with an imperfect and un-refreshed memory, he revealed to me that he understood the nature of some sophisticated business transactions. I believe that he understood, at least, that Martinvale Estates and Newmarket Golf Club had undertaken an aggressive expansion that would present very challenging cash flow and financing problems until more than one new project could become sustainable.

126 In or about August 1989, a serious cash flow problem presented itself. The Royal Bank was pressing for payment of some indebtedness, and to address this situation, Mr. Martin privately arranged a $400,000 net loan from one Perkins on the security of the golf course lands. Because he was rushing off to Florida, Mr. Martin gave the cheque to Mr. Axton with instructions to use the funds to cover the Royal Bank's demand and also to pay tuition for Mr. Martin's son. Instead of using the funds for these purposes, Mr. Axton applied $392,000 of the funds to retire some of the alleged indebtedness to the FP Group.

127 When Mr. Martin returned from Florida, he was shocked to learn what Mr. Axton had done with the money from the Perkins loan. Although he did not immediately say anything, Mr. Martin was now very suspicious of Mr. Axton. Mr. Martin undertook his own detective work, and very late at night in the summer of 1989, he broke into the private offices and the vault of the FP Group. It was during these investigations that he learned about Nigel Stephens' true identity and about his criminal record. Mr. Martin testified that in light of the documents he discovered, he now believed that he had been defrauded by Mr. Axton.

128 The testimony and the evidence presented at the trial leaves me unable to know or describe precisely what happened next, apart from stating that within about twelve or thirteen months, Martindale Estates and Newmarket Golf Club were in bankruptcy.

129 However, I do know from reading Lederman J.'s judgment that in November, 1989, Martin and his companies sued Axton and members of the FP Group for damages for fraud, misappropriation, and conversion. Unfortunately, before the action against Mr. Axton came on for trial, Mr. Martin, Martinvale Estates and Newmarket Golf Club Ltd. went into bankruptcy. Remarkably, Mr. Axton purchased the cause of action from the trustee in bankruptcy and, not surprisingly, being the plaintiff by assignment and also the defendant of the fraud action, Mr. Axton called no evidence, and O'Brien, J. dismissed the misappropriation action in February 1991.

130 For present purposes, nothing turns on the outcome of the trial decided by O'Brien J. apart from the outcome providing motivation for Martinvale Estates and Newmarket Golf Club to recover their lost fortune from Mr. Goldfarb and Farano Green. For present and practical purposes, the problem becomes one of determining the losses suffered by these corporations between August 1988, when Mr. Goldfarb breached his fiduciary duty, and August 1989, when Mr. Martin discovered that he had been duped by Mr. Axton.

The Assessment of Loss -- Causation and Quantification

131 Mr. Martin's argument is that Martinvale Estates, and Newmarket Golf Club should be compensated for what they lost because of the combination of Mr. Axton's fraudulent activities, which eroded the assets of the corporations, and Mr. Goldfarb's breach of fiduciary duty, which denied the corporations the opportunity to avoid the erosion. Mr. Martin further submits that Martinvale Estates and Newmarket Golf Club lost everything.

132 Mr. Martin's arguments raise problems of causation and of quantification. These problems have been considered and to a large extent resolved by Lederman J. and by the Court of Appeal in the first appeal in the 1990 Action. I say this not as a matter of *res judicata* but as a matter of *stare decisis.*

133 As a matter of precedent, you could hardly find a judgment that was more on "all fours" with the case at bar than Finlayson J.A.'s judgment. As a matter of legal principles, his judgment analyzed the problems of causation and quantification in the same circumstances that are present in the case at bar.

134 Mr. Martin's argument is that once a breach of fiduciary duty is established then the onus shifts to the fiduciary to prove that the beneficiary suffered no loss. For the reasons expressed by Lederman J. and by Finlayson J.A., I reject this argument. In this regard, Finlayson J.A. stated at p. 184 of his judgment:

> Having concluded that Martin is entitled to only the damages that he suffered personally as a result of the breach of fiduciary duty as a result of the breach of fiduciary duty occasioned by Goldfarb's conduct once he was engaged in July 1998, the burden lay on Martin to prove those losses.

135 Lederman J. stated at paras. 89-90 of his judgment:

> Coming then to the second issue of who has the burden of proving the loss resulting from the breach of the fiduciary duty, the principle is not that once a breach of fiduciary duty is established, losses are presumed to flow from the breach and the defence bears the onus of proving which losses did not flow from the breach. The plaintiff must establish the loss arising from the breach and the defendant only bears the onus of trying to prove, if it so chooses, that the loss would have been suffered regardless of the breach.
>
> Certainly, the general rule is that the plaintiff must establish that it suffered a loss and adduce evidence to quantify that loss. Moreover, with specific regard to fiduciary duty cases, the structure of analysis always seems to be "what loss flows from this breach." It is not, "what loss has the defence proven did not flow from the breach". The onus is only on the defendant if it offers the affirmative defence that the loss would have happened anyway. This conclusion would seem entirely consistent with the above noted statement of La Forest J. [in *Hodgkinson v. Simms, supra,*] that "where the plaintiff has made out a case of non-disclosure and the loss occasioned thereby is established, the onus is on the defendant to prove that the innocent victim would have suffered the same loss regardless of the breach" (p. 200).

