Federal Court of Appeal  Cour d'appel fédérale

Date: 20130812

Docket: A-417-12

Citation: 2013 FCA 191

CORAM: **BLAIS C.J.**
MAINVILLE J.A.
NEAR J.A.

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

Appellants

and

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

Respondent

Heard at Regina, Saskatchewan, on June 26, 2013.

Judgment delivered at Ottawa, Ontario, on August 12, 2013.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: BLAIS C.J.
NEAR J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20130812

Docket: A-417-12

Citation: 2013 FCA 191

CORAM: **BLAIS C.J.**
MAINVILLE J.A.
NEAR J.A.

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

Appellants

and

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

Respondent

REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] This is an appeal from a judgment of Russell J. of the Federal Court (the "Judge") dated July 19, 2012 and cited as 2012 FC 915 (the "Reasons"), which summarily dismissed the appellants' claim on the basis that the limitation period had expired pursuant to Saskatchewan's *Public*

Officers' Protection Act, R.S.S. 1978, c. P-40 or pursuant to limitation periods set out under limitations of actions statutes applicable in Saskatchewan.

The claim

[2] In 1874, Her Majesty the Queen entered into Treaty No. 4 with certain Cree, Saulteaux and other aboriginal peoples. That treaty notably provided for the setting aside of reserves of sufficient area to allow one square mile for each family of five. The pertinent provision of the treaty reads as follows:

> And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for the said Indians, such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families, provided, however, that it be understood that, if at the time of the selection of any reserves, as aforesaid, there are any settlers within the bounds of the lands reserved for any band, Her Majesty retains the right to deal with such settlers as She shall deem just, so as not to diminish the extent of land allotted to the Indians;

[3] Moreover, Treaty No. 4 also provided that following the assignment of the reserves, any interest or right therein, or appurtenant thereto, could be sold, leased or otherwise disposed of by the Government of Canada (a) for the use and benefit of the Indians and (b) with the consent of the Indians entitled thereto:

> and provided, further, that the aforesaid reserves of land, or any part thereof, or any interest or right therein, or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained, but in no wise shall the said Indians, or any of them, be entitled to sell or to otherwise alienate any of the lands allotted to them as reserves.

[4] Treaty No. 4 also prescribed that in the event any section of a reserve was required for public works or building, compensation would be provided to the Indians:

> It is further agreed between Her Majesty and Her said Indian subjects that such sections of the reserves above indicated as may at any time be required for public works or building of whatsoever nature may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made to the Indians for the value of any improvements thereon, and an equivalent in land or money for the area of the reserve so appropriated.

[5] Pursuant to Treaty No. 4, the Peepeekisis Reserve No. 81 (the "Peepeekisis reserve") was surveyed and set apart for the benefit of the Peepeekisis band. The reserve was confirmed by Order in Council P.C. 1151 of May 17, 1889.

[6] In 1896, William Morris Graham was appointed as the Indian Agent for the File Hills Agency, which included the Peepeekisis reserve. Indian Agent Graham developed what became known as the "scheme of colonization". Under that scheme started in 1901, the best farming sections of the Peepeekisis reserve were surveyed into lots in order to settle thereon ex-pupils from various Indian schools who were not members of the Peepeekisis band. The appellants claim that as a result of the scheme of colonization, a section of reserve land comprising 7,680 acres was subdivided in 1902 into 96 lots, and another section comprising 11,040 acres of land was subdivided in 1906 into another 136 lots.

[7] For the purpose of achieving the scheme of colonization, the band membership of each of the pupils settling on the Peepeekisis reserve had to be transferred to the Peepeekisis band. Under the terms of the *Indian Act* as it then applied, the consent of the band was required to carry out such

a transfer. The first transfers appear to have been approved by the membership of the Peepeekisis band. However, in 1910 Indian Agent Graham reported that "of late there has been quite a lot of opposition" (Appeal Book ("AB") at p. 538).

