Federal Court  Cour fédérale

Date: 20120719

Docket: T-1068-92

Citation: 2012 FC 915

Ottawa, Ontario, July 19, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

THE PEEPEEKISIS BAND as represented by CHIEF ENOCH POITRAS, DWIGHT PINAY, ARTHUR DESNOMIE, ALLAN BIRD, JAMES POITRAS, PERRY McLEOD, CLARENCE McNABB and LAWRENCE DEITER, CHIEF AND COUNCILLORS OF THE PEEPEEKISIS BAND No. 81

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is a motion by the Defendant under subsection 213(1) of the *Federal Courts Rules* SOR/98-106 (Rules) for summary judgment on the grounds that the Plaintiffs' claim is

fundamentally flawed and is time barred. The Defendant also asks the Court to strike the Plaintiffs' statement of claim under paragraph 221(1)(*f*) of the Rules as an abuse of process.

BACKGROUND

[2] The Peepeekesis band (Band) is a band within the meaning of the *Indian Act* RSC 1985 c I-5 (*Indian Act*) and within the meaning of Treaty 4. The individual Plaintiffs are members of the Band and its Chief and Councilors.

Statement of Claim

[3] On 29 April 1992, the Plaintiffs filed a statement of claim in which they allege the Defendant had diminished their reserve lands between 1897 and 1944. They allege that the Defendant subdivided their reserve without obtaining their informed consent and that the subdivided land was transferred to members who were unlawfully admitted to the Band (New Members). They say that contrary to section 140 of the *Indian Act*, the New Members were added to the Band by the Defendant without a majority vote of the Band or its council. In the alternative, if the New Members were admitted by a majority vote, the Plaintiffs say this vote was obtained by bribery, undue influence or other unconscionable conduct which amounted to constructive fraud.

[4] By unlawfully admitting the New Members, the Plaintiffs say that the Defendant depleted the assets which had been held by original Band members (Original Members) prior to the addition of the New Members. Under section 140 of the *Indian Act*, when a new member is added to a band, the new band is entitled to a per-capita share of the capital held by the new

member's previous band (Per-Capita Shares). The Band says it did not receive the Per-Capita Shares of New Members when they were added to the Band as New Members.

[5] The Plaintiffs also say that the Defendant breached its fiduciary duty to the Band by alienating the Band's lands to the New Members, adding the New Members without the Band's informed consent, and by bribing, unduly influencing, and defrauding the Original Members. The Defendant also breached its fiduciary duty by failing to properly administer the Band's assets and by failing to transfer the Per-Capita Shares to which the Band was entitled under section 140 of the *Indian Act*. The Defendant further breached its fiduciary duty by failing to provide the Original Members with independent legal advice with respect to the addition of the New Members to the Band. Finally, the Plaintiffs say that the Defendant also breached its fiduciary duty to the Plaintiffs when it depleted their assets by adding the New Members.

Procedural History

[6] On 8 December 1998, Justice John Richard ordered that this case be exempted from section 380 of the Rules. This allowed the Plaintiffs to pursue their claims through the Specific Claims Process (SCP) – a dispute resolution process established by the Minister of Indian Affairs and Northern Development (Minister). Justice Richard's order was set to expire on 20 September 1999. The Court extended this order several times until it finally expired on 30 September 2009 and was not extended again.

[7] On 28 May 2004, the Indian Claims Commission – a body established by the Minister under the SCP – recommended the claim be accepted for negotiation. The Minister rejected this

recommendation because he believed *res judicata* applied to the issues raised in the Plaintiffs' claim.

[8] The Chief Justice of the Federal Court issued a Notice of Status Review on 20 November 2009, after the Defendant indicated that the Plaintiffs had not said they wanted to pursue their claim under the SCP. In their submissions in response to the Notice of Status Review, the Plaintiffs requested that a case management judge be appointed. The Defendant did not object to this request and, on 28 January 2010, Prothonotary Tabib ordered the case to continue as a specially managed proceeding. The Court assigned Prothonotary Tabib as the case management judge on 26 February 2010.

[9] The Plaintiffs filed an amended statement of claim on 21 July 2010 (Amended Statement of Claim) and the Defendant filed an amended statement of defence (Amended Statement of Defence) on 2 September 2010.

[10] The Defendant filed its motion for summary judgment on 18 November 2011 and the Plaintiffs filed their responding motion record on 30 December 2011.

Amended Statement of Claim

[11] In the Amended Statement of Claim, the Plaintiffs added allegations that the Indian Agent responsible for their reserve in 1896 allotted parcels of land to New Members who he brought to the reserve without following the requirements of the *Indian Act*. Between 1897 and 1944, the Defendant implemented a scheme by which former pupils of the Qu'Appelle Indian School and other industrial schools were settled on the Peepeekesis Reserve without the Band's

informed consent (Colonization Scheme). Under the Colonization Scheme, the Peepeekesis Reserve was surveyed and subdivided, and the pupils were settled on some of the subdivided land. The pupils were also added as New Members to the Band. The Plaintiffs allege that the Colonization Scheme was not created for the Band's benefit.

[12] The Plaintiffs further allege that, in 1910, some members of the Band opposed the addition of further New Members. The Indian Agent at that time sought to obtain an agreement with the Band by which fifty New Members could be added. In 1911, the Indian Agent reported that an agreement to this effect had been approved by the Band (1911 Agreement). The Plaintiffs claim that the 1911 Agreement was not properly approved by the Band.

[13] The Plaintiffs further allege that, in 1956, Judge McFadden of the District Court of Saskatchewan (Judge McFadden) heard protests referred to him by the Registrar of Indians under subsection 9(4) of the *Indian Act* SC 1951 c 29. The Plaintiffs say that Judge McFadden was provided with a copy of the 1911 Agreement but was not given any background information. Judge McFadden found that the Defendant had treated the 1911 Agreement as having been approved by a majority vote by the Band in order to give the Defendant the right to add New Members to the Band.

[14] In addition to the losses suffered by the Original Members, which the Plaintiffs asserted in the Original Statement of Claim, the New Members also suffered loss from the Colonization Scheme because the New Members were deprived of their Per-Capita Shares from their original bands.

[15] The Plaintiffs seek a declaration that the Colonization Scheme was invalid, that the Defendant breached its fiduciary obligation by failing to act in the Plaintiffs' best interest and by adding the New Members to the Band. They also seek damages for the wrongful alienation of their lands and the Defendant's breach of its fiduciary obligation. The Plaintiffs seek further damages for the Defendant's breach of their treaty rights and for the implementation of the Colonization Scheme in breach of the *Indian Act*.

Amended Statement of Defence

[16] The Defendant says that no land was ever alienated from the Band, so that no breach of any duty could have occurred. The New Members were added with the Band's consent. In 1956, Judge McFadden found that the New Members were added lawfully, so that any challenge to the lawfulness of adding New Members is now *res judicata*. The 1911 Agreement was not improperly induced and was approved by a majority of the Band members.

[17] The Defendant also says that the causes of action alleged in the Amended Statement of Claim accrued to the Plaintiffs more than 10 years before they commenced their action. Hence, the action is barred by the *Limitation of Actions Act* RSS 1978 c L-15 (LAA) and the *Crown Liability and Proceedings Act* RSC 1985 c C-50.

ISSUES

[18] The Defendant raises the following issues in this motion:

a. Whether the Plaintiffs' claim is fundamentally flawed;

b. Whether the Plaintiffs' action is an abuse of process;

c. Whether the Plaintiffs' action is time-barred;

d. Whether summary dismissal is appropriate.

