Federal Court  Cour fédérale

**Date: 20110418**

**Docket: T-1261-01**

**Citation: 2011 FC 457**

**Ottawa, Ontario, April 18, 2011**

**PRESENT: The Honourable Mr. Justice Crampton**

**BETWEEN:**

**DALVIN STEWART POTSKIN**
**ALBERT LAWRENCE POTSKIN and**
**RICHELLE MARIE POTSKIN**

**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

[1] At the time of their birth, the Plaintiffs were illegitimate children within the meaning of paragraph 11(1)(e) of the *Indian Act*, RSC 1970, c. I-6 (the "Former Act"). Therefore, they were registered on the Band List of the Sawridge Band, of which their mother was a member at that time. When they were still toddlers, their mother married Neil Morin, a member of the Enoch Band. The following year, she and Mr. Morin signed Statutory Declarations declaring Mr. Morin to be the

natural father of the Plaintiffs. Shortly after receiving a copy of those Statutory Declarations, the Registrar under the Former Act instructed the Lesser Slave Lake Indian Regional Council to report the transfer of the Plaintiffs from the Sawridge Band to the Enoch Band, as contemplated by section 10 of the Act.

[2] When their mother transferred from the Sawridge Band to the Enoch Band subsequent to her marriage to Mr. Morin, she received a payment in the amount of $210,891.62. This represented the difference between the value of a *per capita* share in the Sawridge Band and the value of a *per capita* share in the Enoch Band.

[3] The Plaintiffs maintain that a similar payment should have been made to a trustee, to hold on their behalf until they reached the age of majority. However, no such payment on their behalf was ever made to anyone. As a result, they commenced this action alleging, among other things, that the Defendant breached its fiduciary obligation to protect their economic interests.

[4] For the reasons that follow, I find that on the particular facts of this case, the Defendant did not owe to the Plaintiffs the specific fiduciary obligations that the Plaintiffs have identified. I also find that if the Defendant had any fiduciary obligations towards the Plaintiffs, those obligations were not breached by the actions taken by the Registrar or any other persons in the Department of Indian Affairs and Northern Development (the “Department”).

[5] I also find that this action is barred by the *Limitation of Actions Act*, RSA 1980, c L-15 and/or the *Limitations Act*, RSA 2000, c L-12, which are the relevant limitations statutes in this case.

**I. Background**

[6] The Plaintiffs are all children of Harriet Potskin. Dalvin Stewart Potskin was born on February 7, 1979. Albert Lawrence Potskin was born on March 27, 1980. Richelle Marie Potskin was born on April 14, 1981.

[7] Given that Harriett Potskin was unmarried at the time of their birth, the Plaintiffs were registered on the Band List of the Sawridge Band, of which she was a member, as contemplated by paragraph 11(1)(e) of the Former Act.

[8] The Former Act was administered by the Defendant Minister of Indian Affairs and Northern Development. Pursuant to section 5 of the Former Act, an Indian Register was required to be maintained, consisting of Band Lists and General Lists in which were recorded the names of every person entitled to be registered as an Indian. The Indian Register and all such membership lists were controlled by the Registrar.

[9] On or about November 27, 1981, Harriet Potskin married Neil Morin, a member of the Enoch Band. As required by section 14 of the Former Act, she therefore transferred from the Sawridge Band to the Enoch Band.

[10] Pursuant to subsection 16(3) of the Former Act, the Sawridge Band then made two payments. The first payment, in the above-mentioned amount of $210,891.62, was made to Harriet Potskin. The second payment, in the amount of approximately $6,000, was made to the Enoch Band. That sum represented the value of a *per capita* share in the Enoch Band. Together, the two sums represented the value of a *per capita* share in the Sawridge Band at that time.

[11] On April 15, 1982, Harriet Potskin and Neil Morin signed Statutory Declarations declaring Neil Morin to be the natural father of the Plaintiffs. However, for one reason or another, those Statutory Declarations were not forwarded to the Registrar until March 29, 1983, when they were sent to the Registrar by Mr. David Fennell, the solicitor for the Sawridge Band. In his cover letter to the Registrar, Mr. Fennell stated that the Plaintiffs "should have been transferred to the Enoch Band List as they are now the legitimate children of their father." In addition, he requested that the Registrar "deal with this matter as expeditiously as possible." It appears that the reason why the Sawridge Band was anxious to have the matter dealt with promptly was that it had been continuing to issue oil royalty cheques on a regular basis to Mrs. Harriet Potskin on behalf of the Plaintiffs.

[12] On April 27, 1983 the Registrar wrote to the Lesser Slave Lake Indian Regional Council to request that the Council report the transfer of the Plaintiffs from the Sawridge Band to the Enoch Band in its next Band Membership Report for the former Band. By copy of its letter to the Office Manager of the Enoch Band, it requested that Band to do the same.

[13] To this date, the Plaintiffs remain members of the Enoch Band. However, neither they nor the Enoch Band has ever received payments from the Sawridge Band similar to those that were made subsequent to their mother's transfer to the Enoch Band.

## II. Relevant Legislation

[14] Pursuant to subsection 2(1) of the Former Act, the Registrar was the officer of the Department who was in charge of the Indian Register.

[15] The transfer of the Plaintiffs and their mother from the Sawridge Band List to the Enoch Band List maintained by the Registrar resulted from the operation of subsection 7(1), section 10, paragraphs 11(1)(d) and (e), and section 14 of the Former Act. Those provisions, which are part of a scheme that focused upon the status of the male in spousal and parental relationships (*Martin v Chapman*, [1983] 1 SCR 365, at 370), stated as follows:

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| *Indian Act*, RSC 1970, c. I-6 | *Loi sur les indiens*, SRC 1970, c. I-6 |
| Definition and Registration of Indians | Définition et enregistrement des indiens |
| […] | […] |
| 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 this Act, is entitled or not entitled, as the case may be, to have his name included in that List. | 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 qui, d'après la présente loi, a ou n'a pas droit, selon le cas, à l'inclusion de son nom dans cette liste. |
| […] | […] |
| 10. Where the name of a male person is included in, omitted from, added to or deleted from a Band list or a General List, the names of his wife and his minor children shall also be included, omitted, added or deleted, as the case may be. R.S., c. 149, s. 10. | 10. Lorsque le nom d'une personne du sexe masculin est inclus dans une liste de bande ou une liste générale, ou y est ajouté ou omis, ou en est retranché, les noms de son épouse et de ses enfants mineurs doivent également être inclus, ajoutés, omis ou retranchés, selon le cas. S.R., c. 149, art. 10. |
| […] | […] |
| 11. (1) Subject to section 12, a person is entitled to be registered if that person | 11. (1) Sous réserve de l'article 12, une personne a droit d'être inscrite si |
| […] | […] |
| (d) is the legitimate child of | d) elle est l'enfant légitime |
| (i) a male person described in paragraph (a), (b); or | (i) d'une personne du sexe masculin décrite à l'alinéa a) ou b), ou |