[8] As a result of this opposition, Indian Agent Graham devised in 1911 a scheme by which the Peepeekisis band would enter into an agreement with the Crown providing that, in exchange for $20 to be paid to each member, the band would agree to admit into membership "such male graduates of the various Indian boarding and industrial schools as shall from time to time be designated by the Superintendent General…but such male graduates shall not exceed fifty in number" (AB at p. 543) (the "1911 Agreement"). The 1911 Agreement also provided that "the Superintendent General may locate such graduates on whatever quantity of land, and in whatever portion of the Band's reserve, as he may deem advisable…"

[9] The 1911 Agreement was at first rejected by the band membership, but then approved in a second vote by 23 for and 10 against. It is not disputed that there is no provision in the *Indian Act* for such an agreement.

[10] Pursuant to the scheme of colonization and the terms of the 1911 Agreement, numerous pupils were settled on the Peepeekisis reserve. However, the overall size of the reserve remained unchanged, thus *de facto* reducing the reserve land base available to the original Peepeekisis band members and their descendants. The large increase in band membership led the Superintendent of Reserves and Trusts to conclude in 1945 that "it may well be that an investigation into the Band

membership of the Peepeekisis Band, whose original members have been pauperized in the process, is indicated" (AB at p. 552). Moreover, in 1948, certain original members of the Peepeekisis band, led by Ernest Goforth (the "Goforth Group"), called for an investigation into the band membership issue (AB at p. 558), and retained the services of a lawyer to pursue the matter (AB at pp. 559-560).

[11] A ministerial committee provided a report to the Registrar dated January 1955 on the subject of Peepeekisis band membership. This committee made no specific recommendation with respect to membership issues, but was critical of the actions of Indian Agent Graham, noting that he may have "used forms of bribery or threat and disregarded the provisions of the Indian Act in the matter of admissions to band membership" (AB p. 574), and that an "effort should be made to reach a settlement with the original Peepeekisis Band members and the so-called 'newcomers'", including "the payment of reasonable compensation to the descendants of the original members of the Band" (AB at pp. 575-576). The committee further opined (AB at p. 576):

> …that while the objectives and results of the File Hills colony scheme were good in themselves, the methods adopted by Mr. Graham and the Department of Indian Affairs were high handed and showed a disregard for the Indian Act and the fact the lands were set aside for the Peepeekisis Band of Indians. The scheme resulted in the best lands in the reserve being made available to other Indians contrary to the provisions of the treaty as interpreted by legislation.

[12] The *Indian Act* was substantially revised in 1951 following the activities of a Joint Committee of the Senate and the House of Commons examining aboriginal policy in the aftermath of the Second World War. The 1951 *Indian Act* notably introduced a new system of registration for Indians governed by the Act. This new system allowed for protests and for an adjudicative process

to settle such registration protests. The Goforth Group initiated various band membership protests in the early 1950's under these then newly adopted provisions of the *Indian Act*.

[13] As a result of these membership protests, L. Trelenberg was appointed in 1954 as commissioner to take evidence. Following these hearings, the Registrar reached his decisions on the protests. At the request of Ernest Goforth, the Registrar's decisions were reviewed by a judge in accordance with subsections 9(3) and (4) of the 1951 *Indian Act*. On December 13, 1956 Judge J.M. McFadden reached his decision finding that all residents of the Peepeekisis reserve whose membership in the Peepeekisis band had been protested were entitled to be registered as Indians members of that band (AB at pp. 342 to 375).

[14] After this decision, Ernest Goforth continued to pursue the matter, but not with respect to membership protests. In a letter dated August 17, 1957 to the Director of the Indian Affairs Branch, Mr. Jones, he noted the following (AB at p. 378):

> I am very glad and thankful to have your statement brought to notice when you say that you feel that there is a moral obligation toward the original members of the Peepeekisis Band in connection with the recent decision given to Peepeekisis Band membership. To me that decision is still out on a limb. Even if Mr. Graham did everything in accordance with the Indian Act I shall still maintain that the original Indians, according to the Treaties of 1874, could not then nor can they today say anything or do anything that will jeopardise the passing on the treaty rights to the future Indian children. Furthermore, these Indian lands cannot be sold nor can they be allotted or subdivided according to your present system…<u>In the case of my few original members I am duty bound to at least get a section of land for every five persons. If you are taking away the rest of our reserve and giving it to other Indians without our consent then we certainly are entitled to certain financial and economic remuneration.</u>
> [Emphasis added]

[15] There is some indication in the record that there may have been some attempts by Indian Affairs officials to reach an agreement with the Goforth Group in the early 1960's, but all discussions ceased with the death of Mr. Goforth in 1962 (Affidavit of Percy Glen Goforth at paras. 4 and 5, AB at pp. 403-404; Affidavit of Aubrey Goforth at paras. 11 to 14, AB at pp. 399-400).