STATUTORY PROVISIONS

[19] The following provision of the *Federal Courts Act* RSC 1985 c F-7 (*Federal Courts Act*) is applicable in this proceeding:

39. (1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.	**39.** (1) Sauf disposition contraire d'une autre loi, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance devant la Cour d'appel fédérale ou la Cour fédérale dont le fait générateur est survenu dans cette province.
[…]	[…]

[20] The following provisions of the *Federal Courts Rules*, 1998 are applicable in this proceeding:

213. (1) A party may bring a motion for summary judgment or summary trial on all or some of the issues raised in the pleadings at any time after the defendant has filed a defence but before the time and place for trial have been fixed	**213.** (1) Une partie peut présenter une requête en jugement sommaire ou en procès sommaire à l'égard de toutes ou d'une partie des questions que soulèvent les actes de procédure. Le cas échéant, elle la présente après le dépôt de la défense du défendeur et avant que les heure, date et lieu de l'instruction soient fixés.
[…]	[…]

221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to mend, on the ground that it	**221.** (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
(*a*) discloses no reasonable cause of action or defence, as the case may be,	*a*) qu'il ne révèle aucune cause d'action ou de défense valable;
[…]	[…]
(*f*) is otherwise an abuse of the process of the Court,	*f*) qu'il constitue autrement un abus de procédure.
and may order the action be dismissed or judgment entered accordingly.	Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

[21] The following provisions of the *Indian Act* SC 1951 c 29 (*Indian Act* 1951) are also applicable in this proceeding:

5. An Indian Register shall be maintained in the Department, which shall consist of Band Lists and General Lists and in which shall be recorded the name of every person who is entitled to be registered as an Indian.	**5.** Est maintenu au ministère un registre des Indiens lequel consiste dans des listes de band et des listes générales et où doit être consigne le nom du chaque personne ayant droit d'être inscrite comme Indien.
6. The Name of every person who is a member of a band and is entitled to be registered shall be entered in the Band List for that band, and the name of every person who is not a member of a band and is entitled to be registered shall be entered in a General List.	**6.** Le nom de chaque personne qui est membre d'une bande et a droit d'être inscrit doit être consigné sur la liste de bande pour la band en question, et le nom de chaque personne que n'est pas membre d'une bande et a droit d'être inscrite doit apparaître sur une liste

générale.

7. (1) The Registrar may at any time add to or delete from a Band List or a General List the name of any person who, in accordance with the provisions of this Act, is entitled or not entitled, as the case may be, to have his name included in that lists.

7 (1) Le registraire peut en tout temps ajouter à une liste de bande ou à une liste générale, ou en retrancher, le nom de toute personne que, d'après les dispositions de la présente loi, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans cette liste.

(2) The Indian Register shall indicate the date on which each name was added thereto or deleted therefrom.

(2) Le registre des Indiens doit indiquer la date où chaque nom y été ajoute ou en été retranche.

8. Upon the coming into force of this Act, the band lists then in existence in the Department shall constitute the Indian Register, and the applicable lists shall be posted in a conspicuous place in the superintendent's office that serves the band or persons to whom the list relates and in all other places where band notices are ordinarily displayed.

8. Dès l'entrée en vigueur de la présente loi, les listes de bande alors dressées au ministère doivent constituer le registre des Indiens et les listes applicables doivent être affichées à un endroit bien en vue dans le bureau du surintendant que dessert la bande ou les personnes visées par la liste et dans tous les autres endroits où les avis concernant la bande sont ordinairement affiches.

9. (1) within six months after a list has been posted in accordance with section eight or within three months after the name of a person has been added to or deleted from a Band List or a General List pursuant to section seven

9. (1) Dans las six mois de l'affichage d'une liste conformément à l'article huit ou dans les trois mois de l'addition du nom d'une personne à liste du bande ou à une liste générale, ou de son retranchement d'une telle liste, en vertu de l'article sept.

(a) in the case of a Band List, the council of the band, any ten electors of the band, or any three electors if there are less

(a) dans le cas d'une liste de band, le conseil de la bande dix électeurs de la bande ou trois électeurs, s'il y en a

than ten electors in the band,

[…]

may by notice in writing to the Registrar, containing a brief statement of the grounds therefor, protest the inclusion, omission, addition, or deletion, as the case may be, of the name of that person.

(2) Where a protest is made to the Registrar under this section he shall cause an investigation to be made into the matter and shall render a decision, and subject to a reference under subsection three, the decision of the Registrar is final and conclusive.

(3) Within three months from the date of a decision of the Registrar under this section

(a) the council of the band affected by the Registrar's decision, or

(b) the person by or in respect of whom the protest was made,

may, by notice in writing, request the Registrar to refer the decision to a judge for review, and thereupon the Registrar shall refer the decision, together with all material considered by the Registrar in making his decision, to the judge of the county or district court of the

moins de dix,

[…]

peuvent, par avis écrit au registraire, renfermant un bref exposé des motifs invoqués à cette fin, protester contre l'inclusion, l'omission, l'addition, ou le retranchement, selon le cas, du nom de cette personne.

(2) Lorsqu'une protestation est adressée au registraire, en vertu de présent article, il doit faire tenir enquête sur la question et rendre une décision qui, sous réserve d'en renvoi prévu au paragraphe trois, est définitive et péremptoire.

(3) Dans les trois mois de la date d'une décision du registraire aux termes de présent article,

(a) le conseil de la bande que vise la décision du registraire, ou

(b) la personne qui a fait la protestation ou a l'égard de qui elle a eu lieu,

peut, moyennent un avis écrit, demander au registraire de soumettre la décision a un juge, pour revision, et dès lors le registraire doit déférer la décision, avec tous les éléments que le registraire a examinés en rendent sa décision, au juge de la cour de comté ou district du comté ou

county or district in which the band is situated or in which the person in respect of whom the protest was made resides, or such other county or district as the Minister may designate […].	district ou la band est située ou dans lequel réside la personne a l'égard de que la protestation a été faite, ou du tel autre comté ou district que le Ministre peut désigner, […].
(4) the judge of the county, district, or Superior Court, as the case may be, shall inquire into the correctness of the Registrar's decision, and for such purposes may exercise all the powers of a commissioner under Part I of the *Inquiries Act*; the judge shall decide whether the person in respect of whom the protest was made is, in accordance with the provisions of this Act, entitled or not entitled, as the case may be, to have his name included in the Indian Register, and the decision of the judge is final and conclusive.	(4) Le juge de la cour de comté, de la cour de district ou de la cour supérieure, selon le cas, doit enquêter sur la justesse de la décision du registraire et, à ces fins, peut exercer tous les pouvoirs d'un commissaire en vertu de la Partie I de la *Loi des enquêtes*. Le juge doit décider si la personne qui a fait l'objet de la protestation a ou n'a pas droit, selon le cas, d'après les dispositions de la présente loi, à l'inscription de son nom au registre des Indiens, et la décision du juge est définitive et péremptoire.

[22] The following provisions of the *Public Officers Protection Act* RSS 1978 c P-40 (POPA) are at issue in this proceeding:

> **2** (1) No action, prosecution or other proceedings shall lie or be instituted against any person for an act done in pursuance or execution or intended execution of a statute, or of a public duty or authority, or in respect of an alleged neglect or default in the execution of a statute, public duty or authority, unless it is commenced:
>
> (a) within twelve months next after the act, neglect or default complained of or, in case of continuance of injury or damage, within twelve months after it ceases; or
>
> (b) within such further time as the court or a judge may allow.