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| (ii) a person described in paragraph (c); | (ii) d'une personne décrite à l'alinéa c); |
| (e) is the illegitimate child of a female person described in paragraph (a), (b) or (d); or | e) elle est l'enfant illégitime d'une personne du sexe féminin décrite à l'alinéa a), b) ou d); ou |
| […] | […] |
| 14. A woman who is a member of a band ceases to be a member of that band if she marries a person who is not a member of that band, but if she marries a member of another band, she thereupon becomes a member of the band of which her husband is a member. R.S., c. 149, s. 14. | 14. Une femme qui est membre d'une bande cesse d'en faire partie si elle épouse une personne qui n'en est pas membre, mais si elle épouse un membre d'une autre bande, elle entre dès lors dans la bande à laquelle appartient son mari. S.R., c. 149, art. 14. |

[16] Subsection 15(1) of the Former Act allowed for the payment of a per capita share of the monies held by Her Majesty on behalf of an Indian Band, and certain other monies, to an Indian who became "enfranchised" or who otherwise ceased to be a member of that Band. Subsection 15(3) identified the options available to the Minister where such a person was under the age of twenty-one. However, subsection 16(1) of the Former Act excluded the operation of section 15 in situations where a person ceased to be a member of one Band by reason of becoming a member of another Band. Moreover, subsection 16(2) specifically precluded such a person from any entitlement to any interest in the lands or moneys held by Her Majesty on behalf of the former Band. Pursuant to subsection 16(3), this was subject to one exception, namely, where a woman transferred from one Band to another Band by reason of marriage. The full text of these provisions were as follows:

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| *Indian Act*, RSC 1970, c. I-6 | *Loi sur les indiens*, SRC 1970, c. I-6 |
| Definition and Registration of Indians | Définition et enregistrement des indiens |
| […] | […] |

15. (1) Subject to subsection (2), an Indian who becomes enfranchised or who otherwise ceases to be a member of a band is entitled to receive from Her Majesty

(a) one per capita share of the capital and revenue moneys held by Her Majesty on behalf of the band, and

(b) an amount equal to the amount that in the opinion of the Minister he would have received during the next succeeding twenty years under any treaty then in existence between the band and Her Majesty if he had continued to be a member of the band.

[…]

(3) Where by virtue of this section moneys are payable to a person who is under the age of twenty-one, the Minister may

(a) pay the moneys to the parent, guardian or other person having the custody of that person or to the public trustee, public administrator or other like official for the province in which that person resides, or

(b) cause payment of the moneys to be withheld until that person reaches the age of twenty-one.

[…]

16. (1) Section 15 does not apply to a person who ceases to be a member of one band by reason of his becoming a member of another band, but, subject to subsection (3), there shall be transferred to the credit of the latter band the amount to which that person would, but for this section, have been entitled under section 15.

15. (1) Sous réserve du paragraphe (2), un Indien qui devient émancipé ou qui, d'autre manière, cesse d'être membre d'une bande a droit de recevoir de Sa Majesté

a) une part *per capita* des fonds de capital et de revenu détenus par Sa Majesté au nom de la bande, et

b) un montant égal à la somme que, de l'avis du Ministre, il aurait reçue durant les vingt années suivantes aux termes de tout traité alors en vigueur entre la bande et Sa Majesté s'il était demeuré membre de la bande.

[…]

(3) Lorsqu'en vertu du présent article, des deniers sont payables à une personne de moins de vingt et un ans, le Ministre peut

a) payer les deniers au père ou à la mère, au tuteur ou à l'autre personne ayant la garde de cette personne, ou au curateur public ou administrateur public ou autre semblable fonctionnaire de la province où réside ladite personne, ou

b) faire suspendre le paiement des deniers jusqu'à ce que la personne ait atteint l'âge de vingt et un ans.

[…]

16. (1) L'article 15 ne s'applique pas à une personne qui cesse d'appartenir à une bande du fait qu'elle devient membre d'une autre bande, mais, sous réserve du paragraphe (3), le montant auquel cette personne aurait eu droit en vertu de l'article 15, sans le présent article, doit être transféré au crédit de la bande en dernier

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| | lieu mentionnée. |
| (2) A person who ceases to be a member of one band by reason of his becoming a member of another band is not entitled to any interest in the lands or moneys held by Her Majesty on behalf of the former band, but he is entitled to the same interest in common in lands and moneys held by Her Majesty on behalf of the latter band as other members of that band. | (2) Une personne qui cesse de faire partie d'une bande du fait qu'elle est devenue membre d'une autre bande n'a droit à aucun intérêt dans les terres ou deniers détenus par Sa Majesté au nom de la bande en premier lieu mentionnée, mais elle a droit au même intérêt en commun, dans les terres et les deniers détenus par Sa Majesté au nom de la bande en deuxième lieu mentionnée, que les autres membres de cette dernière. |
| (3) Where a woman who is a member of one band becomes a member of another band by reason of marriage, and the per capita share of the capital and revenue moneys held by Her Majesty on behalf of the first-mentioned band is greater than the per capita share of such moneys so held for the second-mentioned band, there shall be transferred to the credit of the second-mentioned band an amount equal to the per capita share held for that band, and the remainder of the money to which the woman would, but for this section, have been entitled under section 15 shall be paid to her in such manner and at such times as the Minister may determine. R.S., c. 149, s. 16. | (3) Lorsqu'une femme qui fait partie d'une bande devient membre d'une autre bande du fait de son mariage et que la part *per capita* des fonds de capital et de revenu détenus par Sa Majesté au nom de la bande en premier lieu mentionnée, est plus élevée que la part *per capita* des fonds ainsi détenus pour la bande en deuxième lieu mentionnée, il doit être transféré au crédit de la bande en deuxième lieu mentionnée un montant égal à la part *per capita* détenue pour cette bande, et le solde des deniers auxquels cette femme aurait eu droit aux termes de l'article 15, dans le présent article, doit lui être versé de la manière et aux époques que le Ministre détermine. S.R., c. 149, art. 16. |

[17] In addition, section 9 of the Former Act allowed, among other things, a person to protest, in writing to the Registrar, the inclusion, omission, addition or deletion of that person's name on or from a Band List or a General List. In the event of an adverse decision on the protest, section 9 also allowed such a person to request the Registrar to refer the decision to a judge for review. In this case, it is common ground that no such protest or request for judicial review was ever made.

[18] Finally, it is relevant to note that the management, use and expenditure of "Indian moneys" under the Former Act was governed by sections 61 to 69. Among other things, subsection 61(1) provided that "Indian moneys shall be expended only for the benefit of the Indians or bands for whose use and benefit in common the moneys are received or held …"

**III. Issues**

[19] In their Statement of Claim, the Plaintiffs alleged that the Defendant breached:

i. a statutory obligation that they claimed existed under subsection 15(3) of the Former Act;

ii. an unspecified treaty obligation of fair dealing; and

iii. a fiduciary obligation to protect their economic interests.