[16] The record does not disclose any further activity on the claim until after the adoption by the Government of Canada of the 1982 *Specific Claims Policy*. That policy considerably expanded the scope of the federal government's prior policy on the matter of claims for mismanagement of Indian land, moneys or assets. Under the new policy, the Government of Canada committed itself to resolve through negotiations those claims which relate to the administration of land and other Indian assets and to the fulfilment of treaties (so-called "specific claims") without regard to the strict rules of evidence, to limitation periods, to the doctrine of laches or to other procedural defences. The federal government also committed itself to making its internal documents more easily available for the presentation of specific claims.

[17] Within the context of the *Specific Claims Policy*, the Peepeekisis band started work directed towards establishing a treaty entitlement claim based on the Crown's failure to provide a volume of land consistent with the terms of Treaty No. 4. This research served to prepare a specific claim related to the scheme of colonization, which was submitted for negotiations under the *Specific Claims Policy* in early May 1986 (Affidavit of Enoch Poitras at paras. 3 and 4, AB pp. 392-393). The Peepeekisis band also initiated this litigation by filing on April 29, 1992 a Statement of Claim in the Federal Court of Canada (now the Federal Court). The litigation before the Federal Court of

Canada was however placed in abeyance pending the outcome of the claim process provided for under the *Specific Claims Policy*.

[18] The claim was eventually brought before the Indian Claims Commission first created in 1991 as an alternative to the courts under the *Specific Claims Policy*. That Commission carried out an inquiry and recommended, on May 28, 2004, that the claim be accepted for negotiation under the *Specific Claims Policy*. The Minister apparently chose to disregard that recommendation on the ground of *res judicata* based on his belief that the decision of Judge McFadden applied to the issues raised by the claim (Judge's Reasons at para. 7).

[19] As a result, the litigation in the Federal Court was reactivated by the filing of an Amended Statement of Claim on July 21, 2010. The Defendant Crown filed an Amended Statement of Defence on September 2, 2011.

The Federal Court Judgment

[20] By motion filed November 18, 2011, the Crown sought to amend its Amended Statement of Defence to include a defence based on subsection 2(1) of the *Public Officers' Protection Act* and on paragraph 3(1)(*j*) of the *Limitations of Actions Act*, R.S.S. 1978, c. L-15. It also sought to have the claim dismissed on two grounds:

> (a) first it sought to strike the Amended Statement of Claim on the ground that it disclosed no reasonable cause of action or was an abuse of the process in that the issue of entitlement to Band membership had been conclusively determined by Judge McFadden in 1956 (*res judicata*); and

> (b) second, it sought to summarily dismiss the claim on the ground that the limitations set out in the *Public Officers' Protection Act* and the *Limitations of Actions Act* barred the action.

[21] The Judge did not accept the Crown's submissions on *res judicata*. He found that Judge McFadden's decision of 1956 concerned membership issues which, though relevant to the claim, did not address the matters of breach of fiduciary duty, breach of treaty obligations and breach of the *Indian Act* which may have resulted from the scheme of colonization and on which the claim primarily rested (Reasons at paras. 60 to 63).

[22] The Judge nevertheless concluded that the claim was barred by limitations periods.

[23] He first found that in light of the litigation resulting from the membership protests and of Judge McFadden's decision, the essential facts underlying the claim were widely known in the community and among band members by 1956 at the latest (Reasons at para. 76). He also found, based on *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372 ("*Lameman*"), that limitation periods applied to this type of aboriginal claim (Reasons at para. 77).

