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Supreme Court Overturns Manitoba Court of Appeal on Métis Land Grants

The Supreme Court of Canada decision in [*Manitoba Metis Federation Inc. v. Canada \(Attorney General\)*](#), 2013 SCC 14, declaring that the federal government failed to act with diligence in fulfilling its obligations under s.31 of the *Manitoba Act* to provide Métis children with allotments of land, will impact future land negotiations in Manitoba and have wider implications for constitutional law matters according to these commentators:

- [*A Duty of Diligent Fulfillment? SCC Rules that Land Grants to Métis Children Breached Honour of Crown*](#), Canadian Appeals Monitor.
- [*Manitoba Metis Federation v. Canada: the Eternal Constitutional Oversight of the Courts*](#), Davis LLP.

Dismissal of Leave Application to Add Defendant Upheld: MBCA

The Court of Appeal upheld the lower court ruling in [*McIntyre v. Frolich*](#), 2013 MBCA 20 dismissing a plaintiff's application for leave under Part II of [*The Limitation of Actions Act*](#) to add his family doctor as a defendant in a medical negligence lawsuit. The appeal court agreed with the judge that the one year limitation period started to run from the date of the examination for discovery at which time the plaintiff understood that there could be a causal connection between the family doctor's inaction (in failing to update the surgeon about the plaintiff's underlying condition) and the damages suffered. It was not necessary, said the court, for the plaintiff to understand that the decisive facts gave rise to a cause of action.

Failure to Provide Reasons a Serious Breach of Procedural Fairness: MBCA

Two recent decisions of the Court of Appeal criticize the Taxicab Board for failing to provide reasons for its licensing decisions. In [*Abetew v. Taxicab Board*](#), 2013 MBCA 19, the court quashed the board's decision and reinstated the taxicab licence. In [*Sunshine Transit Service a/o Sunshine*](#), 2013 MBCA 15, the court granted leave to appeal the board's refusal to grant a licence to operate a limousine service.

Insured's Opinion Irrelevant: MBCA

In [*Badenhorst v. Great-West Life Assurance Company*](#), 2013 MBCA 5, the Court of Appeal overturned the lower court decision ordering an insurance company to pay the claim of a woman who had misinterpreted certain questions on the application relating to her health and therefore answered them incorrectly. Disability contracts are *uberrimae fidei*, said the court, and an applicant is obliged to disclose all material facts bearing on the risk to be insured. Questions on an application are to be interpreted objectively and contextually in accordance with the objectives of the legislation. In this case there was overwhelming evidence "that the critical questions were clear, unambiguous and material." The trial judge applied the wrong test when he considered the subjective opinion of the insurance applicant as to her interpretation of the questions on the insurance application, thereby ignoring the issue of their materiality.

Understanding the Legal Difference Between a New Breach of Contract and a New Cause of Action: MBCA

In [*Winnipeg \(City\) v. Columbus Centennial*](#), 2013 MBCA 2 the Court of Appeal overturned the motion judge's ruling allowing the City of Winnipeg to amend its statement of claim for unpaid rent/taxes by introducing additional breaches of the same lease. The appeal court reiterated its position on what constitutes a new cause of action (set out in [*Britton v. Manitoba*](#), 2011 MBCA 77) as follows:

...the crux of what constitutes an independent actionable claim is whether success on the newly alleged breach is dependent upon success on the original breach. If it is, then it is not an independent action; but, if liability can be based on the amendments regardless of the outcome of the original claim, then it is an independent actionable claim.

In this case, the proposed amendments clearly introduced a cause of action independent of the original claim and the court refused to permit them.