136 Four points emerge from Finlayson J.A.'s analysis. First, Mr. Goldfarb's breach of fiduciary duty could cause a loss to Martinvale Estates and Newmarket Golf Club. Second, the onus was on Martinvale Estates and Newmarket Golf Club to establish the quantification of the loss caused by Goldfarb's breach of fiduciary duty. Third, if Martinvale Estates and Newmarket Golf Club chose to employ a global before-and-after theory to quantify their loss, they must provide reliable evidence to establish an initial aggregate figure or "benchmark" of what were the values of these corporations. Fourth, the corporations are not entitled to blame Mr. Goldfarb for their total ruin, and "pre-Goldfarb and non-Axton transactions" must be deducted to determine the losses caused by Mr. Goldfarb's breach of fiduciary duty.

137 Because of the work performed by Finlayson J.A. in the first appeal of the 1990 Action, it is not necessary and it may be otiose for me to say much about the cases he relied on to fix these four major points. The four points emerge from his analysis (and for that matter also from the helpful analysis of Lederman J.) of *Canson Enterprises Ltd. v. Boughton & Co., supra,* and *Hodgkinson v. Simms, supra.* For present purposes, all that needs be said is that I rely on and, in any event, I am bound to follow and apply the authority of the Court of Appeal's judgment in *Martin v. Goldfarb* (1998), 41 O.R. (3d) 161 (C.A.).

138 Applying the four analytical points to my findings of fact for the case at bar and, for the moment, putting to the side Martinvale Estates' claim for losses arising from the Jarvis Street transaction, the first two points favour Martinvale Estates and Newmarket Golf Club, but the second two points are unfavourable, and in the end result, Martinvale Estates'

and Newmarket Golf Club's claims fail because of the absence of any initial benchmark value and because deducting the losses from "pre-Goldfarb and non-Axton transactions" might also reduce their claims to zero.

139 As I think was made very clear by Finlayson J.A.'s judgment in the 1990 Action, it fell on Martinvale Estates and Newmarket Golf Club to provide an initial aggregate figure or "benchmark" of what were the values of these corporations at the point at which Mr. Goldfarb breached his fiduciary duty. I believe this point also emerges from Lederman J.'s judgment, but he was found to be too generous in using guesswork to arrive at an assessment of the losses caused by the breach of fiduciary duty.

140 In the 1990 Action, the valuation date for the benchmark was July 28, 1998. On the evidence presented at this trial, I have selected the near equivalent valuation date of August, 1998.

141 There is no reliable evidence of the value of Martinvale Estates' and Newmarket Golf Club's assets as of August 1998.

142 As noted at the outset of these Reasons for Judgment, Martinvale Estates and Newmarket Golf Club claim that they lost $13,959,764, which was determined by deducting the value of genuine encumbrances from the fair market value of the land as of December 8, 1988. The evidence adduced during the cross-examination of Mr. Martin indicated that Mr. Phillips might have omitted three legitimate mortgages (that is, non-Axton mortgages) with a value of $2,430,000 (Klaiman mortgage, $2.25 million; Willowdale mortgage, $80,000; and Toronto Dominion Bank, $100,000). This would reduce the loss claim to approximately $11.5 million.

143 In making his calculations, Mr. Phillips uses Mr. Roth's appraisal evidence to provide the market value of two substantial assets of these corporations (which according to Mr. Phillips' calculations amounted to about 86% of their combined equity). Mr. Roth opines that the market value of lands owned by Martinvale Estates that adjoined the golf course together with the value of the golf course lands owned by Newmarket Golf Club was between $13,255,000 to $14,730,000. However, Mr. Roth's valuation date for the benchmark is as of January 1990. This is the wrong valuation date, and his valuation undoubtedly overstates the value of the land as of the proper valuation date of August 1998, because land values in January 1990 were at the peak of what had been a rising real estate market since at least August 1998.

144 In his calculation of the loss of equity of Martinvale Estates and Newmarket Golf Club, Mr. Phillips arbitrarily picks the mid-point of Mr. Roth's valuations and then uses a statement of net worth dated December 8, 1988 for the benchmark values of the other assets of the corporations. Apart from the fact that, once again, the wrong valuation date is selected, the statement of net worth is useless and has no probative value in the exercise of determining the benchmark value for the before-and-after theory. The net worth statement was probably prepared by Mr. Martin, but he did not recall it. And if he was the source of the valuations in the net worth statement, he did not justify those values and whether the values were realistic or just wishful thinking remains a mystery.

145 My own assessment is that the proof offered by Mr. Phillips is useless and his, Mr. Roth's, and Mr. Martin's testimony was inadequate to establish a proper valuation of the losses of Martindale Estates and Newmarket Golf Club at the valuation date of August, 1988.

146 Still putting aside the matter of the claim 412-414 Jarvis Street, Toronto, transaction, this last conclusion is obviously fatal to Mr. Martin's claim in the immediate action. However, the claims might have been moribund anyway because in determining what the corporations lost, it is necessary to deduct or not include losses from "pre-Goldfarb and non-Axton transactions."