[24] In the Judge's view, the claim in this case involved an exercise by the Crown of a public power or duty (Reasons at para. 81). The *Public Officers' Protection Act*, which was in force in Saskatchewan from 1923 to 2005, provided that no legal proceeding may be instituted against any person for an act done in pursuance or execution of a statute or a public duty or authority unless commenced within twelve months after the act. The Judge therefore found that the protection

available under the *Public Officers' Protection Act* of Saskatchewan extended to the Crown in this case (Reasons at para. 82).

[25] The Judge concluded that this public duty was rooted in the band list, which list had to be maintained by the Department of Indian Affairs under the terms of the *Indian Act* (Reasons at para. 84). In the Judge's view, the colonization scheme involved activity directly arising out of Canada's statutory mandate to manage and administer the Peepeekisis reserve, the Band list and reserve assets. The Judge thus accepted the Crown's submission 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" (Reasons at para. 87). He further opined that the alleged breaches were not of a private nature or of an internal or operational character, but rather part of a public mandate to further the colonization scheme (Reasons at para. 96).

[26] He also refused to extend the time limitation provided under the *Public Officers' Protection Act* on the ground of equitable fraud, as had been done in *Guerin v. Canada*, [1984] 2 S.C.R. 335 ("*Guerin*") and *Semiahmoo Indian Band v. Canada*, [1998] 1 FC 3 (FCA) ("*Semiahmoo*"). He based this refusal on his finding that the facts underlying the claim were publicly available (Reasons at paras. 97 to 102) and on his acceptance of the submission that the Crown would be prejudiced by the passage of time (Reasons at para. 103).

[27] He further found that the limitation periods set out in Saskatchewan's *Limitations of Actions Act* also applied (Reasons at paras. 105 to 108).

[28] Since the Judge had found that the plaintiffs understood or should have understood the material facts supporting their case in 1948, or by 1956 by the latest, and since the statement of claim was filed in 1992, the Judge concluded that the limitation periods under both the *Public Officers' Protection Act* and the *Limitations of Actions Act* had long ago applied to bar the claim.

The Issues

[29] The principal issues raised by this appeal may be regrouped under the following questions:

a. Did the Judge err in finding that the *Public Officers' Protection Act* applied to the claim?

b. If so, did he err in finding that the *Limitations of Actions Act* applied to the claim?

c. If not, can the litigation nevertheless be pursued as a declaratory proceeding engaging the honour of the Crown?

Did the Judge err in finding that the *Public Officers' Protection Act* applied to the claim?

[30] Subsection 39(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and section 32 of the *Crown Liability and Proceedings Act*, R.S.C. 1985 c. C-50 provide that the laws relating to prescription and the limitation of actions in force in a province apply to any proceedings against the federal Crown, including proceedings taken in the Federal Court.

[31] Limitation of actions periods set out in provincial legislation may thus apply to the type of claim raised by this litigation (*Lameman* at paras. 12 and 13; *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245 ("*Wewaykum*") at paras. 114 to 133; *Blueberry River Indian*

Band v. Canada (Department of Indian Affairs and Northern Development), [1995] 4 S.C.R. 344 ("*Blueberry River*") at paras. 106-107).

[32] It is not disputed that the cause of action in this case originated in Saskatchewan. Subsection 31(3) of the *Limitations Act*, S.S. 2004, c. L-16.1 provides that no proceeding shall be commenced with respect to a claim if the former limitation period expired before the coming into force of that Act, *i.e.* before May 1st, 2005. Subsection 2(1) of the *Public Officers' Protection Act*, which was in force in Saskatchewan from 1923 to 2005, provided for the following:

> 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 on the execution of a statute, public duty or authority, unless it is commenced:
>
> i. within twelve months next after the act, neglect or default complained of or, in the case of continuance of injury or damage, within twelve months after it ceases; or
>
> ii. within such further time as the court or a judge may allow.