> (2) If, in the opinion of the court, the plaintiff has not given the defendant a sufficient opportunity of tendering amends before the commencement of the proceeding, the court may award to the defendant costs to be taxed as between solicitor and client.

[23] The following provisions of the LAA are at issue in this proceeding:

> **3** (1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned:
>
> …
>
> (e) actions for:
>
> (i) trespass or injury to real property or chattels, whether direct or indirect, and whether arising from an unlawful act or from negligence; or
>
> (ii) the taking away, conversion or detention of chattels;
>
> within six years after the cause of action arose;
>
> (f) actions for:
>
> (i) the recovery of money, except in respect of a debt charged upon land, whether recoverable as a debt or damages or otherwise, and whether on a recognizance, bond, covenant or other specialty or on a simple contract, express or implied; or
>
> (ii) an account or for not accounting;
>
> within six years after the cause of action arose;
>
> (g) actions grounded on fraudulent misrepresentation, within six years from the discovery of the fraud;
>
> (h) actions grounded on accident, mistake or other equitable ground of relief not hereinbefore specifically dealt with, within six years from the discovery of the cause of action;

…

(j) any other action not in this Act or any other Act specifically provided for, within six years after the cause of action arose

[…]

12 (1) No proceedings shall be taken to recover:

(a) any rent charge; or

(b) any sum of money:

(i) secured by any mortgage; or

(ii) otherwise charged upon or payable out of any and or rent charge; or

(c) any legacy, whether it is or is not charged upon land; or

(d) the personal estate or any share of the personal estate of any person dying intestate and possessed by his personal representative;

but within ten years next after a present right to recover the same accrued to some person capable of giving a discharge therefor or a release thereof, unless prior to the expiry of said ten years:

(e) some part of the rent charge, sum of money, legacy or estate or share or some interest thereon has been paid by a person bound or entitled to make a payment thereof or his agent in that behalf to a person entitled to receive the same or his agent; or

(f) some acknowledgment in writing of the right to such rent charge, sum of money, legacy, estate or share, signed by any person so bound or entitled, or his agent in that behalf, has been given to a person entitled to receive the same or his agent;

and in such case no action shall be brought but within ten years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was made or given.

ARGUMENTS

The Defendant

[24] Summary dismissal is appropriate in this case because the Plaintiffs' claim lacks a genuine issue for trial, is an abuse of process, and is time-barred. Granting summary judgment in this case will save the Court the time and costs associated with adjudicating a claim which has no prospect of success. On a motion for summary judgment, the moving party must show there is no genuine issue requiring trial. However, the judge hearing the motion may make inferences of fact based on evidence. See *Canada (Attorney General) v Lameman* 2008 SCC 14 at paragraph 10. The Court should also ensure that the pleadings are not an attempt to circumvent the law by improper framing.

[25] The Defendant says a number of Band members, led by Ernest Goforth (Goforth Group), asked the Crown to appoint a Royal Commission to examine the Band's membership in 1948. In 1952 the Goforth Group protested the addition of 25 New Members to the Band and, in 1954, the Defendant appointed Leo Trelenberg to investigate these protests (Trelenberg Inquiry). Mr. Trelenberg reported his findings to the Registrar of Indians, who found that 23 of the 25 challenged New Members, were entitled to be members of the Band. Ernest Goforth challenged this decision and, in 1956, Judge McFadden found all 25 challenged New Members were entitled to be registered and that the 1911 Agreement was valid.

The Claim is Fundamentally Flawed

[26] The Plaintiffs' claim is fundamentally flawed because the Band's assets are held collectively; the Original Members and their descendants have no severable interest in the reserve lands. The rights to hold and occupy reserve lands are held by the community as it exists from time to time, so no individual member has a severable right to reserve lands. See *Beattie v Canada*, [2000] FCJ No 1920 at paragraphs 20 and 24. Whatever actions were taken by the Defendant, no lands were alienated from the Band and no land was irrevocably given to any member. When the New Members joined the Band they became entitled to participate in the collective rights held by the Band. Entitlement to reserve land flows from band membership, not descent, so only current members have a right to the Band's land. The legal framework which establishes the Band's collective right to its lands precludes the Plaintiffs' claim, so there is no genuine issue for trial.

Abuse of Process

[27] The Plaintiffs' claim is also an abuse of process because the basis of the claim has already been determined by a court of competent jurisdiction. The Plaintiffs base their claim on the unlawful addition of New Members to the Band between 1896 and 1944. Judge McFadden found in 1956 that 25 New Members admitted between 1896 and 1919 were lawfully registered as band members under the *Indian Act*. Judge McFadden considered the same facts and evidence which the Plaintiffs rely on in this claim. If the Court were to find the New Members were unlawfully added, this would directly contradict Judge McFadden's decision.

Claim is Time-Barred

[28] Further, the Plaintiffs' claim is time-barred under the POPA or the LAA because the facts which underlie the claim have been well-known for at least forty years. In *Lameman*, above, the Supreme Court of Canada held at paragraph 13 that:

> This Court emphasized in *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, that the rules on limitation periods apply to Aboriginal claims. The policy behind limitation periods is to strike a balance between protecting the defendant's entitlement, after a time, to organize his affairs without fearing a suit, and treating the plaintiff fairly with regard to his circumstances. This policy applies as much to Aboriginal claims as to other claims, as stated at para. 121 of *Wewaykum*:
>
> > 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.

Public Officers' Protection Act

[29] Under section 39 of the *Federal Courts Act*, limitation periods established by provincial law apply to proceedings before the Federal Court. The POPA sets a limitation of twelve months from the date of an act or omission for an action against a public officer, unless a court or judge extends the time for filing.

[30] *Des Champs [Deschamps] v Conseil des écoles séparées catholiques de langue française de Prescott-Russell*, [1999] 3 SCR 281 (QL) at paragraph 50 sets out the following test for a limitation period under the POPA:

> (1) Is the defendant a public authority within the class of entities or individuals for whom the limitation protection was intended? While most public authorities will satisfy the requirements, *Schnurr*, supra, illustrates problems that may arise.
>
> (2) What was the public authority doing, and pursuant to what duty or power was it doing it? This information will generally appear from the pleadings. […]
>
> (3) Is the power or duty relied on as part of the plaintiff's cause of action properly classified as entailing "a public aspect or connotation" or on the other hand, is it more readily classifiable as "private executive or private administrative ... or ... subordinate in nature" (per Estey J. in *Berardinelli*, at p. 283)?
>
> (4) Is the activity of the defendant public authority that is the subject matter of the complaint "inherently of a public nature" or is it more of "an internal or operational nature having a predominantly private aspect" (per Estey J. in *Berardinelli*, at p. 284 (emphasis deleted))?
>
> (5) Looking at it from the plaintiff's perspective, does the plaintiff's claim or alleged right "correlate" to the exercise by the defendant public authority of a public power or duty or does it relate to the breach of a public duty or does it complain about an activity of a public character, thus classified?

[31] The Defendant was acting in the course of its public duties under the 1951 *Indian Act* when it subdivided the Band's lands and added New Members. The limitation period under the POPA expired before the claim was filed in 1992, so it is time barred.

[32] Although paragraph 2(1)(*b*) of the POPA permits a court or judge to extend a limitation period, the Plaintiffs do not meet the threshold necessary for this relief. To be granted an extension under this section, the Plaintiffs must show:

a. A *prima facie* case;

b. A reasonable explanation for the delay in filing their claim;

c. There will be no prejudice to the Defendant.