147 Based on the evidence, I heard at the trial, and recalling that Martindale Estates or Newmarket Golf Course had historically covered the losses of associated corporations, I assess the losses associated with "pre-Goldfarb and non-Axton transactions" as having a value of approximately $10 million broken down as follows:

(a) The loss on the St. Petersburg, Florida project was about $1.0 million.
(b) The investment with Dr. Kerr for his plastic engine was a loss of approximately $3.0 million, and may have been more, because mortgages registered to Dr. Kerr or to members of his family totaled $4.6 million.
(c) The investment in the Kingston Road project was about a $5.0 million loss, having regard to the wasted expense of the construction contract and the purchase price.
(d) The operating losses of the nursing home, retirement home, or group home businesses were about a $1.0 million.

148 As a possible additional "non-Axton transaction," there is the circumstance that Mr. Martin's corporations had historically overcome cash flow problems and the operating losses of the nursing, retirement, and group homes by selling or mortgaging assets. With the benefit of hindsight, it can be said that independent of the activities of Mr. Axton, this business strategy entails that Mr. Martin's corporations would have been confronted with the problem of weathering the economic storm of the early 1990's, when land values plummeted and interest rates soared. While Mr. Martin's enterprises had survived previous storms of the economy, they were not at the same time engaged in an aggressive business expansion program that was rife with problems and whose financial success was unproven.

149 The idea that Mr. Martin's corporations' descent into bankruptcy was caused by an inability to weather the economic storm was pursued by the cross-examination of Mr. Martin, but he refused to even admit that the high interest rates would have been a problem. Nevertheless, I think that there is considerable strength in the idea that the economic conditions of the 1990's are a source of loss that is independent of Mr. Axton's activities and Mr. Goldfarb's breach of fiduciary duty. However, I am unable to quantify the amount of this loss.

150 I asked Mr. Adair, Mr. Goldfarb's counsel, whether the losses from some Axton transactions "post-Goldfarb" should also be deducted from the calculation of loss attributable to Mr. Goldfarb's breach of fiduciary duty, and he answered in the negative. My own view, however, is that this answer may be incorrect. To illustrate, although 412-414 Jarvis Street was an Axton-touched transaction, given Mr. Martin's expansionary mood, it is quite possible that Mr. Martin would have proceeded with this transaction with other partners, as he did with the St. Petersburg, Florida project. Put somewhat differently, the losses arising from the Jarvis Street project or from Hawkesbury Villas, Preston Springs, and University Avenue, Windsor may be attributable to bad business decisions and not fraudulent activities of Mr. Axton or his cronies. In any event, based on the evidence and Mr. Adair's concession, I cannot quantify this possible source of loss.

151 It may be that the "pre-Goldfarb and non-Axton transactions" would have by themselves eroded much of the value of the assets of Martinvale Estates and Newmarket Golf Club. However, apart from $10 million of losses, I am unable to derive a figure for the losses from these transactions. All I can say is that there are substantial losses that Mr. Martin cannot connect to Mr. Goldfarb's breach of fiduciary duty. More to the point, he has not quantified any loss attributable to the breach of fiduciary duty. I conclude that an assessment of damages or equitable compensation based on the before-and-after theory fails.

152 The claim for compensation based on the Jarvis Street transactions falls next to be considered.

153 I have reviewed the facts associated with this transaction above, and will not repeat them here save to highlight three facts: (i) the loss caused by the flip was $425,000; (ii) the $425,000 loss was suffered by 412-414 Jarvis Street Properties Limited, not by Martindale Estates; and (iii) Martindale Estates incurred a contingent liability of $875,000 by providing collateral security for the loan from the Royal Bank that funded the third mortgage for the Jarvis Street property.

154 The authority of the rule from *Foss v. Harbottle, supra,* discussed earlier in the context of the Court of Appeal's first judgment in the 1990 Action, applies again, and Martinvale Estates cannot claim the $425,000 loss directly suffered by 412-414 Jarvis Street Properties Limited.

155 As for its own direct loss, while Martinvale Estates guaranteed repayment of the $875,000 loan made by the Royal Bank and provided collateral security, there was no evidence that Martinvale Estates paid anything on this contingent liability, and thus this potential source of damage was not developed factually at the trial and is, therefore, not recoverable. See *Martin v. Goldfarb* (1998), 41 O.R. (3d) 161 (C.A.) at p. 180 and *Martin v. Goldfarb* (2003), 68 O.R. (3d) 70 (C.A.) at para. 10.

The Plea of Contributory Negligence

156 This brings me to the matter of Mr. Goldfarb's plea that Mr. Martin was contributorily negligent and that the principles of contributory negligence should be applied in the context of a claim for breach of fiduciary duty.

157 Since a fiduciary relationship presupposes a vulnerable or reliant person who is the beneficiary of the relationship and a fiduciary who is obliged to act loyally and in the interest of the beneficiary, I have doubts about whether it is appropriate to apply the principles of contributory negligence in this context. However, having regard to my conclusions that Mr. Martin's claim should be dismissed on the basis of a technical defence and on the grounds of inadequacy of proof, it is not necessary, nor, in my view, is it desirable to say anything more the merits of this plea.