[33] This provision generally limits to twelve months the time within which an action may be instituted against a person, including the Crown, acting in furtherance of a public duty or authority (*R.J.G. v. Canada (Attorney General)*, 2004 SKCA 102, [2006] 1 W.W.R. 599 ("*R.J.G.*") at paras. 6 and 15). This provision is to be interpreted in light of the principles expounded by Binnie J. in *Des Champs v. Conseil des écoles séparées catholiques de langue française de Prescott-Russell*, [1999] 3 S.C.R. 281 ("*Des Champs*") (see *R.J.G.* at paras. 13 and 18; *F.P. v. Saskatchewan*, 2004 SKCA 59, [2006] 3 W.W.R. 257 at paras. 14 and 26).

[34] *Des Champs* holds (at para. 49) that provisions such as subsection 2(1) of the *Public Officers' Protection Act* are to be read restrictively and in favour of the person whose right is being truncated. It also holds (*Des Champs* at para. 50) that the fundamental issue to determine when considering such a provision is whether the power or duty relied on as part of the cause of action can be properly classified as a "public duty or authority" having a public aspect or connotation as opposed to a private administrative or subordinate aspect or a predominantly private aspect.

[35] The appellants in this case are fundamentally seeking "damages arising from the wrongful alienation of their lands and the breach of Canada's fiduciary obligation" (Amended Statement of Claim at p. 15 para. (d)). They principally base their claim on their assertion that "during the period 1897 to 1944 the reserve was diminished and much of the reserve was alienated by the actions of the Crown and the Crown's agent, through the illegal subdivision of the reserve without the informed and willing consent of the Band" as a result of "a scheme or program of colonization developed by the Crown's Agent and other officials or employees of Canada's Indian Department", which scheme was "not created or carried out for the benefit of the Band or its members" (Amended Statement of Claim at paras. 8, 8A, 8B and 11).

[36] In their Amended Statement of Claim at paras. 12 to 17, the appellants do raise issues related to the admission of new members into the Peepeekisis band as a result of the scheme of colonization. However, they do so not to challenge the membership of any individual band member, but rather to establish the factual matrix in which to ground their claim for damages based on the

Crown's breach of its fiduciary duties with respect to the management of the band's reserve land (Amended Statement of Claim at paras. 18 to 18E).

[37] It is now well settled that the Crown's fiduciary duty in the management of reserve land and of other band assets is a *sui generis* obligation that cannot be properly classified as a "public duty". In the seminal case of *Guerin v. The Queen*, [1984] 2 S.C.R. 335, Dickson J. stated the following at p. 385:

> It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public 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. The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. As was pointed out earlier, the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary.
> [Emphasis added]

Dickson J. further added the following at p. 387 of *Guerin*:

> I repeat, the fiduciary obligation which is owed to the Indians by the Crown is *sui generis.* Given the unique character both of the Indians' interest in land and of their historical relationship with the Crown, the fact that this is so should occasion no surprise.
> [Emphasis added]

[38] This approach was reaffirmed in *Wewaykum*, where Binnie J. explained (at para. 74) the distinction between the public law duties and private law duties of the Crown in the following terms:

> The enduring contribution of *Guerin* was to recognize that the concept of political trust did not exhaust the potential legal character of the multitude of relationships between the Crown and aboriginal people. A quasi-proprietary interest (e.g., reserve land) could not be put on the same footing as a government benefits program. The latter will generally give rise to public law remedies only. The former raises considerations "in the nature of a private law duty" (*Guerin*, at p. 385). Put another way, the existence of a public law duty does not exclude the possibility that the Crown undertook, in the discharge of that public law duty, obligations "in the nature of a private law duty" towards aboriginal peoples.
> [Emphasis added]

[39] In that case, Binnie J. distinguished between the creation of a reserve, which gives rise to public law duties, and the management of the land within a reserve which has already been created, which may give rise to private law type duties, particularly where the land is expropriated by the Crown or where the Crown assumes a discretionary power over its management. Once a reserve is created, the Crown also has a private law type duty with respect to "exploitative bargains", meaning "that ordinary diligence must be used by the Crown to avoid invasion or destruction of the band's quasi-property interest by an exploitative bargain with third parties or, indeed, exploitation by the Crown itself" (*Wewaykum* at para. 100; see also *Blueberry River* at para. 35).