[20] Those allegations were all baldly asserted. It does not appear that the Plaintiffs articulated, at any time prior to the trial, the specific nature of the alleged obligations that they claimed had been breached.

[21] At trial, the Plaintiffs abandoned their claims that the Defendant had breached statutory and treaty obligations owed to them. Indeed, as to the alleged statutory obligations, counsel to the Plaintiffs acknowledged that:

i. a plain reading of subsections 16(1), 16(2) and 16(3) of the Former Act supported the Defendant's position that subsection 15(3) did not apply to the Plaintiffs; and, therefore

ii. there was no basis upon which they could maintain that the Defendant had breached a statutory obligation, whether under subsection 15(3) or otherwise, to ensure that they were paid the difference between the value of a *per capita* share in the Sawridge Band and a *per capita* share of the Enoch Band (Court Transcript, pp 205-207, 257, and 274).

[22] In short, the Plaintiffs accepted that, unlike their mother, who was entitled to be paid such an amount by virtue of being an Indian woman explicitly described in subsection 16(3), they had no statutory entitlement to be paid any monies as a result of their transfer from the Sawridge Band to the Enoch Band.

[23] In addition to abandoning their claims that the Defendant had breached statutory and treaty obligations owed to them, the Plaintiffs also abandoned at trial their claims to: (i) judgment in the amount of $500,000 or such further or other sum as may be proved at trial; (ii) punitive damages in the sum of $100,000; and (iii) costs on a solicitor client basis.

[24] Accordingly, the only remaining issue is whether the Defendant breached a fiduciary duty owed to the Plaintiffs.

## IV. Analysis

### *A. Did the Defendant owe a fiduciary duty to the Plaintiffs?*

[25] As noted above, the Plaintiffs claimed that the Defendant breached a fiduciary obligation to protect their economic interests. At trial, they clarified, for what appears to have been the first time, the specific nature of the fiduciary obligation that they claim was owed to them in the circumstances of this case. It bears underscoring that, before providing that clarification, the Plaintiffs conceded

that they had no entitlement to receive any payments from the Sawridge Band when they transferred the Enoch Band.

[26] Having made that concession, the Plaintiffs then claimed that, prior to the point in time at which their parents signed the Statutory Declarations that the Registrar relied upon in directing the transfer of their names from the Sawridge Band List to the Enoch Band List, the Registrar had a fiduciary obligation to advise their parents, in their capacity as their guardians:

i. of the potential adverse financial consequences associated with signing the Statutory Declarations; and

ii. that it was open to them to refrain from signing the Statutory Declarations.

[27] The principal adverse financial consequence that they identified was the significant difference between the monthly payments made by the Sawridge Band and the Enoch Band to their respective members. Mrs. Potskin testified that she received approximately $100 per month for each of the Plaintiffs from the Sawridge Band, whereas the corresponding payments received from the Enoch Band were only approximately $25 per month. In addition, counsel to the Plaintiffs implied that the Plaintiffs also may have been deprived of other financial benefits that might have been associated with being a member of the Sawridge Band, because a *per capita* share in that Band was worth approximately 30 times the value of a *per capita* share in the Enoch Band.

[28] Moreover, the Plaintiffs claimed that, subsequent to the signing of the Statutory Declarations, the Registrar had a fiduciary duty to advise their parents of:

i. the aforementioned potential adverse financial consequences; and

ii. their right to protest the transfer, pursuant to subsection 9(3) of the Former Act, within the three month time period set forth in that provision.

1. The Fiduciary Duties Alleged to Exist Prior to the Execution of the Statutory Declarations

[29] The fiduciary duties that the Plaintiffs claim were breached prior to the signing of the Statutory Declarations of paternity do not require significant discussion. In short, there is no persuasive evidence that the Registrar or anyone at the Department knew or ought to have known, prior to the execution of those documents that the Plaintiffs' parents were considering executing, or had been requested to execute, those documents. Indeed, there is no persuasive evidence that the Registrar or anyone at the Department knew or ought to have known that the Statutory Declarations had been signed prior to when they were sent to the Registrar by Mr. Fennell, on March 29, 1983.

[30] During the Defendant's examination for discovery, Mrs. Potskin testified that the first time the Department was made aware of the identity of the Plaintiffs' father was after Mr. Fennell sent the Statutory Declarations of paternity to the Department in March 1983. The Plaintiff Dalvin Potskin testified that he adopted the testimony given by his mother on behalf of the Plaintiffs, and that he was authorized to give answers on behalf of his siblings.

[31] During trial, a question arose as to whether Carole Holland, the Commissioner of Oaths who witnessed the execution of the Statutory Declarations by Harriet Potskin and Neil Morin, was an employee of the Department at that time. During his direct examination of Harriet Potskin, counsel to the Plaintiffs asked whether Mrs. Potskin was aware that another employee of the Department, Susan Weston, had testified that Ms. Holland was in fact an employee of the Department. Mrs. Potskin replied in the affirmative. However, counsel to the Defendant subsequently read into

evidence the relevant portion of the transcript of the examination of Ms. Weston, dated January 17, 2006. That transcript revealed that Ms. Weston was not aware of whether Ms. Holland was employed with the Department at the time that Mrs. Potskin and Neil Morin signed their Statutory Declarations of paternity. After stating this fact, Ms. Weston simply stated that Ms. Holland was an employee of the Department when Ms. Weston began working with the department in December 1984.

[32] Significantly, the Plaintiffs' counsel did not ask Mrs. Potskin whether, at the time she and Neil Morin signed the Statutory Declarations, they believed that Ms. Holland was employed by the Department. Instead, his focus was on: (i) the circumstances under which she and Mr. Morin signed the Statutory Declarations; (ii) the communications she had with the Department; and (iii) whether anyone at the Department ever represented to her that monies were or would be held in trust for the Plaintiffs.

[33] Regarding the circumstances under which the Statutory Declarations were signed, Mrs. Potskin testified that counsel to the Sawridge Band, Mr. Fennell, required her to sign a Statutory Declaration of paternity in late 1981 or early 1982, before the Sawridge Band would be prepared to release to her a special Christmas bonus that was paid to its Band Members at that time. She stated that she did not want to sign the declaration because she knew that it would probably lead to the Plaintiffs being transferred to the Enoch Band. However, she agreed to sign the document after Mr. Fennell told her that her children would receive a payment similar to the one that she received. Mrs. Potskin testified that Mr. Fennell added that, because they were minors, their respective payments would be placed in a trust account for them.