158 I simply note that the following authorities were relied on, largely by analogy, to advance the argument that the plea was tenable in law: *M. Tucci Construction Ltd. v. Lockwood*, [2000] O.J. No. 3192 (S.C.J.), affd. [2002] O.J. No. 424 (C.A.); and *Sitko v. Hartum*, [2004] A.J. No. 1327 (Alta. Q.B.).

Conclusion

159 For the reasons set out above I dismiss Mr. Martin's action brought as the assignee of Martinvale Estates and Newmarket Golf Club.

160 The final matter to resolve is the issue of costs, including the costs of the withdrawn defence of Ms. Aleksandra Kurowska-Barrie. If the parties cannot agree about these matters, then they may make submissions to me in writing, beginning with Mr. Martin's submissions within 45 days of the release of these Reasons for Judgment, to be followed by Mr. Goldfarb's submissions within a further 15 days. Mr. Martin has a right to reply within a further 10 days.

P.M. PERELL J.

cp/e/qw/qlyxh/qlrsg/qlhcs/qlgpr

6

Case Name:

Zurich Indemnity Co. of Canada v. Matthews

Between
Zurich Indemnity Company of Canada and Zurich Insurance Company, plaintiffs (respondents), and Donald J. Matthews and Orville Parkes, defendants (appellants)

[2005] O.J. No. 1687

254 D.L.R. (4th) 97

198 O.A.C. 304

22 C.C.L.I. (4th) 16

44 C.L.R. (3d) 18

13 C.P.C. (6th) 221

138 A.C.W.S. (3d) 1046

2005 CarswellOnt 1629

Docket: C42484

Ontario Court of Appeal
Toronto, Ontario

K.N. Feldman, J.M. Simmons and E.E. Gillese JJ.A.

Heard: February 1, 2005.
Judgment: May 2, 2005.

(49 paras.)

On appeal from the order of Justice Peter G. Jarvis of the Superior Court of Justice dated July 7, 2004.

Counsel:

Hans P. Engell for the appellants

Richard H. Shaban and Cullen F. Price for the respondents

The judgment of the Court was delivered by

1 **E.E. GILLESE J.A.**:-- The appellants moved for an order permitting them to amend their statement of defence and to obtain a further and better affidavit of documents. By an order dated July 7, 2004, Jarvis J. dismissed the motion. The appellants appeal from that dismissal.

BACKGROUND

2 The appellants, Donald Matthews and Orville Parkes, were officers and directors of Matthews Contracting Inc. ("MCI").

3 Between September 1992 and August 1993, MCI, as general contractor, entered into six contracts on various construction projects. The contracts were subject to the provisions of the Construction Lien Act, R.S.O. 1990, c. C.30.

4 The respondents, Zurich Indemnity Company of Canada and Zurich Insurance Company (collectively "Zurich"), issued labour and material payment bonds, and performance bonds, for the projects.

5 The labour and material payment bonds were issued to guarantee payment in respect of any default by MCI in paying its subcontractors. The performance bonds were issued to guarantee performance in respect of any default by MCI in completing the various projects.

6 In December 1993, the Royal Bank of Canada placed MCI in receivership. Later, the bank petitioned MCI into bankruptcy. As a result, Zurich's labour and material payment bonds and performance bonds were called upon. Zurich hired Lindsey Morden Claim Services Limited to adjust the claims under the bonds.

7 Zurich paid out approximately $5.257 million to satisfy the subcontractors' claims under the labour and material payment bonds and became subrogated to the subcontractors' rights against MCI. Based on their subrogated rights, Zurich commenced an action against the appellants for breach of the trust provisions of the Construction Lien Act.

8 The appellants sought disclosure of certain documents from Zurich but Zurich maintained, based on the pleadings, that the documents were not relevant. Consequently, the appellants moved to amend their statement of defence. A number of the proposed amendments were not opposed. However, Zurich did oppose the amendments contained in paras. 18, 19 and 20 of the draft amended statement of defence.

9 In paras. 18 and 19, the appellants alleged that Zurich had acted improvidently in underwriting the MCI bonds (the "improvident underwriting claims"). Paragraphs 18 and 19 read as follows:

> Further, the plaintiffs, had discretion to execute, provide or procure fresh bonds for and on behalf of MCI. By virtue of its position as underwriter the plaintiffs were fully aware of MCI's financial position and, regardless continued to execute and provide such bonds.
>
> Further, the plaintiffs offered to provide financing to MCI which would have allowed it to complete the construction projects, listed in the Statement of Claim. The defendants' assert that, as the plaintiffs' ultimate refusal to provide financing led to MCI's bankruptcy the plaintiffs

therefore caused, contributed, and failed to mitigate their own damages.

10 In para. 20, the appellants allege that Zurich's claim was barred either under s. 45(1)(h) of the Limitations Act or by the doctrine of laches. The proposed para. 20 was:

> Further, and in the alternative, if the defendants' alleged acts and omissions give rise to a cause of action, which is not admitted but specifically denied, the defendants plead and rely on section 45(1)(h) of the Limitations Act R.S.O. 1990, c. L.15, and submit that the plaintiffs are barred from recovery. In the alternative the defendants rely on the doctrine of laches.