[40] In this case, it appears *prima facie* from the record that, as a result of the 1911 Agreement, the Crown did assume a discretionary power over the management of the land situated in the Peepeekisis reserve. Under that Agreement, the Superintendent General was provided with the authority to admit at his discretion new band members, and to "locate such graduates on whatever quantity of land, and in whatever portion of the Band's reserve, as he may deem advisable…" (AB at p. 543). The fundamental issue raised by the Amended Statement of Claim is whether this 1911

Agreement constituted an exploitative bargain reached in breach of the Crown's fiduciary duty with respect to the management of reserve land.

[41] As I have explained above, such an issue does not raise a "public law" duty on the part of the Crown. Rather the duty raised by the proceedings is a *sui generis* obligation incumbent on the Crown which is in the nature of a private law duty.

[42] The Judge thus erred when he found at para. 96 of his Reasons that the Crown was acting pursuant to a public duty in bringing new members onto to Peepeekisis reserve and allotting to them sections of reserve land. No such public duty is set out in the *Indian Act*. Moreover, the resettlement scheme itself was developed not in the interest of the Peepeekisis band, but for other considerations. It was largely brought about through the 1911 Agreement by which the Crown's officers assumed extraordinary discretionary control over both band membership and the allocation of land in the Peepeekisis reserve. The issues raised by the proceedings do not consequently flow from a public duty. The claim is rather largely based on the alleged exploitative bargain resulting from the 1911 Agreement. As I have noted, such a claim is based on a *sui generis* duty of the Crown more akin to a private law duty than to a public law duty.

[43] Nor are these proceedings related to any public duty which may be incumbent on the Crown or any of its officers with respect to band membership under the *Indian Act*. Rather, the issue is the effect of the allotment of reserve land to new members of the band made at the discretion of the Crown. The distinction is important, and it was readily recognized by the then Director of the Indian

Affairs Branch when writing about the issue to his Deputy Minister in February 1955 (AB at p. 582):

> As will be noted, the recommendation is that an effort be made to reach a compromise settlement with the Indians. There seems no doubt but at the time new members were brought on to the reserve to participate in the File Hills Colony scheme, the wishes of the original members and the provisions of the Indian Act were given scant consideration. The [band membership] protests, with one exception, could possibly be disallowed on the basis that the allegations had not been proven either by the protesters or as a result of the examination of information on file in the Department. That, however, would not settle the matter. There would undoubtedly be appeals and, although the judge hearing the appeals might possibly support the decisions of the Registrar, that would not settle the matter or remove the unjust treatment of the original band members. The reserve was set aside for the Peepeekisis Band alone. I concur in the recommendation of the committee [that compensation be provided under the terms of a settlement] and submit same for your consideration.
> [Emphasis added]

[44] Consequently, the thrust of the claim set out in the Amended Statement of Claim is based on a *sui generis* duty of the Crown more akin to a private law duty than to a public law duty. As a result, the *Public Officers' Protection Act* does not apply. The Judge erred in finding otherwise.

Did the Judge err in finding that the *Limitations of Actions Act* applied to the claim?

[45] As I have already noted, subsection 31(3) of the *Limitations Act*, S.S. 2004, c. L-16.1 provides that no proceeding shall be commenced with respect to a claim if the former limitation period expired before the coming into force of that Act, *i.e.* before May 1st, 2005.

[46] Taking into account the nature of the claim set out in the Amended Statement of Claim, the limitation period under any of the prior limitation legislation applicable in Saskatchewan would

have been six years. This would be so under the *Limitation of Actions Act*, R.S.S. 1978, c. L-15 or the various versions of that Act which preceded it, which are all similar in their essential elements.

[47] The claim described in the Amended Statement of Claim is largely based on the *sui generis* fiduciary duty of the Crown. It may thus be properly viewed as coming within the ambit of paragraph 3(1)(j) of the *Limitations of Actions Act* which provides that for "any other action not in this Act or any other Act specifically provided for" there is a limitation period set at "within six years after the cause of action arose." (see *Wewaykum* at para. 131). This limitation period may however be extended "when the cause of action has been concealed by the fraud of the person setting up this Part…as a defence", in which case, "the cause of action shall be deemed to have arisen when the fraud was first known or discovered" (*Limitations of Actions Act*, section 4).