[34] As it turned out, the document that Mrs. Potskin signed at Mr. Fennell's request either was misplaced or was not in fact a Statutory Declaration of paternity. As a result, Mrs. Potskin testified that, in April 1982, after she made an enquiry at the Enoch Band Office about why she had been receiving royalties from both the Sawridge Band and the Enoch Band, a representative of the latter Band requested her and Neil Morin to sign the Statutory Declarations of paternity that were the only such declarations filed in evidence in these proceedings. Those documents were executed on April 15, 1982. There is no evidence to suggest that they were signed under any form of duress.

[35] For some reason, it was not until March 1983, when Mr. Fennell discovered that the Plaintiffs remained on the Sawridge Band list, that copies of those Statutory Declarations were forwarded to the Department for what appears to have been the first time. No evidence was adduced to suggest that the Department may have been aware, prior to March 1983, of the existence of those Statutory Declarations, or the Statutory Declaration that Mrs. Potskin testified to having signed at the behest of Mr. Fennell in late 1981 or early 1982.

[36] With respect to her communications with the Department, Mrs. Potskin testified that she contacted the Department on numerous occasions. However, she did not state that any of those contacts were made prior to when she and Mr. Morin signed the Statutory Declarations. Indeed, two of the three people with whom she testified she had communicated at the Department (Mr. Sisson and Ms. Weston) did not begin to work at the Department until long after the Statutory Declarations had been signed. No evidence was adduced regarding when the third person (Mr. Hughes) started to work at the Department.

[37] With respect to the question of whether anyone in the Department ever represented to her that monies were being held in trust for the Plaintiffs, Mrs. Potskin testified that no such

representations were ever made by anyone in the Department. She stated that those representations were made by Chief Twim of the Sawridge Band and Mr. Fennell. There was no evidence that anyone at the Department ever knew or ought to have known that such representations had been made by Chief Twim and Mr. Fennell.

[38] Based on the foregoing, I find that the Plaintiffs have not established, on a balance of probabilities that the Registrar or anyone else at the Department knew or ought to have known, prior to the point in time when the Statutory Declarations of paternity were signed, that their parents were considering executing, or had been requested to execute, those documents. As noted above, the evidence does not establish that anyone at the Department knew those documents had been signed until almost a year later, on March 29, 1983. Accordingly, even if I were prepared to agree with the Plaintiffs' submission that, prior to when the Statutory Declarations of paternity were signed, the fiduciary obligations described at paragraph 26 above were owed to them by the Defendant, the Defendant could not have breached those obligations. That said, for the reasons discussed below, I find that the Defendant was not subject to any of the fiduciary obligations asserted by the Plaintiffs.

[39] I will now turn to the fiduciary duties that the Plaintiffs claim were owed to them and their parents subsequent to the signing of the Statutory Declarations.

2. The Fiduciary Duties Alleged to Exist After the Execution of the Statutory Declarations

[40] In *Frame v Smith*, [1987] 2 SCR 99, at 136, it was observed that fiduciary obligations have been imposed by the courts when relationships possess the following 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.

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

[41] In *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development),* [1995] 4 SCR 344, at para 38, this view was briefly endorsed in the context of considering whether the circumstances of that case gave rise to a fiduciary obligation on the Crown with respect to the surrender of an Aboriginal reserve.

[42] The leading cases in which the nature of the Crown's fiduciary obligation, if any, towards Aboriginal peoples has been assessed in greater detail have emphasized the existence of Crown discretion as being a critical threshold issue in the assessment.

[43] In *Guerin v the Queen*, [1984] 2 SCR 335 at 383, Justice Dickson (as he then was), placed the importance of Crown discretion in context by noting, at the outset of his discussion of the Crown's fiduciary obligation in that case, that "[t]he concept of fiduciary obligation originated long ago in the notion of breach of confidence, one of the original heads of jurisdiction in Chancery." After observing that, in enacting the Former Act, Parliament conferred discretion upon the Crown to protect Aboriginal peoples' "interests in transactions with third parties" from being exploited, he then proceeded to state, at p. 384, the following:

> This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one. Professor Ernest Weinrib maintains in his article *The Fiduciary Obligation* (1975), 25 UTLJ 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 the relationship by holding him to the fiduciary's strict standard of conduct.
>
> [Emphasis added.]

[44] Importantly, Justice Dickson then clarified, at p. 385, that "[p]ublic law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. As the 'political trust' cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function."

[45] The requirement that there be an exercise of Crown discretion, beyond the exercise of the Crown's legislative or administrative function, before a fiduciary obligation towards Aboriginal peoples will be recognized, has been embraced in several subsequent cases. Those cases have recognized that the existence of a public law duty on the part of the Crown does not exclude the possibility that a fiduciary obligation will be found to exist in connection with the exercise of the Crown's discretion. However, before such an obligation will be triggered, the public duty must be "in the nature of a private law duty", or the obligation must originate "in a private law context" (*Wewaykum Indian Band v Canada*, [2002] 4 SCR 245, at paras 85 and 96). This is so even in a

general context in which the Crown may be said to be in a fiduciary relationship with Aboriginal peoples (*Wewaykum*, above, at paras 83 and 92).

[46] In *Ermineskin Indian Band and Nation v Canada*, [2009] 1 SCR 222, at para 128, it was held that the surrender of the interests of the appellant Indian Bands' interests in oil and gas reserves found beneath the surface of their reserves gave rise to fiduciary obligations on the part of the Crown with respect to (i) the granting of rights to others to exploit those resources; and (ii) the manner in which the Crown handled the royalties received from such exploitation of the Bands' resources. Such obligations were found to arise by virtue of the Crown's "discretion with respect to the terms on which it granted rights to exploit the minerals and with respect to the way in which it dealt with the royalties it received on the bands' behalf" (*Ermineskin*, above, at paras 69-70, and 74).

[47] That said, the Court proceeded to observe that "[a] fiduciary that acts in accordance with legislation cannot be said to be breaching its fiduciary duty" (*Ermineskin*, above, at para 128).

[48] This approach is consistent with the jurisprudence of this Court and the Federal Court of Appeal. For example, in *Fairford First Nation v Canada (Attorney General)*, [1999] 2 FC 48, at para 63 (TD), it was held that "duties that arise from legislative or executive action are public law duties" and that "[s]uch duties … typically do not give rise to a fiduciary relationship." With this in mind, the Court concluded:

> [T]he actions taken by the Indian Affairs Branch arose under and by reason of the *Indian Act* and the *Department of Citizenship and Immigration Act* and were public law duties. There is no indication they would be in the nature of private law duties such as when Indian land is surrendered. Nor is there any suggestion the Crown was exercising a discretion or power for on or behalf of the Indians. For these reasons,

> course of conduct by the Crown in its dealings with and for Indians under these Acts generally, may not be relied upon as a basis for the creation of a fiduciary duty upon the Crown and, in particular, with respect to its involvement with the Water Control Structure in this case." (*Fairford*, above, at para 63.)