11 The appellants also moved for production of additional documents, including Zurich's underwriting file, which file included:

> (a) a report by Lindsey Morden that related to a review of Zurich's potential exposure should MCI default on its obligations; and
> (b) documents relating to meetings of Zurich, MCI and the bank in respect of potential refinancing of MCI.

12 The motion judge dismissed the motion, holding that the proposed pleading of improvident underwriting was not a tenable defence and that s. 45(1)(h) of the Limitations Act did not apply to an action for breach of trust. Nothing was expressly stated about the doctrine of laches. The motion judge refused to order additional disclosure on the basis that the documents sought were irrelevant to the issues as pleaded.

13 The appellants appeal, saying that the motion judge erred in refusing to permit the amendments and to compel further production of documents.

ISSUE 1: AMENDMENT OF THE PLEADINGS

14 Rule 26 of the Rules of Civil Procedure provides that the court shall grant leave to amend a pleading at any stage of an action absent prejudice that is not compensable by costs or an adjournment. Case law makes it clear that the motion judge has the jurisdiction to refuse to allow amendments that are not tenable in law. See Keneber Inc. v. Midland (Town) (1994), 16 O.R. (3d) 753 (Gen. Div.).

15 Zurich does not claim prejudice. Thus, this appeal turns upon whether the motion judge correctly found that none of the defences of improvident underwriting, s. 45(1)(h) of the Limitations Act or laches was tenable. Each of the proposed defences is considered below.

Improvident Underwriting

16 Section 8(1) of the Construction Lien Act stipulates that all amounts owing to the subcontractors (on account of the contract or subcontract of an improvement) constitute a trust fund. Section 8(2) provides that the contractor is the trustee of the trust fund created by subsection (1).

> 8.(1) All amounts,
>
> (a) owing to a contractor or subcontractor, whether or not due or payable; or
> (b) received by a contractor or subcontractor,
>
> on account of the contract or subcontract price of an improvement constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to the improvement who are owed amounts by the contractor or subcontractor.

> (2) The contractor or subcontractor is the trustee of the trust fund created by subsection (1) and the contractor or subcontractor shall not appropriate or convert any part of the fund to the contractor's or subcontractor's own use or to any use inconsistent with the trust until all subcontractors and other persons who supply services or materials to the improvement are paid all amounts related to the improvement owed to them by the contractor or subcontractor.

17 In addition to those liable in an action for breach of trust, s. 13 of the Construction Lien Act makes directors and officers of a corporation liable for breach of trust if they assented to, or acquiesced in, conduct that they reasonably ought to have known amounted to a breach of trust by the corporation. Based on these provisions of the Construction Lien Act, the subcontractors had the right to take action against MCI and the appellants for breach of trust.

18 Pursuant to s. 69(3) of the Construction Lien Act (and at common law including by virtue of the assignment of claims by the subcontractors), Zurich became subrogated to the rights of the subcontractors. Section 69(3) provides:

> The surety, upon satisfaction of its obligation to any person whose payment is guaranteed by the bond, shall be subrogated to all the rights of that person.

19 For the purposes of the subrogated action, Zurich stands in the shoes of the subcontractors. Zurich can sue the appellants because the subcontractors had the right to sue them. However, because Zurich stands in the subcontractors' shoes, it is the conduct of the subcontractors that is relevant from a defence perspective, not that of Zurich. The improvident underwriting claim that the appellants seek to advance - whether characterized as such or as contributory negligence or negligent misrepresentation - relates to actions by Zurich, not the subcontractors. Tenable defences are those that can be made against the subcontractors. Thus, improvident underwriting is not a tenable defence at law to a subrogated action for breach of trust under the Construction Lien Act.

20 As the motion judge correctly noted, relying upon Axa Pacific Insurance Co. v. R.J.B. Nicol Construction (1975) Ltd. (1998), 67 O.T.C. 271 (Gen. Div.), the actions of a surety - even if it knows of possible default and continues to provide bonds - does not make the surety responsible for the misconduct of the defendants relating to their trust obligations.

21 Accordingly, as the proposed amendments in paras. 18 and 19 of the draft amended statement of defence are based on claims of improvident underwriting, the motion judge correctly refused to permit the amendments.

Section 45(1)(h) of the Limitations Act

22 The motion judge gave the following reasons for refusing to permit the appellants to amend their statement of defence to raise a limitation period defence based on s. 45(1)(h) of the Limitations Act:

> The defendants seek to amend their statement of defence to plead s. 45(1)(h) of the Limitations Act and for laches. There is no limitation period in actions for breach of trust provided in the Construction Lien Act. It is significant that there was such a provision in its predecessor legislation. The Limitations Act, section 44(2) provides expressly that no claim of a beneficiary of a trust against the trustee for any property held on an express trust, or in respect of such trust, "shall be held to be barred by any statute of limitations".
>
> In addition the authorities are clear and state that section 45(1)(h) of the Limitations Act does not apply to an action for breach of trust. Rather, its application is solely to "penal actions". See West End Construction Ltd. v. Ontario (Ministry of Labour) (1989), 70 O.R. (2d) 133 (C.A.) at pp. 144-45 and Abraham v. Canadian Admiral Corp. (Receiver of) (1998), 39 O.R. (3d) 176 (C.A.) at

182.