[48] The appellants principally submit that the material facts underlying their claim were concealed by the Crown. Though I agree with the appellants that the fraudulent concealment necessary to suspend the operation of the limitation period need not amount to deceit or common law fraud (*Guerin* at p. 390; *M(K.) v. M. (H.)*, [1992] 3 S.C.R. 6 at pp. 56-57; *Semiahmoo* at paras. 79-80), there must nevertheless at the very least be some form of concealment. In this case, it is abundantly clear from the record that, by the 1950's, a large segment of the membership of the Peepeekisis band was aware of the essential material facts underlying the cause of action set out in the Amended Statement of Claim. During this decade, numerous membership protests were initiated and pursued, and the basic facts concerning the claim were clearly publicly known. As a result, I cannot conclude that there was a concealment of material facts by the Crown.

[49] The appellants however add that even if the material facts supporting the claim were known to certain band members by the 1950's (notably the Goforth Group), that knowledge cannot be imputed to the band itself. I disagree. For the purposes of limitation periods, it suffices that the band members directly affected were aware of the material facts underlying the claim (*Lameman* at para. 17). In this case, there is no doubt that the descendants of the original members of the Peepeekisis band, as represented by the Goforth Group, were aware of the pertinent material facts at least by the 1950's, and did in fact pursue a claim against the Crown, albeit outside a judicial forum.

[50] The appellants also rely on this Court's decision in *Semiahmoo*, where Isaac C.J. noted (at paras. 84 to 86) that it has been only since the Supreme Court's 1984 decision in *Guerin* that Indian bands have been able, from a practical point of view, to exercise their legal rights with respect to breaches of the Crown's fiduciary duty. I agree that prior to *Guerin*, the so-called "political trust" theory of the Crown-aboriginal relationship made it difficult for First Nations to resort to the courts to pursue a claim based on the Crown's mismanagement of reserve land. The Supreme Court of Canada has nevertheless, since *Guerin*, stated that limitation periods apply to such a claim from the discovery of the material facts underlying it (*Wewaykum*; *Lameman*). In any event, even if *Guerin* was taken as the starting point of the limitation period, the action in this case would still be time barred.

[51] The appellants also submit that the Crown's breach of its fiduciary duty should be viewed as a continuing breach. I disagree. In *Wewaykum*, the Supreme Court dismissed a similar argument

made by the plaintiffs in that case, noting (at para. 135) that "[a]cceptance of such a position would, of course, defeat the legislative purpose of limitation periods."

[52] Consequently, and in light of the record before me, I agree with the Judge that the claim disclosed by the Amended Statement of Claim was barred by statutory limitation periods.

May the litigation nevertheless be pursued as a declaratory proceeding engaging the honour of the Crown?

[53] The appellants also rely on the recent decision of the Supreme Court of Canada in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 ("*Manitoba Métis*"). In that case, McLachlin C.J. and Karakatsanis J. found that a "claim based on the honour of the Crown is not barred by the law of limitations or the equitable doctrine of laches" and that as a result "the Métis are entitled to a declaration that Canada failed to implement s. 31 [of the *Manitoba Act, 1870*, S.C. 1870 c. 3] as required by the honour of the Crown" (*Manitoba Métis*, at para. 9).

[54] Of particular interest to these proceedings, *Manitoba Métis* stands for the proposition that the law of limitations does not apply so as to preclude a declaration that a specific obligation set out in the Constitution was not fulfilled in the manner demanded by the Crown's honour (*Manitoba Métis*, at paras. 133 to 144).

[55] The honour of the Crown is not only engaged where an explicit obligation to an Aboriginal group is enshrined in the Constitution, it is engaged in all situations involving the reconciliation of Aboriginal rights with Crown sovereignty. This includes with respect to the interpretation and

implementation of treaties or where section 35 of the *Constitution Act, 1982* is engaged (*Manitoba Métis* at paras. 68 to 72).