[49] A similar position was adopted in *Tsartlip Indian Band v Canada (Minister of Indian Affairs and Northern Development)*, [2000] 2 FC 314, at para 35 (CA), where the Federal Court of Appeal held:

> The concept of fiduciary duty is remarkably unsuited, in my view, for the purpose of defining what is the role of the Minister when, in the exercise of his statutory duties with respect to the management of land in a reserve, he assesses the competing interests of a member of a band on the one hand, and of the band as a whole. The Minister has no interest in the outcome of his decision. The Crown does not stand to gain any benefit from the decision of the Minister. Whatever the decision, the lands will remain lands on the reserve. There is no adversarial relationship between the Crown and the band as a whole or the member of the band. There is no legitimate public purpose to be advanced by the Minister which would be adverse to the interest of the Aboriginal people. There is no "exploitation" by the Crown of the band's or the locatee's rights.

[50] In *Sam v Canada (Minister of Indian Affairs and Northern Development)*, 2006 FC 1009, at para 67, the passage immediately above was quoted with approval by my colleague Justice Tremblay-Lamer, who added:

> [69] I echo the words of the Court of Appeal in *Tsartlip* that the concept of fiduciary duty is unsuited to the Minister's exercise of his discretionary powers under the Act with respect to the management of reserve land. Under subsection 50(4), the Minister's role is simply to approve or not. The Minister is an uninterested participant in the process. The Crown is not a party and has nothing to gain from section 50 sales as these sales are only open to those eligible individuals under the Act, those being band members.

[51] In *Squamish Indian Band v Canada*, [2000] FCJ No 1568, at para 521 (TD), my colleague Justice Simpson went further and held as follows:

> It cannot be the case that each time legislation gives the Crown discretion to act, a Private Law Fiduciary Duty or even a *sui generis* fiduciary duty applies. This must be so because, in matters of public law, there will generally not be a reasonable expectation that the Crown is acting for the sole benefit of the party affected by the legislation. For this reason, it is my conclusion that, in matters of public law, discretion and vulnerability can exist without triggering a fiduciary standard. There would have to be special circumstances, other than those created by the legislation, to justify the imposition of a fiduciary duty on the Crown.

[52] In the case at bar, no special circumstances were identified that would justify the imposition of such a fiduciary duty on the Crown.

[53] Other courts have also taken the view that the Crown is not subject to any fiduciary duty in the exercise of its purely public law statutory responsibilities under the Act. This includes the exercise of the Registrar's duties under the Act. For example, in *Tuplin v Canada (Registrar of Indian & Northern Affairs)*, 2001 PESCTD 89, the Prince Edward Island Supreme Court (Trial Division) rejected the appellant's assertion that the Registrar had a fiduciary duty towards him and his father when making her decision under the protest provisions in section 14.2 of the *Indian Act*, RSC 1985, c. I-5. In the course of reaching this conclusion, the Court observed:

> **56** This case calls for a note of clarification regarding application of fiduciary duty to government relations in aboriginal matters. There is an element of fiduciary duty in government relations with aboriginal peoples, applicable to negotiations and like matters. However, its presence does not extend to the Registrar's administration of an individual protest. In my understanding, the Supreme Court directives do not intend fiduciary duty to override, emasculate, or stand in conflict with the performance by an administrator such as the Registrar of a public law duty specifically prescribed by statute.

[54] The same conclusion was reached in *Wilson v Canada (Registrar of the Indian Registry)* (1999), 71 BCLR (3d) 145, at para 79 (SC).

[55] Applying the jurisprudence discussed above to the Plaintiffs' claims, it is clear that, in the particular factual matrix of this case, the Crown did not owe to the Plaintiffs any of the fiduciary obligations to which the Plaintiffs claim the Defendant was subject.

[56] None of the hallmarks of a fiduciary relationship that are identified in that jurisprudence were present in the relationship that existed between the Plaintiffs, as represented by their mother, and the Department.

[57] In brief, counsel to the Plaintiffs conceded that, once the Registrar received the executed Statutory Declarations of paternity from Mrs. Potskin and Neil Morin, the Registrar had no discretion as to whether to transfer the Plaintiffs from the Sawridge Band to the Enoch Band (Court Transcript, at pp. 183, 203 and 241).

[58] Moreover, throughout the history of this matter, the Registrar and other representatives of the Department who were involved were simply exercising public law duties that were not "in the nature of a private law duty" and that did not originate "in a private law context" (*Wewaykum*, above, at paras 85 and 96).

[59] I am satisfied that, throughout their involvement in this matter, the Registrar and other representatives of the Department were simply acting in accordance with their responsibilities under the Former Act, such that they could not be said to have breached any fiduciary duty towards the Plaintiffs (*Ermineskin*, above, at para 128; *Fairford*, above, at para 63).

[60] As in *Sam*, above, the Department was an uninterested participant throughout its dealings with the Plaintiffs and their parents. In this context, the above-quoted comments made by the Federal Court of Appeal in *Tsartlip* apply with equal force. In short, the Department appears to have been caught between competing interests of the Plaintiffs and the Sawridge Band. The Department had no interest in the outcome of the matter, namely, whether the Plaintiffs remained on the Band List of the Sawridge Band or were transferred to the Band List of the Enoch Band, as contemplated by section 10 of the Former Act. The Department did not stand to gain any benefit from the transfer of the Plaintiffs to the Enoch Band. In addition, there was no adversarial relationship between the Department and the Plaintiffs, the Sawridge Band or the Enoch Band.

[61] The Plaintiffs attempted to support their position by relying statements made by the Supreme Court in *Haida Nation v British Colombia (Minister of Forests)*, [2004] 3 SCR 511, at para 43. However, that part of the Court's decision dealt with the scope of the Crown's duty to consult and accommodate, in connection with unresolved land claims. In that regard, it was held that the content of that duty "varies with the circumstances" (para 39). The Court then proceeded to state: "At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice" (*Haida*, above, at para 43). Earlier in that case, it was specifically determined that "[t]he Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal Group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title" (*Haida*, above, at para18). Accordingly, that case does not assist the Plaintiffs.

[62] In summary, based on all of the foregoing, I find that, subsequent to its receipt of the Statutory Declarations signed by the Plaintiffs' parents, the Department did not owe to the Plaintiffs any of the fiduciary obligations described at paragraph 28 above.

*B. Did the Defendant breach the fiduciary duty it owed to the Plaintiffs?*

[63] Given my conclusions in Part IV.A above, it follows that the Defendant did not breach any of the fiduciary obligations that the Plaintiffs claimed were owed to them.