[33] The Plaintiffs meet none of these criteria. There is no genuine issue for trial, so there can by no *prima facie* case. The Plaintiffs have also not explained the delay in filing their claim. Further, the Defendant will be prejudiced by the delay because relevant documents have been lost and potential witnesses have died.

Limitations of Actions Act

[34] As of 1958, the LAA barred the Plaintiffs' claim. At that time, the material facts on which it is based had been discovered, or were discoverable with reasonable diligence, for more than 10 years. As of 1948, the Plaintiffs clearly understood all the material facts of their claim. The documentary evidence establishes that the facts underlying the Plaintiffs' claims were widely known. The longest time period available under the LAA is 10 years and the last document establishing the Plaintiffs' claim, a letter from Mr. Goforth asserting a treaty right and complaining about Judge McFadden's decision, was produced in 1957.

The Constitution does not Shield the Claim

[35] When the limitation period applicable to the Plaintiffs' claim expired in 1958, this extinguished their claim. The *Constitution Act, 1982* cannot be used to invalidate earlier actions by government officials. See *Papaschase Indian Band No. 136 v Canada (Attorney General)* 2004 ABQB 655 at paragraph 50.

[36] Although *in rem* declarations to strike down unconstitutional legislation may be exempt from limitations legislation (see *Air Canada v British Colombia (Attorney General),* [1986] 2

SCR 539 at page 543), the Plaintiffs have only asked for *in personam* relief. They cannot be exempt from the applicable limitations legislation.

[37] *Ravndahl v Saskatchewan* 2009 SCC 7 establishes that limitation periods apply to claims for personal remedies flowing from section 35 of the *Constitution Act, 1982*. Even if the Plaintiffs' rights were protected under section 35, their action for personal remedies is still time-barred.

The Plaintiffs

[38] The Plaintiffs argue that there is no basis for the Defendant's summary judgment motion and it should be dismissed.

Reasonable Cause of Action

[39] The Plaintiffs say the Defendant has misconstrued the nature of their claim. Their claim is founded on the wrongful development by the Defendant of the Colonization Scheme by which individuals who had no right to be on the Band's reserve gained access to it. This scheme included manipulation of the Band's membership without the Band's informed consent. By establishing the Colonization Scheme and manipulating Band membership, the Defendant breached its fiduciary duty and treaty obligations. The Defendant has not argued that the claims for breach of fiduciary duty and treaty obligations are flawed, so they should not be dismissed.

[40] Although the Defendant has said that no lands were removed from the Band, the Plaintiffs say the Original Members were denied the use and benefit of reserve land. The evidence shows that Original Members were forced on to the unsurveyed portion of the reserve

and the File Hills Colony was treated as a separate reserve. In any case, whether the reserve lands were alienated from the Plaintiffs is a question of mixed fact and law which should not be determined on a motion to strike.

No Abuse of Process

[41] The Plaintiffs also argue that Judge McFadden did not decide whether the Defendant had breached its fiduciary duty, treaty obligations, or the requirements of the *Indian Act*. He was only empowered to decide if the decision of the Registrar to admit the New Members was correct. Further, the Band was not a party to the proceeding before Judge McFadden.

[42] In addition, the process before Judge McFadden was flawed because the Defendant did not provide counsel to the Original Members who challenged the admission of New Members. The Defendant also withheld important documents during this process. Judge McFadden's decision only says that he was not prepared to set aside the Registrar's decision to admit a member if that member appeared on the Band membership list before 1951.

[43] The Defendant, in effect, has argued that Judge McFadden's decision means that the Plaintiffs' claim is *res judicata*, but the Plaintiffs say the issues before Judge McFadden and this Court are different. This claim is about a breach of fiduciary duty or breach of treaty obligations, which were not issues before Judge McFadden. *Re the Indian Act Re Joseph Poitras*, [1956] SJ No. 33 (SKQB) and *In the The Indian Act In re Wilson*, [1954] AJ No. 52 (ADC) suggest that a judge hearing a membership reference under subsection 9(4) of the *Indian Act* would not decide

alleged breaches of treaty or fiduciary obligations. In *Canada (Minister of Indian Affairs and Northern Development) v Ranville*, [1982] 2 SCR 518, the Supreme Court of Canada held that a judge hearing a reference under subsection 9(4) of the *Indian Act* is acting in an appellate capacity.

[44] Even if the issues the Plaintiffs raise are *res judicata*, the Court should exercise its residual discretion to hear this case. *Danyluk v Ainsworth Technologies Inc* 2001 SCC 44 establishes a number of factors which the Court can examine to determine if it should hear a case even though the issues raised are *res judicata*. In this case, the *Danyluk* factors suggest the Court should hear the Plaintiffs' case.

[45] Further, even if the issues the Plaintiffs raise involve re-litigation of issues previously decided, this case is not an abuse of process. *Morel v Canada* 2008 FCA 53 sets out at paragraphs 33 to 40 a number of circumstances where re-litigation will not be an abuse of process. In the present case, the Defendant heavily controlled the proceedings before Judge McFadden. The Defendant also controlled the information that was before Judge McFadden, and several documents were never placed before him. In these circumstances, re-litigation will enhance the integrity of the judicial system, so the Plaintiffs' claim is not an abuse of process.

Summary Dismissal is not Appropriate

[46] In *Lameman*, above, the Supreme Court of Canada said the bar for summary judgment is high. On a motion for summary judgment, the responding party need only "put forward evidence showing there is a genuine issue for trial." See *MacNeil Estate v Canada (Indian and Northern*

Affairs Department) 2004 FCA 50 at paragraph 25. The Court hearing the motion should only grant summary dismissal if it is satisfied there is no genuine issue for trial.

Public Officers' Protection Act

[47] The limitation period established in paragraph 2(1)(*a*) of the POPA does not apply to the Plaintiffs' claim. The injury the Plaintiffs suffered from the Defendant's implementation of the Colonization Scheme is continuing because the Original Members are still being deprived of the use and benefit of the reserve lands. Treaty 4 establishes that the Peepeekesis reserve was set aside for the Original Members. The Colonization Scheme transferred ownership to the New Members without compensating the Band.

[48] Treaty 4 also says that "Her Majesty retains the right to deal with such settlers as She shall deem just, so as not to diminish the extent of the land allotted to the Indians." This shows that the Defendant is obligated to preserve the land base held by the Band by not permitting others to reside on the Peepeekesis reserve. However, the Colonization Scheme permitted the New Members to reside on the reserve, which breached the Defendant's obligation by transferring the use and benefit of the Peepeekesis reserve to the New Members and their descendants.

[49] The POPA limitation periods are also not applicable in this case because the establishment of the Colonization Scheme was a private act. In *A.K. v Canada (Attorney General)* 2003 SKQB 46, the Saskatchewan Court of Queen's Bench found acts of an internal or operational character with respect to Indian residential schools were not subject to the 12-month limitation period under the POPA (see paragraph 19). The Colonization Scheme is analogous to

the internal operation of residential schools, so the POPA limitation period does not apply in this case. Even if the Colonization Scheme was authorized by the *Indian Act*, its implementation was not a public act to which the POPA applies.

[50] In the alternative, the Plaintiffs say the Court should extend the time for filing a claim under paragraph 2(1)(*b*) of the POPA because it is just to do so. The Defendant has engaged in equitable fraud by treating the Band unconscionably and has fraudulently concealed the Plaintiffs' claim. *Guerin v Canada*, [1984] 2 SCR 335 establishes that an aboriginal interest in lands is inalienable except by surrender to the Defendant. The Colonization Scheme required such surrender, but this never occurred.