23 On my reading of these reasons, the motion judge concluded that s. 45(1)(h) was not a tenable defence on two grounds. The first is that limitation periods do not apply in respect of trustees and he appears to have assumed that the appellants were trustees. The second is that s. 45(1)(h) of the Limitations Act applies only to penal actions.

24 In my view, the trial judge was incorrect in assuming that the appellants were trustees.

25 Section 13(1)(a) of the Construction Lien Act extends liability to directors and officers of a corporation if the directors or officers assented to, or acquiesced in, conduct by the corporation which the directors or officers reasonably ought to have known amounted to a breach of trust.

> 13.(1) In addition to the persons who are otherwise liable in an action for breach of trust under this Part,
>
> (a) **every director or officer of a corporation**;
> (b) any person, including an employee or agent of the corporation, who has effective control of a corporation or its relevant activities,
>
> **who assents to, or acquiesces in, conduct that he or she knows or reasonably ought to know amounts to breach of trust by the corporation is liable for the breach of trust**. [emphasis added].

26 Section 13 does not declare the directors and officers to be trustees nor does it deem them to be such. It does not make the directors and officers trustees. It imposes liability on directors and officers for breaches of trusts committed by the corporation and only if it is found that the directors and officers assented to, or acquiesced in, conduct by the corporation that they reasonably ought to have known amounted to breach of trust. In coming to this conclusion, I adopt the reasoning in Patrick Harrison & Co. v. Devran Petroleum Ltd. (1993), 22 C.P.C. (3d) 285 (Gen. Div.) and Baltimore Aircoil of Canada Inc. v. ESD Industries Inc. (2002), 60 O.R. (3d) 290 (Sup. Ct.).

27 It remains to be determined whether s. 45(1)(h) of the Limitations Act can apply to an action taken pursuant to s. 13 of the Construction Lien Act. Section 45(1)(h) reads as follows:

> 45.(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned,
>
> (h) an action for a penalty, damages, or a sum of money given by any statute to the Crown or the party aggrieved, within two years after the cause of action arose;

28 At first blush, it appears that s. 45(1)(h) applies. Zurich, standing in the shoes of the subcontractors, has commenced an action for damages and the right to bring the action was given to the subcontractors, as aggrieved parties, by s. 13 of the Construction Lien Act. However, as explained below, the weight of the jurisprudence is to the effect that s. 45(1)(h) applies only to penal actions. And, as also explained below, in my view because s. 13 is remedial rather than penal in nature, s. 45(1)(h) does not apply.

Section 45(1)(h) Applies Only to Penal Actions

29 The English Court of Appeal considered the antecedents of s. 45(1)(h) in Thomson v. Lord Clanmorris, [1900-03] All E.R. Rep. 804. Lindley M.R. stated that s. 3 of the Civil Procedure Act, 1833, 3 & 4 Geo. IV, c. 42, - the statutory

equivalent and predecessor to s. 45(1)(h) of the Limitations Act - was intended to apply to penal actions. He held that an action brought under s. 3 of the Directors' Liability Act, 1890, to recover damages from a director for loss sustained by reason of an untrue statement in a prospectus, was compensatory, not penal, and that consequently s. 3 of the Civil Procedure Act, 1833, did not apply. In coming to this conclusion, Lindley M.R. stated at pp. 806-07:

> The first thing that I will deal with is s. 3 of the Civil Procedure Act, 1833, which has been so much relied upon. In construing that enactment, as in construing any other enactment, you must look, not only at the words used, but at the history of the Act, and consider what were the reasons which led to its being passed. You must look at the mischief which had to be cured as well as the cure afforded. And when you have looked at the state of the law previous to the Civil Procedure Act, 1833, you see pretty well what it was that had to be dealt with. There were certain causes of action as to which there was no defined time of limitation. Some of them were alluded to in the earlier part of the section - actions for debt on specialties and other things which are there enumerated. They were not provided for by the existing statutes of limitations, and they are brought in. That was defect number one. There was another class of actions as to which there was no definite time for suing. Those were actions for penalties and damages and sums of money given by various Acts of Parliament by way of penalty or punishment and not by way of compensation. But as was pointed out by LORD ESHER, M.R., when commenting in Saunders v. Wiel, [1892] 2 Q.B. 321 upon Adams v. Batley 18 Q.B.D. 625, the punishment was there an object. And, whether you call it penalty, damages, or sum of money, it was not assessed with a view to compensate the plaintiff, although he might put some of it in his own pocket. That is the class of action. In other words, they were what are popularly called "penal actions." You get at that from the history of the legislation, and from knowing what the state of the law was and what the defect was.

30 In West End Construction Ltd. v. Ontario (Ministry of Labour) (1989), 70 O.R. (2d) 133 (C.A.), Finlayson J.A., on behalf of the court, quoted at length from the judgment of Lindley M.R. and noted that the decision in Clanmorris had been followed by the Federal Court of Canada and the Alberta Court of Appeal. He held that a complaint under the Human Rights Code was not an action and that therefore s. 45(1)(h) could not apply. Nonetheless, while he found it unnecessary to determine whether s. 45(1)(h) was limited to penal actions, he expressly approved the reasoning of Lindley M.R. in Clanmorris saying, at p. 144:

> If I was obliged to consider the matter from this perspective, I do not think I could ignore the reasons of Lindley M.R. in Clanmorris. When a judge of his experience and reputation stated so baldly that the genesis of s. 45(1)(h) referred to "penal actions" and based that assertion on "the history of the Act, and from a knowledge of the then state of the law and the defect which was to be cured", it hardly lies in my mouth to contradict him. Certainly no one else has. Despite Robinson v. Essex, I do not think that s. 45(1)(h) has any application to the remedies sought under the Code. Even if the complaint of Tabar can be construed as an "action", it is not a penal action and s. 45(1)(h) does not apply.