[64] In short, there is no persuasive evidence that the Registrar or anyone else in the Department was aware that steps were being taken to effect the transfer of the Plaintiffs from the Sawridge Band to the Enoch Band until March 29, 1983, approximately one year after Harriet Potskin and Neil Morin signed the Statutory Declarations of paternity. So, even assuming, to put the matter in the best possible light for the Plaintiffs, that the Registrar owed fiduciary duties to advise the Plaintiffs' parents of the potential adverse financial consequences that might be associated with signing those Statutory Declarations, and that it was open to them to refrain from signing those documents, the Registrar was never in a position in which those duties could be exercised on behalf of the Plaintiffs. In these circumstances, it cannot be said that those fiduciary duties were breached, assuming that they even existed.

[65] For the reasons discussed in Part IV.A above, once the Statutory Declarations of paternity were signed, the Registrar did not have a fiduciary obligation to advise the Plaintiffs or their parents of either: (i) the potential adverse financial consequences that could result from the transfer of the Plaintiffs from the Sawridge Band to the Enoch Band; or (ii) their right to protest the transfer, pursuant to subsection 9(3) of the Former Act, within the three month time period set forth in that

provision. Accordingly, the Registrar's failure to provide such advice did not constitute a breach of any fiduciary duty.

[66] Even if the Registrar had recognized that the Plaintiffs might be adversely impacted financially by virtue of being transferred from the Sawridge Band to the Enoch Band, the Registrar would not have breached any fiduciary duty that may have been owed to the Plaintiffs, by simply directing that such transfer occur. In acting as he did, the Registrar simply fulfilled the responsibilities that were contemplated by sections 10, 11 and 16 of the Former Act.

[67] Specifically, once the Registrar was satisfied that Neil Morin was the natural father of the Plaintiffs, section 10 and paragraph 11(1)(d) of the Former Act contemplated that the Plaintiffs should be transferred to his band, namely, the Enoch Band. In addition, subsections 16(2) and (3) explicitly and implicitly contemplated that the Plaintiffs were not entitled to any interest in the lands or moneys held by the Crown on behalf of the Sawridge Band. Moreover, as counsel to the Plaintiffs conceded during the trial of this matter, the plain wording of subsection 16(1) is inconsistent with the Plaintiffs' initial claim that they were entitled, under subsection 15(3) of the Former Act, to receive a share of the Sawridge Band's monies, upon their ceasing to be members of that band.

[68] The evidence suggests that the Department's interpretation of these provisions in the Former Act was consistent with the interpretation and policies that it maintained prior and subsequent to the execution of the Statutory Declarations by the Plaintiffs' parents (Agreed Exhibit Book, Exhibits #1, 2, 16, 17, 23, 28, 34, 36, 38 and 41). That interpretation also was consistent with the legal advice received by the Department, after Mrs. Potskin's inquiries prompted local officials who were

unaware of the Department's position regarding the aforementioned provisions of the Former Act to request clarification from the Department's head office in Ottawa.

[69] There was nothing in the Former Act that required the Registrar or anyone else in the Department to advise the Plaintiffs or their parents of: (i) the financial consequences of being transferred from the Sawridge Band to the Enoch Band; or (ii) their right to protest that transfer, pursuant to subsection 9(3) of the Former Act. There was also nothing in the Former Act that required the consent of either the person(s) being transferred or the Bands involved in the transfer.

[70] Indeed, Mrs. Potskin was well aware of at least some of the adverse financial consequences that would be associated with such a transfer, because, for a period of time in early 1982, she was receiving monthly payments from both the Sawridge Band and the Enoch Band. As discussed above, those payments were approximately $100 and $25 per person, respectively. It was the receipt of these payments from both Bands that prompted her to make the inquiries which, in turn, led the Enoch Band to request that she and Neil Morin sign the Statutory Declarations that led to the official transfer of the Plaintiffs to the Enoch Band.

[71] During the trial, counsel to the Plaintiffs kept returning to Mrs. Potskin's allegation that Mr. Fennell and Chief Twim represented to her that a portion of the Plaintiffs' *per capita* share interest in the Sawridge Band would be placed in trust for the Plaintiffs until they reached the age of majority. When pressed as to the relevance of that allegation for the purposes of these proceedings, he suggested that it could be inferred from this that the Department was aware that "something was going on with Mrs. Potskin that [it] ought to be getting involved with" (Court Transcript, at pp. 222-223). However, the only "evidence" that he identified to support this assertion was a document from another file, involving Mrs. Potskin's sister and her nephews.

[72] That document was a letter from the Registrar, dated February 1, 1984, to Mr. Fennell in which the Registrar: (i) agreed with Mr. Fennell that, upon the marriage of the parents of two of Harriet Potskin's nephews, he would "have to transfer [the nephews] from the Sawridge Band to [their father's band] under the provisions of section 10 of the Indian Act"; and (ii) stated that, "in such an instance, an appropriate portion of per capita share of the Sawridge Band also becomes transferable to the [father's band] as provided by section 15 of the *Indian Act*." In my view, that letter does not provide any persuasive support whatsoever for the claim that the Department was aware that "something was going on with Mrs. Potskin [and the Plaintiffs that the Department] ought to be getting involved with." That letter involved Mrs. Potskin's nephews, rather than the Plaintiffs, and post-dated, by almost two years, the point in time at which Mrs. Potskin and Neil Morin signed their Statutory Declarations. As to the reference in the letter to section 15, it may well have simply been a typographical error. In any event, it has little, if any, import for the case at bar.

[73] Counsel to the Plaintiffs attempted to rely on another document from the file of Mrs. Potskin's nephews, to support the claim that the Department should have advised Mrs. Potskin that she was not obliged to sign a Statutory Declaration of paternity. However, unlike her sister, who approached the Department to inquire as to the potential consequences of signing such a declaration, Mrs. Potskin made no such similar approach to the Department prior to signing her Statutory Declaration. As discussed above, the Department did not know anything about this matter until after Mrs. Potskin and Neil Morin signed their Statutory Declarations.

[74] Moreover, the Department did not advise Mrs. Potskin's sister that she was not obliged to sign a Statutory Declaration of paternity. It simply stated that if Statutory Declarations were provided by both parents, the Department would be obliged to report their children's transfer to their

father's band, subject to one exception, namely, where the children were found to be not entitled to to be registered (Exhibit 36).

[75] In passing, I should add that I have great difficulty with the suggestion that it might be possible for the Department to breach a fiduciary obligation owed to the Plaintiffs, by failing to advise their mother as to how she might avoid the application of the law. This is particularly so given that: (i) Dalvin Potskin and Mrs. Potskin appear to have accepted, in examination for discovery and testimony, respectively, that Neil Morin is the natural father of the Plaintiffs; and (ii) the only other evidence regarding the paternity of the Plaintiffs suggests that Mr. Morin is in fact the Plaintiffs' natural father. At no time did Mrs. Potskin or Dalvin Potskin ever take the opportunity to raise any doubt on this point.