[51] The Defendant has not acted in a manner which accords with the integrity of the Crown. The Defendant concealed key documents from Judge McFadden and did not raise important issues before him. Further, the Defendant controlled the McFadden and Trelenberg Inquiries and did not provide funds to the Band to retain counsel in those proceedings. The Defendant acknowledged liability for the loss of the Original Members' interest when it engaged in negotiations related to compensation for this loss. Transcripts of the McFadden and Trelenberg Inquiries could not be located until after the Plaintiffs began this action, which also demonstrates how the Defendant controlled these inquiries. The Court should exercise its discretion under paragraph 2(1)(*b*) of the POPA to extend the time for the Plaintiffs to bring their claim. Otherwise the operation of the POPA limitation period will work injustice on the Plaintiffs.

Limitation of Actions Act

[52] Like the POPA, the LAA does not bar this action because the Colonization Scheme is a continuing breach of Treaty 4. *Roberts v Portage la Prairie*, [1971] SCR 481 establishes that a statutory limitation period does not apply where damage is ongoing.

[53] The Plaintiffs argue in the alternative that they brought their action within the applicable limitation period. When examining whether an action is time-barred, the Court must analyze three questions. First, the Court must determine the applicable limitation statute. This action was not extinguished before the Original Statement of Claim was issued because the facts which underlie the cause of action were not discoverable until after the LAA came into force. The LAA is the applicable limitations statute because it was in force when the Original Statement of Claim was issued.

[54] Second, the Court must determine the applicable limitation period. The ten-year limitation period under paragraph 12(1)(*a*) of the LAA applies in this case. Under the Colonization Scheme, some of the New Members occupied farm land before their membership was challenged. The Plaintiffs claim damages for wrongful alienation of their land. These damages are like damages for occupational rent because the land was occupied by the New Members under the Colonization Scheme.

[55] Third, the Court must determine when the Plaintiffs' cause of action arose. Although the actions of the Defendant which the Plaintiffs challenge occurred between 1897 and 1944, the cause of action in this case did not arise until much later. The Plaintiffs could not have been aware of their cause of action until they became aware of various facts through research which

they conducted after filing their initial claim. Only after they obtained the transcripts of the Trelenberg and McFadden Inquiries could they have known their claim had a reasonable prospect of success. The limitation period did not begin to run until after the Original Statement of Claim was issued.

[56] Although the Plaintiffs have said that Ernest Goforth made the same arguments before Judge McFadden in the 1940s, Mr. Goforth did not act as a representative for the Band. He was only challenging membership, and not breaches of treaty or breaches of fiduciary duty. Further, Mr. Goforth's ideas and knowledge are not the Band's ideas and knowledge. Others in the Band opposed his actions to challenge their membership and he had little capacity to discover the facts necessary to obtain appropriate advice and conclude that his case had a reasonable prospect of success.

ANALYSIS

[57] I think it is immediately apparent from the complex historical background to this dispute, the conflicting characterization of issues, and the allegations of unconscionable conduct by the Crown (many years ago, but which still has an impact upon members of the Band) that the Court cannot deal with the merits of the claims in a summary way.

Rule 221 – Motion to Strike

[58] The Defendant asks the Court to strike the Statement of Claim on the grounds that:

a. The claim discloses no reasonable cause of action. It is fundamentally flawed and formulated on a proposition that directly contradicts well-established legal principles; and

b. The claim is an abuse of process, since lawful entitlement to Band Membership was conclusively determined by a court of competent jurisdiction in 1956 and limitation periods apply.

[59] The motion is based upon paragraphs 221(1)(*a*) and 221(1)(*f*) of the Rules.

Rule 221(1)(*a*) – No Reasonable Cause of Action

[60] The general principles applicable to this kind of motion to strike are not in dispute in this case. The basic test is whether it is plain and obvious that the claim discloses no reasonable cause of action. See *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959. It is also clear that, in ruling on a motion to strike, the Court is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial, and that all allegations of fact unless patently ridiculous or incapable of proof, must be accepted as proved. See *Edell v Canada (Revenue Agency)* 2010 FCA 26. It is for the defendant seeking summary dismissal to show the lack of a genuine issue (see *Edell*, above) and the onus of proof is a heavy one. See *Apotex Inc. v Syntex Pharmaceuticals International Ltd.* 2005 FC 1310.

[61] In my view, the Defendant has not discharged the applicable burden of proof in this case. The Defendant adopts an interpretation of the claim that is at odds with the Plaintiffs' interpretation. Essentially, the Plaintiffs say that the Defendant and its agents wrongfully

developed a scheme under which individuals other than those for whom the Band reserve was established under Treaty 4 gained access to the benefits of the reserve. The impact of the Colonization Scheme was never explained to the Original Members. The manipulation of membership was key to the Colonization Scheme, and was undertaken without the informed and willing consent of the Band or, if consent was obtained, this consent was obtained by undue influence, inducement, or in unconscionable circumstances, and that these actions constituted a breach of the Defendant's fiduciary duty and treaty obligations.

[62] It seems to me that the full implications of the Colonization Scheme, how it was implemented, and its on-going impact upon Band Members cannot be decided simply upon the basis that "Reserve lands are a collective asset," as the Defendant suggests. This is because the Plaintiffs also raise breach of fiduciary duty, breach of treaty obligations, and breach of the *Indian Act* as a result of the Colonization Scheme. These are issues which are not necessarily connected to whether or not reserve lands are a collective asset. The determination of these issues involves complex issues of fact and law and I cannot say on the record before me that it is plain and obvious that there is no genuine issue for trial.

Rule 221(1)(*f*) – Abuse of Process

[63] While re-litigating the same issues can be an abuse of process, it is my view that the Plaintiffs are not attempting to re-litigate what Judge McFadden decided in 1956. Although membership issues are no doubt relevant to the Claim, the present status, scope, and application of Judge McFadden's decision to the facts and issues raised in the Claim are very much open to dispute, so that it cannot be said there is an abuse of process or no issue for trial on this basis.

Rule 221 – Limitation Periods

[64] The Defendant also argues that the "Plaintiffs lacked a genuine issue for trial because the limitation period for advancing this claim has long since passed." I will deal with this matter in considering summary dismissal.

Rule 215 – Summary Dismissal

[65] The Defendant asks that, under Rule 215, the Claim should be summarily dismissed because the limitation period for advancing the Claim has long passed. In my view, this is the decisive issue in this motion.

[66] Once again, the general legal principles applicable to this aspect of the motion do not appear to be in dispute.

Principles of Summary Judgment

[67] The Defendant says the Plaintiffs' claim should be summarily dismissed because it was brought after a relevant limitation period expired. The Defendant relies on the now repealed POPA and LAA for the limitation periods which bar the Plaintiffs' claim.

[68] Prior to considering whether the Plaintiffs' action is statute barred it is necessary to first consider the principles regarding summary dismissal of an action. In *Granville Shipping Co. v*

Pegasus Lines Ltd., 1996 FCJ No. 481, at paragraph 8, Justice Danièle Tremblay-Lamer summarized the relevant principles as follows:

> 1. the purpose of the provisions is to allow the Court to summarily dispense with cases which ought not proceed to trial because there is no genuine issue to be tried […];
>
> 2. there is no determinative test […] but Stone J.A. seems to have adopted the reasons of Henry J. in *Pizza Pizza Ltd. v. Gillespie*. It is not whether a party cannot possibly succeed at trial, it is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial;
>
> 3. each case should be interpreted in reference to its own contextual framework […] ;
>
> 4. provincial practice rules (especially Rule 20 of the *Ontario Rules of Civil Procedure*, [R.R.O. 1990, Reg. 194]) can aid in interpretation […];
>
> 5. this Court may determine questions of fact and law on the motion for summary judgment if this can be done on the material before the Court (this is broader than Rule 20 of the Ontario Rules of Civil Procedure) […];
>
> 6. on the whole of the evidence, summary judgment cannot be granted if the necessary facts cannot be found or if it would be unjust to do so […];
>
> 7. in the case of a serious issue with respect to credibility, the case should go to trial because the parties should be cross-examined before the trial judge […]. The mere existence of apparent conflict in the evidence does not preclude summary judgment; the court should take a "hard look" at the merits and decide if there are issues of credibility to be resolved […].
> [references omitted]

[69] These principles were recently canvassed by the Supreme Court of Canada in *Lameman*, above, which made it clear that the "bar on a summary judgment is high."