31 In Abraham v. Canadian Admiral Corp. (Receiver of) (1998), 39 O.R. (3d) 176 (C.A.), McKinlay J.A., writing for the majority, approved of the comments of Finlayson J.A. in West End Construction.

32 The reasoning in Clanmorris has been followed in the Ontario superior court. See Superior Propane Inc. v. Tebby Energy Systems (1992), 9 O.R. (3d) 769 (Gen. Div.). It has been followed in the Federal Court of Canada, as well. See A.M. Smith & Co. Ltd. v. The Queen (1981), 120 D.L.R. (3d) 345 (C.A.) and Johnson Controls Inc. v. Varta Batteries Ltd. (1984), 80 C.P.R. (2d) 1 (C.A.). In addition, it has been followed by other Canadian courts with legislative provisions that are equivalent to s. 45(1)(h). See, for example, Bank of Nova Scotia v. Dunphy Leasing Enterprises Ltd. (1987), 38 D.L.R. (4th) 575 (Alta. C.A.); Saskatchewan (Beef Stabilization Board) v. Thomas (1992), 13 C.P.C. (3d) 190 (Sask. Q.B.) and Herbin v. Halifax Atlantic Investments Ltd. (c.o.b. Wandlyn Inns) (2002), 36 C.P.C. (5th) 118

(N.S. S.C.).

33 The 1969 Ontario Law Reform Commission Report on Limitation of Action at p. 52 notes that s. 45(1)(h) does not bring all actions brought on statutes within its scope, noting that in England the words of the provision have been construed so as to include only actions for recovering sums in the nature of penalties.

34 I acknowledge that the decision of this court in Robinson v. Essex (1932), 41 O.W.N. 342 held that s. 45(1)(h) was not limited to penal actions. Only a very brief report of the judgment rendered in Robinson is available. In that report, the court held that a claim for damages arising from works constructed pursuant to the Municipal Drainage Act was barred by the then equivalent of s. 45(1)(h) as an "action for damages given by any statute must be brought within two years after the cause of action arose". There is nothing in the report to suggest that the court considered Clanmorris. In West End Construction, Finlayson J.A. referred to Robinson and chose not to follow it.

35 For these reasons, in my view, the weight of authority is to the effect that s. 45(1)(h) of the Limitations Act applies only to penal actions. A factor that further militates in favour of interpreting s. 45(1)(h) as applying only to penal actions is the passage of new limitations legislation. The comments of Feldman J.A. in Lax v. Lax (2004), 70 O.R. (3d) 520 at para. 35, although made in the context of enforcement of foreign judgments, are equally apt in the circumstances of the within appeal:

> [T]he legislature has now passed a new Limitations Act that radically changes the approach to limitations generally, imposing a standard two-year limitation for most actions and eliminating any limitation on the enforcement of court orders. ... [T]he existence of the new Act is another factor that militates in favour of leaving the original meaning of the sections of the former Act as they have been interpreted historically.

Section 13 of the Construction Lien Act is Remedial in Nature

36 Section 13 of the Construction Lien Act imposes liability on the corporation's directors or officers when they are found to have assented to, or acquiesced in, the corporation's breach of trust. As the statute does not impose a fine or term of imprisonment, in my view, the intention is not to punish the directors and officers but to provide an additional remedy to the injured parties.

37 A historical review of s. 13 reinforces that conclusion. Section 13 dates from the reform of the Mechanics' Lien Act in 1983. Section 3(7) of the Mechanics' Lien Act, R.S.O. 1980, c. 261, the antecedent to s. 13, provided for penal sanctions of a fine and/or imprisonment. Section 3(7) read as follows:

> Every person upon whom a trust is imposed by this section who knowingly appropriates or converts any part of any trust moneys referred to in subsection (1), (3) or (4) to his own use or to any use not authorized by the trust is guilty of an offence and on conviction is liable to a fine of not more than $5,000 or to imprisonment for a term of not more than two years, or to both, and every director or officer of a corporation who knowingly assents to or acquiesces in any such offence by the corporation is guilty of such offence, in addition to the corporation, and on conviction is liable to a fine of not more than $5,000 or to imprisonment for a term of not more than two years, or to both.

38 According to the 1982 Report of the Ontario Attorney General's Advisory Committee on the Draft Construction Lien Act, s. 3(7) was "unnecessary in light of s. 296 of the Criminal Code which makes it an indictable offence, punishable by up to fourteen years imprisonment, to convert trust funds with an intent to defraud". The Report went on to state, "Where there is no intent to defraud, the civil liability for breach of trust (i.e. s. 13) should be sufficient to rectify any such breach." The word "rectify" accords with the notion of a remedy rather than punishment.