[76] In summary, I find that the Defendant did not breach any fiduciary obligation owed to the Plaintiffs by failing to advise them or their parents of either: (i) the potential adverse financial consequences that could result from the transfer of the Plaintiffs from the Sawridge Band to the Enoch Band; or (ii) their right to protest the transfer, pursuant to subsection 9(3) of the Former Act.

[77] There was no exploitation, wrongdoing, misconduct, disloyalty, lack of good faith or even-handedness, ineptitude or other behaviour that could be said to be tantamount to a breach of confidence or that otherwise might provide the basis for this Court to find that the Defendant breached any fiduciary obligation that the Defendant may have owed to the Plaintiffs in respect of their economic interests (*Guerin*, above, at 383; *Wewaykum*, above, at paras 80 and 95). The Registrar simply acted in accordance with his statutory responsibilities (*Ermineskin*, above, at para 128; *Fairford*, above, at para 63; *Tsartlip*, above, at para 35; *Sam*, above, at para 67).

*C. Did the Plaintiffs initiate this action beyond the applicable limitation period?*

[78] It was common ground between the parties that, pursuant to the *Crown Liability and Proceedings Act*, RSC 1985, c C-50, ss 24 and 32, and the *Federal Courts Act*, RSC 1985, c F-7, s 39, the applicable limitation period in this case is that which is established by the laws of Alberta (Court Transcript, p. 287).

[79] The Plaintiffs filed their Statement of Claim on July 10, 2001. They submit that this action was brought within the applicable limitation period, because the Defendant continued to reassess its position regarding the interplay between subsection 15(3) and section 16, until February 5, 2001, when it finally provided a definitive response regarding its position. I disagree.

[80] On examination for discovery, Mrs. Potksin stated as follows:

> I've been trying to do this lawsuit forever. I started it, like in 1989 and procrastinated, left it alone for a few years; and strated [*sic*]again with Tony Mandamin and then kind of left it alone. And finally got serious about this, yes. And I gathered a little bit of information and then lose [*sic*] the paperwork again.

[81] The foregoing passage indicates that Mrs. Potskin was well aware, at least as early as approximately 1989, that she had a potential cause of action in respect of the claims that are the subject of this action.

[82] In any event, on December 10, 1993, Mr. Jim Sisson, the Acting Director of the Lands and Trust Services Branch of the Department's Alberta Region, confirmed in writing the verbal response that he gave to Mrs. Potskin on December 2, 1993. In his letter, he explained that her file

had been forwarded to Ottawa for review and that it had been determined by officials in Ottawa that the Plaintiffs "were not entitled to a share of Sawridge Band Indian moneys in respect to [*sic*] their transfer of band membership." Mr. Sisson also explained that subsection 15(3) of the Former Act had no application to a minor who transferred into another Band pursuant to subsection 16(1), and that the Plaintiffs fell within the scope of the latter provision.

[83] In my view, as of the date of that letter from Mr. Sisson, Mrs. Potskin, on behalf of the Plaintiffs, ought to have been able to determine whether the Plaintiffs had a potential cause of action in respect of this matter, by exercising reasonable due diligence and retaining counsel (*Canada (Attorney General) v Lameman*, [2008] 1 SCR 372, at para 16; *Central Trust Co v Rafuse*, [1986] 2 SCR 147, at 224; *Stack v Hildebrand*, 2010 ABCA 108, at para 14).

[84] If I am wrong on this point, then, at the very latest, the Plaintiffs discovered that they had a potential cause of action when they retained legal counsel, in 1994 or early 1995. On January 25, 1995, their former legal counsel, Mr. Tony Mandamin, wrote to the Department to advise that he was advancing a claim on behalf of the Defendants. In his letter, Mr. Mandamin stated that: (i) the claim was for the funds the Plaintiffs should have received upon their transfer from the Sawridge Band to the Enoch Band; (ii) the Crown, through the Minister and his officials, stood in a fiduciary relationship with the Plaintiffs; and (iii) the Crown was obligated to protect their interests. Mr. Mandamin elaborated on this position in a more detailed letter dated March 22, 1995.

[85] At the end of the latter letter, Mr. Mandamin: (i) stated that he understood that the Department was reconsidering the matter "in conjunction with Justice Department lawyers"; and (ii) requested that his letter be forwarded to those lawyers, so that they could give consideration to the "fiduciary and trust issues arising in this case." Even if I were to agree with the Plaintiffs' position

that the applicable limitation period did not start to run until the Defendant reached a definitive position on this matter and communicated that position to the Plaintiffs, I find that this occurred on June 28, 1995. In a letter written to Mr. Mandamin, dated July 28, 2005, Mr. Gregor MacIntosh, Director General of the Registration, Revenues and Band Governance Branch at the Department's headquarters in Ottawa, confirmed the advice that he stated was provided to Mr. Mandamin verbally on June 28, 1995. That advice was that the Plaintiffs were not entitled to any Sawridge Band monies as a result of their transfer to the Enoch Band.

[86] The Plaintiffs' current counsel claims that the Department continued to reassess its position until February 5, 2001. I disagree. In response to letters that he wrote to the Department on June 9, 2000 and December 8, 2000, Mr. Daniel Kumpf, an official in the Department's Alberta Region, stated:

> Please be advised that my staff consulted with our Indian Moneys Directorate in Ottawa on this issue. As indicated in Susan Weston's June 30, 1995 correspondence (copy attached) a reassessment of this issue was completed. As a result of this review, the department's position remains unchanged from our position set out in the letter dated July 28, 1995 from Gregor MacIntosh to Tony Mandamin (copy attached).

[87] In my view, it is clear from the foregoing passage that the last internal reassessment of the Department's position took place in June 1995. As I have noted above, that position was communicated to Mr. Mandamin on June 28, 1995. Accordingly, even if I were to accept the Plaintiffs' position that the applicable limitation period did not start to run until the Department finished reassessing its position regarding the interplay between subsection 15(3) and section 16 of the Former Act, that date would be June 28, 1995. The Statement of Claim in this matter was filed more than six years after that date.

[88] The date upon which the last of the Plaintiffs reached the age of majority in Alberta was on April 19, 1999, which is more than two years before their Statement of Claim was filed.

[89] Therefore, even under the former *Limitation of Actions Act*, RSA 1980, c L-15, this action was statute-barred.

[90] However, the applicable limitation period is now set forth in the *Limitations Act*, RSA 2000, c L-12, which was proclaimed into force on March 1, 1999. Pursuant to section 2 of that legislation, the limitation period in this matter expired by the earlier of:

i. June 28, 2001, which is six years after the latest date by which the Plaintiffs ought to have known that they had a potential cause of action, and is the most favourable date under the *Limitation of Actions Act*, above; and

ii. March 1, 2001, which is two years after the *Limitations Act*, above, came into force.