[70] Further, the Federal Court of Appeal in *MacNeil Estate*, above, at paragraph 25 made it clear that the party responding to an application for summary judgment need only "put forward evidence showing there is a genuine issue for trial." The Federal Court of Appeal also considered how evidence on a summary judgment motion should be weighed, finding that the affidavit evidence need only raise an issue for trial and that questions of credibility of the witness are an issue which should be considered at trial (see paragraph 32). *MacNeil Estate* also makes it clear that the Court should not readily summarily dismiss an action; rather, it must be clear to the motions judge that it is proper to deprive the Plaintiffs of their right to a trial. See paragraph 38 and *Aguonie v Galion Solid Waste Material Inc.*, [1998] OJ No 459 (OCA).

[71] In the present case, the Court must be satisfied that there is no genuine issue to be tried with regard to whether the Plaintiffs' claim is statute barred by a limitation period.

[72] It seems to me that the Defendant has established that this claim is time-barred by POPA and the LAA.

Applicable Dates

[73] To properly consider the application of the limitation periods to this claim, it is necessary to identify when the Plaintiffs should be taken to have known about the claim.

[74] As noted above, on a motion for summary judgment the Court must accept as proven all facts plead in support of a claim. The Plaintiffs, in the Amended Statement of Claim, say that the Original Members' interest in the reserve lands was diminished by the addition of New Members between 1897 and 1944 or 1945. It seems to me then, that during this period the Original

Members would have been aware that the New Members were being added to the reserve. As an example, the affidavit of Freda Koochicum says that "My husband's grandfather and grandmother, Charlie and Minnie Koochicum, were two original members who were forced to leave their home in the portion of the reserve that was surveyed and subdivided."

[75] In 1956, Judge McFadden issued his decision on the membership challenge, in which he had this to say about the 1911 Agreement:

> While I have been unable to find any specific provision of the *Indian Act* of that date authorizing an agreement of that kind, the agreement appears to have been considered, or rather, I assume it was considered, by the Department as a general vote of the majority of the members of the Band delegating to the Superintendent General the right to name, choose or designate the particular school graduates whom he might wish to place or join the [Peepeekesis] Band. I regret that the Department did not arrange to have counsel appear before me on this Review to speak particularly as to that 1911 agreement and generally as to other matters that arose during the hearing.

[76] Judge McFadden's decision following what appears to have been a well-published dispute about membership makes it clear that the Defendant relied on the 1911 Agreement to show the Band's consent to the addition of the New Members after 1911. The Plaintiffs have challenged the 1911 Agreement in their Amended Statement of Claim, saying that it was obtained without the Original Members consent, or that their consent was obtained through fraud. It seems obvious that the Original Members would have known they were not consulted or would have known what steps were taken to coerce them into making the 1911 Agreement. After the release in 1956 of Judge McFadden's decision in the full context of the dispute, a publicly available document, the Band members would know that the Defendant was relying on the 1911 Agreement for their consent to the addition of the New Members. At the very latest, it is my

view that the essential elements of the Plaintiffs' claims were reasonably discoverable by 1956 at the latest. The evidence shows that the facts underlying the Plaintiffs' claim were widely known in the Plaintiffs' community and amongst Band members, so that the Plaintiffs clearly understood, or should have understood, that they had a claim by 1956 at the latest.

Application of Limitation Periods

[77] I do not think there can be any dispute that limitation periods apply to Aboriginal claims. See *Lameman*, above at paragraph 13.

POPA

[78] Section 39 of the *Federal Courts Act* provides as follows:

Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.	Sauf disposition contraire d'une autre loi, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance devant la Cour d'appel fédérale ou la Cour fédérale dont le fait générateur est survenu dans cette province.

[79] POPA was enacted in 1923 and remained in force until 2005. In my view, POPA applies to the Plaintiffs' action.

[80] Section 2 of POPA provides:

> No action, prosecution or other proceedings shall lie or be instituted against any person for an act done in pursuance or execution or intended execution of a statute, or of a public duty or authority, or in respect of an alleged neglect or default in the execution of a statute, public duty or authority, unless it is commenced:
>
> > (a) within twelve months next after the act, neglect or default complained of or, in case of continuance of injury or damage, within twelve months after it ceases; or
> >
> > (b) within such further time as the court or a judge may allow

[81] As the Defendant points out, the criteria set forth in *Des Champs*, above, inform the analysis of POPA:

1. Is the defendant a public authority within the class of entities or individuals for whom the limitation protection was intended?
2. What was the public authority doing, and pursuant to what duty or power was it doing it? This information will generally appear from the pleadings.
3. Is power or duty relied on as part of the plaintiff's cause of action properly classified as entailing "a public aspect or connotation?"
4. Is the activity of the defendant public authority that is the subject matter of the complaint "inherently of a public nature?"
5. Looking at it from the Plaintiffs' perspective, does the plaintiffs' claim or alleged right "correlate" to the exercise by the defendant public authority of a public power or duty?

In my view, the Plaintiffs' claim in the present case involves an exercise by the Defendant of a public power or duty.

[82] The protection of POPA is available to the Federal Crown. There is nothing in the wording of section 2 which excludes the Federal Crown from claiming the protection of the statute. POPA protects "any person for an act done in pursuance or execution […] of a statute or of a public duty or authority," which is clearly broad enough to include the Federal Crown.

[83] The Plaintiffs plead that the Defendant breached its fiduciary obligation and the *Indian Act* in that the reserve was alienated through illegal subdivision in breach of sections 15 and 16 of the *Indian Act*. Further, the reserve was alienated as a result of individuals being wrongfully admitted to the band in breach of section 140 as cited in the *An Act further to amend the Indian Act*, SC 1895, c. 35, section 8, amending the *Indian Act*.

[84] In my view, the Plaintiffs' claim is rooted the wrongful addition of the New Members to the Band List. At the relevant time, section 5 of the *Indian Act* established that

> An Indian Register shall be maintained in the Department, which shall consist of Band Lists and General Lists and in which shall be recorded the name of every person who is entitled to be registered as an Indian.
>
> Est maintenu au ministère un registre des Indiens lequel consiste dans des listes de band et des listes générales et où doit être consigne le nom du chaque personne ayant droit d'être inscrite comme Indien.