39 The purpose and intent of the trust provisions in the Construction Lien Act have been held to be remedial in effect.

See Baltimore Aircoil of Canada, supra, at para. 36 and Essroc Canada Inc. v. Towne Concrete Forming Ltd., [2004] O.J. No. 2460 at para. 25, where Paisley J. said, "The trust provisions of the Act do not create a penalty. They are undoubtedly in place to ensure that persons are properly credited for work and services provided and that trust is in respect of monies received for work performed."

40 Although provisions for personal liability of officers and directors may in one sense be penal, in that they impose liability on directors and officers, they are protective and remedial insofar as a creditor is concerned. See Huntington v. Attrill, [1893] A.C. 150 (P.C.) at 159. In Huntington, the Privy Council allowed the action of a creditor of a corporation to be heard on the basis that the action was remedial in nature and not penal, as had been found in both the Ontario High Court of Justice and Court of Appeal. The creditor brought an action against the director of the company for fraudulent misrepresentations in signing false certificates as to the amount of paid up stock in the company. The creditor had recovered judgment in the state of New York, pursuant to s. 21, ch. 611 of the New York Statute of 1875, and was taking action upon the judgment in Ontario. However, according to the rules of international law, if the matter was penal in nature, it could not be adjudicated upon in a foreign jurisdiction. In holding that the provisions were not penal in nature, the Privy Council stated:

> In one aspect of them, the provisions of sect. 21 are penal in the wider sense in which the term is used. They impose heavy liabilities upon directors, in respect of failure to observe statutory regulations for the protection of persons who have become or may become creditors of the corporation. But, in so far as they concern creditors, these provisions are in their nature protective and remedial.

41 Finally, s. 10 of the Interpretation Act, R.S.O. 1990, c. I.11, requires that all legislation shall be deemed to be remedial whether its immediate purport is to prevent or punish the doing of a thing:

> Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any things that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

42 For these reasons, I conclude that an action for breach of trust taken pursuant to s. 13 of the Construction Lien Act is remedial, not penal, in nature. Having previously concluded that s. 45(1)(h) of the Limitations Act applies only to penal actions, it follows that s. 45(1)(h) is not a tenable defence.

Laches

43 A defence based on the doctrine of laches would require the appellants to show that inordinate delay, or acts or omissions on the part of Zurich (in their capacity as subrogated claimants under the Construction Lien Act), resulted in prejudice to them. See Perry, Farley & Onyschuk v. Outerbridge Management Ltd. (2001), 54 O.R. (3d) 131 (C.A.).

44 Zurich says that the cause of action for breach of trust under the Construction Lien Act arose in the fall of 1993. The action was brought in October of 1997, some four years later. I accept Zurich's submission that the proposed amended statement of defence does not plead delay or allege prejudice but that is not an answer to the matter in issue. The issue before this court is whether the appellants can amend their statement of defence to allege laches, not whether particulars should be ordered or whether part of the pleading should be struck for failing to disclose a minimum level of material fact. In my view, it cannot be said at this stage of proceedings, that laches is not a tenable defence. If Zurich is troubled by the amendments, once they are made, they can take the appropriate steps to address their concerns, but that is a matter for them to pursue before a different court and pursuant to a fresh motion.

45 I would add a final comment in relation to the matter of laches. At the conclusion of oral argument in this appeal, the court asked counsel for additional written submissions on whether s. 45(1)(h) of the Limitations Act applies to an

action brought pursuant to s. 13 of the Construction Lien Act. In their additional written submissions, for the first time, Zurich submitted that s. 45(1)(g) of the Limitations Act applied. In its original submission, Zurich took the position that there was no limitation period in respect of an action for breach of trust under the Construction Lien Act and cited authority for that proposition. Then, in two brief paragraphs at the end of their additional written submission, Zurich submitted, based on Fleury v. Fleury (2001), 9 C.P.C. (5th) 222 (Ont. C.A.), that laches was not a tenable defence because s. 45(1)(g) applied.

46 In the circumstances, in my view, it is not appropriate for the court to consider the applicability of s. 45(1)(g) or Fleury. The motion below was argued on the basis that the relevant limitation period provision was s. 45(1)(h). The appellants have not been heard on the matter of s. 45(1)(g), the motion judge was not called upon to decide the matter and there is no proper record upon which to consider the issue.

ISSUE 2: PRODUCTION OF DOCUMENTS

47 Assuming that this court has jurisdiction to entertain an appeal in the matter of production of documents, I would decline to decide it. There is no proper record on which to make such an order. Having said that, it will be apparent that as there is no tenable defence based on improvident underwriting there can be no right to require production related to such a claim.

48 In any event, Zurich has undertaken to provide the appellants with a fresh affidavit of documents and, following release of this decision, disclose all documents made relevant by the decision.

DISPOSITION

49 Accordingly, I would allow the appeal in part and set aside the order below. I would grant the appellants leave to amend their statement of defence so as to plead laches and award the appellants the costs of the motion and costs of this appeal fixed at $2,000, inclusive of disbursements and GST.

E.E. GILLESE J.A.
K.N. FELDMAN J.A. -- I agree.
J.M. SIMMONS J.A. -- I agree.

cp/e/qlgkw/qlgxc