[91] Subsections 2(1) and 2(2) of the *Limitations Act*, above, set forth the transitional provisions applicable to causes of action arising before March 1, 1999. Those provisions state:

> *Limitations Act*, RSA 2000, c. L-12
>
> Application
>
> 2(1) This Act applies where a claimant seeks a remedial order in a proceeding commenced on or after March 1, 1999, whether the claim arises before, on or after March 1, 1999.
>
> (2) Subject to sections 11 and 13, if, before March 1, 1999, the claimant knew, or in the circumstances ought to have known, of a claim and the claimant has not sought a remedial order before the earlier of

> (a) the time provided by the *Limitation of Actions Act*, RSA 1980 cL-15, that would have been applicable but for this Act, or
>
> (b) two years after the *Limitations Act*, SA 1996 cL-15.1, came into force,
>
> the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.
>
> (2.1) With respect to a claim for the recovery of possession of land as defined in the *Limitation of Actions Act*, RSA 1980 cL-15, subsection (2) shall be read without reference to clause (b) of that subsection.
>
> (3) Except as provided in subsection (4), this Act is applicable to any claim, including a claim to which this Act can apply arising under any law that is subject to the legislative jurisdiction of the Parliament of Canada, if
>
> (a) the remedial order is sought in a proceeding before a court created by the Province, or
>
> (b) the claim arose within the Province and the remedial order is sought in a proceeding before a court created by the Parliament of Canada.
>
> (4) This Act does not apply where a claimant seeks
>
> (a) a remedial order based on adverse possession of real property owned by the Crown, or
>
> (b) a remedial order the granting of which is subject to a limitation provision in any other enactment of the Province.
>
> (5) The Crown is bound by this Act.

[92] Accordingly, it is clear that the applicable limitation period in this matter expired on March 1, 2001, before the Statement of Claim was filed by the Plaintiffs. This action is therefore statute-barred, even on a view of the facts that is the most favourable to the Plaintiffs.

## V. **Procedural Issues**

[93] Just before the Plaintiffs closed their case at trial, they verbally sought leave to amend their pleadings, pursuant to Rule 201 of the *Federal Courts Rules*, SOR/98-106. In short, they sought to amend their pleadings to add the Enoch Band as a party to the proceedings. They wanted to do this to enable the Plaintiffs to claim, on behalf of the Enoch Band, the monies that the Enoch Band should have received from the Sawridge Band, pursuant to subsection 16(1) of the Former Act, when the Plaintiffs were transferred from the latter to the former.

[94] I rejected the Plaintiffs' request from the Bench, on the basis that I was inclined to agree with the Defendant's position that it would suffer substantial prejudice if the amendment were allowed. I added that I did not believe that it would be appropriate to allow the amendment in the circumstances.

[95] Those circumstances were essentially those that were identified by the Defendant. These included the following: (i) the Plaintiffs gave no indication during the pre-trial conference or at the outset of the trial that this potential amendment might be sought; (ii) no discovery had been conducted in respect of the issue of why the Enoch Band had not received from the Sawridge Band the payment contemplated by subsection 16(1); (iii) no party led evidence in respect of that issue; (iv) there was no document from the Enoch Band authorizing the Plaintiffs to seek that payment on behalf of the Enoch Band; (v) there was no evidence that the Plaintiffs had even consulted with the leadership of the Enoch Band in respect of this issue; and (vi) the Enoch Band appears to have had the opportunity to join this lawsuit as long ago as 1998, when one of the Plaintiffs' parents discussed this lawsuit with representatives of the Band, which subsequently extended a loan to enable the Plaintiffs to retain their current counsel.

[96] Based on the foregoing, it would not have been in the interest of justice to permit the proposed amendment. In my view, such an amendment would have resulted in severe prejudice to the Defendant that would not have been compensable by a cost award (*Maurice v Canada (Minister of Indian Affairs and Northern Development)*, 2004 FC 528, at paras 10-11; Rule 76).

[97] After the Plaintiffs closed their case and had addressed all issues with the exception of whether this action was statute-barred, their counsel asked for leave to adduce into the evidentiary record three additional documents. Prior to that time, he had not disclosed the documents, which he stated had just been found over the lunch period that day, to counsel to the Defendant. After briefly exploring whether any of those documents might be particularly relevant, such that it might be contrary to the interests of justice to refuse the Plaintiffs' request, I upheld the Defendant's objection to that request.

[98] In short, I agree with the Defendant that Rule 232(1) contemplates that the Court should not allow a party to adduce documents into evidence that fail to meet one of the three requirements set forth therein, or that fail to meet the exception set forth in Rule 232(2), unless it would be in the interest of justice or otherwise appropriate to grant the party's request. In the case of the three documents sought to be adduced by the Plaintiffs, I am not persuaded that it would have been in the interest of justice or otherwise appropriate to grant the Plaintiffs' request, particularly given (i) the very late stage in the proceedings at which the request was made; (ii) the prejudice that would be caused to the Defendant; and (iii) the very limited, if any, relevance of the documents to the issues that then remained in this case.

## VI. Conclusion

[99] The Plaintiffs clearly suffered at least some adverse financial consequences, such as reduced monthly royalty payments, as a result of their transfer from the Sawridge Band to the Enoch Band. However, those consequences flowed directly from the Registrar's application of the Former Act. In short, section 10 of the Former Act required the minor children of a male Aboriginal to be registered on the same Band List as their father.

[100] In these circumstances, even if the Registrar could be said to have owed a general fiduciary duty to protect the Plaintiffs' economic interests, he did not breach that duty by (i) directing the transfer of the Plaintiffs from the Sawridge Band to the Enoch Band; (ii) failing to advise the Plaintiffs' parents of the potential adverse financial consequences associated with signing the Statutory Declarations of paternity; (iii) failing to advise the Plaintiffs' parents that it was open to them to refrain from signing those documents; or (iv) failing to advise the Plaintiffs' parents of their right to protest the transfer, pursuant to subsection 9(3) of the Former Act.

[101] Moreover, this action was brought beyond the applicable limitation period. As such, it is statute-barred.

[102] This action is, therefore, dismissed with costs to the Defendant.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that**:

1. This action is dismissed with costs to the Defendant; and,

2. The style of cause in this matter shall be amended to reflect the correct spelling of the Plaintiffs' names, as indicated in the style of cause above.

"Paul S. Crampton"

_____

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-1261-01 |
| **STYLE OF CAUSE:** | Dalvin Stewart Potskin et al v Her Majesty the Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development |
| **PLACE OF HEARING:** | Edmonton, Alberta |
| **DATES OF HEARING:** | March 21 and 22, 2011 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | Crampton J. |
| **DATED:** | April 18, 2011 |

**APPEARANCES:**

| | |
|---|---|
| Mr. Terence P. Glancy | FOR THE PLAINTIFFS |
| Mr. Kevin P. Kimmis<br>Ms. Sherry Daniels | FOR THE DEFENDANT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
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| Myles J. Kirvan<br>Deputy Attorney General of Canada | FOR THE DEFENDANT |