[85] Whether the addition of the New Members to the Band List was carried out in a manner which breached the Defendant's fiduciary or treaty obligations, or its obligations under the *Indian Act*, the Defendant was carrying out its public duty to manage and administer the reserve and to maintain and update the Band List for the Band. As *Deschamps*, above, establishes,

> The reference to the "intended execution of any statutory or other public duty or authority" (emphasis added) limits the protection to public duties and powers and confirms inferentially that a public authority may well have other duties and powers that are essentially of a private nature. In drawing the line between the public aspects and private aspects, the general principle is that the wording of s. 7 is to be read narrowly and against the party seeking its special protection. This produces an inevitable line drawing exercise that requires the court to examine the nature of the statutory power or duty imposed on the defendant public authority as well as the character of the particular conduct about which the plaintiff complains. [emphasis in original]

[86] In my view, when they created and administered the File Hills Colony, Canada's employees were acting pursuant to the *Indian Act* or their public duties. The File Hills Colony was created with the idea of extending training received at the industrial and residential schools and improving conditions on the reserve.

[87] I agree with the Defendant that Canada's power or duty to manage and administer the reserve is properly classified as entailing "a public aspect or connotation" as opposed to being a private enterprise. The activities in question are not ones that could be performed by private individuals. Looking at it from the Plaintiffs' perspective, the claim directly relates to Canada's alleged breach of a public duty. The activity arose directly out of Canada's statutory mandate to manage and administer the reserve, the Band List, and reserve assets.

[88] This means, in my view, that the Plaintiffs' action is barred by POPA, unless they can bring themselves within the exception contained in paragraph 2(1)(*b*) of POPA.

[89] In order to bring themselves within the paragraph 2(1)(b) exception, the onus is on the Plaintiffs to prove:

1. There is a *prima facie* case;

2. A reasonable explanation for the delay; and

3. The Defendant will not be prejudiced if the claim is allowed to continue.

[90] The Defendant says that the Plaintiffs have no genuine issue for trial and consequently they have no *prima facie* case.

[91] The Defendant also says that the Plaintiffs have proffered no reasonable explanation for the delay in bringing their action and that the Defendant is prejudiced by the passage of time, the loss of relevant documents and the death of potential witnesses. Over 100 years have passed since the first of the impugned events occurred. Documents, such as the petition leading to the second vote consenting to the 1911 Agreement cannot be located. All of the witnesses are deceased.

[92] Besides saying that the acts in question were not done in furtherance of a statute, public duty or authority, the Plaintiffs further argue that:

a. The statutory limitation in paragraph 2(1)(*a*) of POPA does not apply to this action as the injury or damage to the Plaintiffs continues to this day. The action is based upon the development and implementation of the Colonization Scheme under which the Original Members of the Band were deprived of the use and benefit of the reserve set apart for them and, in the case of those brought to the reserve, the deprivation of their right to the use and enjoyment of the original reserve and the cultural and other benefits of membership in their original bands;

b. In the alternative, the time for bringing the claim should be extended to the date of issuance of the Statement of Claim pursuant to paragraph 2(1)(*b*) of POPA; and

c. The time for bringing the claim should be extended as the Defendant has engaged in conduct that amounts to equitable fraud in that it has acted in an unconscionable manner in its treatment of the Band tantamount to fraudulent concealment of the existence of the Plaintiffs' cause of action.

Continuing Breach

[93] If the Plaintiffs' arguments for continuing breach were accepted in this case, there would, in my view, be no limit on when they could bring their claim and the notion of limitation of actions would be rendered meaningless.

[94] I think the Supreme Court of Canada has dealt with the kind of argument raised by the Plaintiffs for continuing breach in *Wewaykum Indian Band v Canada*, [2002] 4 SCR 245 at paragraphs 134 to 137:

> The appellants contend that every day they are kept out of possession of the other band's reserve is a fresh breach, and a fresh cause of action. As a result, their respective claims are not yet statute barred (and could never be). For instance, the [page309] Campbell River Band claims in its factum, at par. 111, that
>
> > [t]he fact that Campbell River has been legally entitled to Quinsam since 1938, at the latest, gives it a presently enforceable right. Two additional consequences flow from this: (1) the Crown's fiduciary duty to safeguard Campbell River's right to its reserve against alienation has also subsisted since the legislation was passed; and (2) Cape Mudge has committed a continuous trespass since it first took possession of Quinsam. Both of these wrongs were committed anew each day and caused fresh damages each day.
>
> The Cape Mudge Band's factum, at para. 98, makes analogous arguments.

> Acceptance of such a position would, of course, defeat the legislative purpose of limitation periods. For a fiduciary, in particular, there would be no repose. In my view such a conclusion is not compatible with the intent of the legislation. Section 3(4), as stated, refers to "[a]ny other action not specifically provided for" and requires that the action be brought within six years "after the date on which the right to do so arose". It was open to both bands to commence action no later than 1943 when the Department of Indian Affairs finally amended the relevant Schedule of Reserves. There was no repetition of an allegedly injurious act after that date. The damage (if any) had been done. There is nothing in the circumstances of this case to relieve the appellants of the general obligation imposed on all litigants either to sue in a timely way or to forever hold their peace.
>
> Similarly, the "ultimate limitation" in s. 8(1) runs "from the date on which the right to [initiate proceedings] arose". All of the necessary ingredients of the causes of action pleaded in these proceedings could have been asserted more than 30 years prior to the date on which the actions were eventually commenced. The trial judge found that no new or fresh cause of action had arisen at any time within the 30-year period. None of the legislated exceptions being [page310] applicable, the 30-year "ultimate limit" applies by reason of its incorporation by reference into federal law.
>
> This conclusion accords with the result on this point reached in *Semiahmoo Indian Band v. Canada*, [1998] 1 F.C. 3 (C.A.), *per* Isaac C.J., at para. 63; *Costigan v. Ruzicka* (1984), 13 D.L.R. (4th) 368 (Alta. C.A.), at pp. 373-74; *Lower Kootenay Indian Band v. Canada* (1991), 42 F.T.R. 241; *Fairford Band v. Canada (Attorney General)*, [1999] 2 F.C. 48 (T.D.), at paras. 295-99.

[95] Similar issues were also canvassed in *McCallum v Canada (Attorney General)*, 2010 SKQB 42, [2010] SJ No 112, at paragraphs 28 – 49. I will refer to this case in more detail when examining the LAA.

Private not Public Act

[96] As previously discussed, I do not think that the evidence supports the Plaintiffs contention that the alleged acts of the Crown were of an inherently private nature and were not

public acts. These acts were not of an "internal or operational character" as referred to at paragraph 18 of *AK v Canada (Attorney General),* [2003] SJ No 49. We are talking here about public servants (particularly Mr. Graham) acting in their official capacity to bring new members onto the Plaintiffs' reserve and having to engage in official and legal ways to achieve the re-settlement of the New Members. In my view, these actions are neither distinct nor separate from the public servants' public mandate. See *AK* at paragraph 19 and *Deschamps* at paragraph 56.

Equitable Fraud

[97] I do not think the Plaintiffs have established a case for equitable fraud and unconscionability so that the time for bringing the Claim should be extended pursuant to paragraph 2(1)(*b*) of POPA.

[98] To begin with, I think the Ontario Court of Appeal's decision in *Authorson (Litigation Administrator of) v Canada (Attorney General)* 2007 ONCA 501 at paragraph 137 provides relevant guidance as to the onus to prove equitable fraud in the context of a fiduciary relationship:

> In general, those who assert a proposition have the burden of establishing it and, in the context of the discoverability principle, the plaintiff bears the burden of demonstrating that the cause of action was not discoverable: *Mikisew Cree Band v. Canada*, [2002] A.J. No. 596 (C.A.) at para. 83. We are not aware of any authority for the proposition that the onus is reversed where the discoverability issue arises within the framework of a fiduciary relationship. To say that the standard of diligence required of a

> "defrauded" person may be attenuated in situations where that person is entitled to rely upon the other party - as Southey J. did in *Public Trustee v. Mortimer* - is not the same thing. While it may make sense to be attuned to the level of proof that a plaintiff needs to put forward, depending on the circumstances, to meet the burden of discoverability, reversing the onus of proof is not justified. On an issue like discoverability (what did the plaintiff know about the claim, and when, and what steps did the plaintiff take to pursue it) it would be at best difficult for the party who is the target of the reverse onus to establish these factors, and at worst unlikely that the party could do so. The fact that a fiduciary has an obligation to keep the beneficiary of the relationship informed does not bear on this issue.