Recent QB Decisions

- The court dismissed the plaintiff's application under s.14 of *The Limitation of Actions Act* to add a third party as a party defendant in [*Green Brier Inn \(Wpg.\) Inc. v. Coca-Cola Bottling Company*](#), 2013 MBQB 53. The third party "was clearly discernable as a target for the plaintiff at the time of the issuance of the statement of claim" and was entitled to stand on its legal rights even though it could not claim to have suffered prejudice by the delay.
- The City was negligent in failing to post appropriate warning signs of hazardous street excavation said the court in [*The Manitoba Public Insurance Corporation v. The City of Winnipeg et al.*](#), 2013 MBQB 45. Among other things, the court rejected the City's assertion that [s.475](#) of *The City of Winnipeg Charter* relieved it of liability. Section 475(3) "is designed to insulate the City from liability for nonfeasance. It is not designed to insulate it from admitted negligence or misfeasance as is the case here," said the court.
- In [*Sowemimo v. College of Physicians & Surgeons of Manitoba*](#), 2013 MBQB 42, a rare case "involving an application for judicial review requiring preliminary determinations prior to the hearing on the merits," the court granted a motion by the College of Physicians and Surgeons to strike portions of a notice of application for judicial review and the accompanying affidavit.
- The court weighs the many factors at play in considering an application to extend a limitation period in [*Laing v. Sekundiak*](#), 2013 MBQB 17, a medical malpractice case in which the hearing of the application itself had been delayed eight-and-a-half years. Although the court said that the last ten months of the delay were inexcusable, it declined to deprive the applicant of her right to have her application decided on its merits

and dismissed the application for delay.

Report on Nuisance: MLRC

The Manitoba Law Reform Commission released its final report on [The Nuisance Act and The Farm Practices Protection Act](#) on March 28, 2013. The report reviews the common law of nuisance and its historical role in regulating environmental and land-use conflicts and examines how the two acts restrict the common law. It concludes by recommending that *The Nuisance Act* be repealed and that there be a broad, inter-disciplinary and public review of *The Farm Practices Protection Act*.

Recommended Reading

The following articles may be of interest to litigators:

- [A treasure trove for litigators](#) - the author of this Slaw article recommends that litigators read the decision in [York University v. Michael Markicevic](#), 2013 ONSC 378, which deals with, among other things, *Mareva* injunctions, *Anton Piller* orders, and fraudulent preferences.
- [Civility as a Strategy in Litigation](#) and [Top 10 Tips on Courtroom Civility](#) - Eugene Meehan Q.C. posted the links to these two papers on civility from this year's MBA mid-winter meeting in Issue 6 of his [Supreme Advocacy Letter](#). He wrote the first article and The Honourable Judge Sean Dunnigan of the Provincial Court of Alberta wrote the second.
- [Litigation, trial and pre-trial iPad apps for lawyers](#) - this LLRX article reviews and links to pre-trial and trial iPad apps for litigators on the go.
- [Why does e-discovery cost so much?](#) - this *Canadian Lawyer* article explores the difficulties in assessing e-discovery costs and why costs are trending upward.
- [The social litigator](#) - this *Lawyers Weekly* article discusses the benefits and drawbacks of social media for litigators and the administration of justice.
- [Med-Arb: The Adjudication Perspective](#) - this Slaw post on mediation at adjudication, or med-arb, focuses on the ethical concerns in being both mediator and adjudicator and sets out best practices to limit these risks.
- [Civil Writes](#) - the latest edition of the CBA's National Civil Litigation section newsletter has articles on [expert witnesses](#), [calling an adverse party as a witness](#), [self-represented litigants and changing rules](#), and [document disclosure](#)

Skilled Litigator Series III: CBA

Upcoming programs in the CBA's Skilled Litigator online series include:

- [Assessing Your Case for Appeal](#) - experienced advocates will provide a framework to assess a client's chances of success on appeal, including undertaking a cost/benefit analysis and updates on standards of review. The program takes place April 16, 2013.
- [Written Advocacy: Drafting the Winning Factum](#) - appellate court judges will identify the common characteristics of persuasive factums in this online program on May 7, 2013.
- [Risk Management for Litigators](#) - learn what you need to know to protect yourself from liability and ensure a claims-free practice at this June 4, 2013 program.

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