[99] I agree with the Defendant that equitable fraud in the present context means the concealment of information that a cause of action exists. The kind of fraudulent concealment required was addressed by the Supreme Court of Canada in *Guerin v Canada*, [1984] 2 SCR 335 at page 390:

> It is well established that where there has been a fraudulent concealment of the existence of a cause of action, the limitation period will not start to run until the plaintiff discovers the fraud, or until the time when, with reasonable diligence, he ought to have discovered it. The fraudulent concealment necessary to toll or suspend the operation of the statute need not amount to deceit or common law fraud. Equitable fraud, defined in *Kitchen v. Royal Air Force Association*, [1958] 1 W.L.R. 563, as "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do toward the other," is sufficient. I agree with the trial judge that the conduct of the Indian Affairs Branch toward the Band amounted to equitable fraud. Although the Branch officials did not act dishonestly or for improper motives in concealing the terms of the lease from the Band, in my view their conduct was nevertheless unconscionable having regard to the fiduciary relationship between the Branch and the Band. The limitations did not therefore start to run until March 1970. The Action was thus timely when filed on December 22, 1975.

[100] The concept of equitable fraud in the context of limitation periods was discussed by the Federal Court of Appeal in *Semiahmoo Indian Band v Canada*, [1998] 1 FC 3, at paragraph 72:

> With respect, I do not accept the appellants' argument that each time the respondent was less than frank in response to an inquiry by the Band, the respondent committed a new equitable fraud, thereby giving rise to a fresh cause of action. The issue of equitable fraud cannot be considered separately from the issue of the proper application of limitation periods. In my view, to construe each interaction between the Crown and the Band as a separate fraud by the Crown is to create a disjointed reality. It is an attempt to give effect to the concept of a continuing breach of fiduciary duty through the back door, in order to skirt the issue of limitation periods altogether. Rather, the issue of the just application of limitation periods in the circumstances of the case at bar must be considered frontally. Thus, the question is, having regard to the special relationship between the Crown and the Band, and the conduct of the Crown, when should the Band have been in a position to bring a cause of action? It is an objective test most appropriately applied in the context of subsection 6(3) of the B.C. *Limitation Act*.

[101] Also of importance for the present case is the warning of the Ontario Court of Appeal in *Authorson*, above, at paragraph 134:

> In our view none of this amounts to concealment of the sort that would give rise to the operation of the equitable fraud exception in the circumstances. Public policy can only be set effectively if government officials are free to consider all lawful options in the course of wide-ranging and unrestricted discussion. Courts should not infer impropriety on the part of government simply from the ebb and flow of legitimate policy discussions amongst public servants.

[102] Examining the evidence of equitable fraud and concealment put forward by the Plaintiffs in this case, I find a significant number of allegations that are just not supported by a convincing factual basis. As the Defendant contends, there is also substantial documentary evidence showing that the facts underlying the Plaintiffs' claim were widely known in the Plaintiffs' community and amongst Band Members, so that the Plaintiffs clearly understood, or reasonably should have understood, that they had a claim as early as 1944, and certainly by 1956. There is no reasonable explanation, in my view, for the delay.

[103] I also accept that the Defendant will be prejudiced by the passage of time. The testimony of the deceased Original Members is highly relevant to the claims the Plaintiffs have advanced, particularly those relating to their consent to the 1911 Agreement. Although their evidence could be introduced by other means, the Defendant cannot test their evidence. On the whole, I am not satisfied I should exercise my discretion to extend the time for filing under paragraph 2(1)(*b*) of POPA.

[104] At the very latest, the Plaintiffs claim was discoverable in 1956, as discussed above. Giving the Plaintiffs the benefit of the longest limitation period available under POPA, on the basis of the facts before the Court their action was time barred in 1958 at the latest.

Limitations of Actions Act

[105] Much the same can be said for the LAA as for POPA. The Plaintiffs say that relying upon the *Semiahmoo Indian Band*, above, decision and the Defendant's conduct, the Plaintiffs could not have been aware of their cause of action until becoming aware of various facts identified during the research they conducted after they submitted their initial claim, and likely not until the transcripts of the Trelenberg and McFadden Inquiries became available. They say it was only at that point that it could be said the Plaintiffs would view the Band's claim as having "a reasonable prospect of success."

[106] I just do not think that the evidence supports this position. As discussed above, the Plaintiffs' claim and the full significance of that claim were discoverable by 1956 at the latest.

[107] Paragraphs 3(1)(*e*), (*f*), (*g*), (*h*), (*j*) and 12 of the LAA are all potentially applicable to the Plaintiffs' claim depending on how it is framed. The longest time limit provided by these sections is 10 years. A cause of action arises for purposes of limitation 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. In my view, the evidence shows that the Plaintiffs clearly understood, or should, with reasonable diligence, have clearly understood the material facts supporting their case in 1948, or 1956 at the latest.

[108] Plaintiffs are expected to act diligently and not "sleep on their rights." See *M(K) v M(H)*, [1992] 3 SCR 6 (QL) at paragraph 24. The latest the Plaintiffs could have filed their claim was in 1966, assuming the 10 year limitation period under subsection 12(1) of the LAA is applicable in this case. The 10 year limitation period in section 12 is the longest available under the LAA, so even if a different section of the LAA applies in this case, the Plaintiff's claim will still be time-barred.

Conclusions

[109] My conclusions are that, although the Defendant has not made a case for striking the claim pursuant to section 221, the Defendant has made a case for summary dismissal under section 215 in that, as regards the claim being time-barred under the POPA and/or LAA, there is no genuine issue for trial. The Plaintiffs have not shown that I should exercise my discretion under section 2(1)(*b*) of POPA to extend the time for filing a claim and I decline to do so.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The Amended Statement of Defense shall be amended to include subsection 2(1) of the *Public Officers' Protection Act* and paragraph 3(1)(*j*) of the *Limitation of Actions Act* as a defence to the claim;
2. The claim is summarily dismissed on the basis of limitations in that the limitation period for advancing the claim has long since passed pursuant to the *Public Officers' Protection Act*, and/or the *Limitation of Actions Act*;
3. The Defendant shall have costs of this motion and the action.

"James Russell"
Judge

FEDERAL COURT
NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-1068-92
STYLE OF CAUSE:	**THE PEEPEEKISIS BAND as represented by CHIEF ENOCH POITRAS, DWIGHT PINAY, ARTHUR DESNOMIE, ALLAN BIRD, JAMES POITRAS, PERRY McLEOD, CLARENCE McNABB AND LAWRENCE DEITER, CHIEF AND COUNCILLORS OF THE PEEPEEKISIS BAND No. 81** - and - **HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT**
PLACE OF HEARING:	Saskatoon, Saskatchewan
DATE OF HEARING:	April 18, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	July 19, 2012

APPEARANCES:

Thomas J. Waller	**PLAINTIFFS**
Karen Jones Sarah Jane Harvey	**DEFENDANT**

SOLICITORS OF RECORD:

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Myles J. Kirvan, Q.C. Deputy Attorney General of Canada	**DEFENDANT**