[56] In this case, the appellants submit that their claim engages the honour of the Crown in the fulfillment and implementation of its treaty promises relating to the setting aside of reserve lands for the Peepeekisis band. The honour of the Crown has indeed been found to be engaged with respect to the fulfillment and implementation of treaties made with aboriginal peoples (*Province of Ontario v. Dominion of Canada*, (1895), 25 S.C.R. 434 at p. 512 per Gwynne J., dissenting; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 at para. 51; *R. v. Badger*, [1996] 1 S.C.R. 771 at paras. 41 and 47; *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 43; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 at paras. 19-20; *Manitoba Métis* at paras. 73 and 79).

[57] The appellants consequently submit that, as a logical result of *Manitoba Métis*, their claim should be allowed to continue as a declaratory action involving the Crown's honour, and this irrespective of any statutory limitation period which may otherwise apply. As noted by Rothstein J. in his dissenting opinion in *Manitoba Métis* at para. 254, "it appears that the majority [in *Manitoba Métis*] has departed from the legal certainty created by *Wewaykum* and *Lameman*, in favour of an approach where 'reconciliation' must be given priority."

[58] For its part, the respondent Crown submits that the principles set out in *Manitoba Métis* are strictly limited to constitutional obligations enshrined in the Constitution. The respondent adds that since no constitutional type of relief is at issue in this case, *Manitoba Métis* does not apply.

[59] I need not however decide this issue since I am of the view that the principles set out in *Manitoba Métis* cannot extend to cases where an effective alternative dispute resolution mechanism is available to the plaintiffs. The majority in *Manitoba Métis* based their finding concerning the non-applicability of limitation statutes by emphasizing the goal of reconciliation recognized in section 35 of the *Constitution Act, 1982* (*Manitoba Métis* at paras. 140-141). The majority in that case also emphasized the fact that no other recourse was available to the plaintiffs, and that "declaratory relief may be the only way to give effect to the honour of the Crown" (*Manitoba Métis* at para. 143, [Emphasis added]).

[60] In this case, there exists an alternative effective recourse giving effect to the honour of the Crown and allowing for the goal of reconciliation to be achieved. Indeed, by following the process set out in the *Specific Claims Tribunal Act*, S.C. 2008, c. 22, the appellants may now pursue their claim before the independent Specific Claims Tribunal composed of a roster of superior court judges. That Tribunal does not consider any rule or doctrine that would have the effect of limiting claims or prescribing rights against the Crown because of the passage of time or delay, and it may award monetary compensation up to $150 million with respect to a specific claim described in section 14 of the *Specific Claims Tribunal Act*.

[61] The specific claims contemplated by the *Specific Claims Tribunal Act* include those arising from (a) a breach of a legal obligation of the Crown to provide lands or other assets under a treaty; (b) a breach of a legal obligation of the Crown under the *Indian Act* or any other legislation pertaining to Indians or lands reserved for Indians; (*c*) a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or the Crown's administration of reserve lands, Indian moneys or other assets of a First Nation; (d) an illegal lease or disposition by the Crown of reserve lands; (e) a failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority; or (f) fraud by employees or agents of the Crown in connection with the acquisition, leasing or disposition of reserve lands.

[62] Following *Manitoba Métis*, it remains an open question whether a declaratory action based on the honour of the Crown could be pursued before the Federal Court in the absence of the *Specific Claims Tribunal Act*. However, in the circumstances of this case, and in light of the terms of the *Specific Claims Tribunal Act*, it is not necessary in this case to answer that question. It is sufficient to note that the appellant's claim is barred from proceeding in the Federal Court by the effect of statutory limitation periods, and that any possible declaratory relief with respect to that claim based on the honour of the Crown would not give rise to any entitlement to pursue the matter in the Federal Court in light of the availability of an effective alternative recourse under the *Specific Claims Tribunal Act*.

Conclusion

[63] For these reasons, I would dismiss this appeal, with costs in favour of the respondent.

"Robert M. Mainville"

J.A.

“I agree.
Pierre Blais C.J.”

“I agree.
D.G. Near J.A.”

FEDERAL COURT OF APPEAL
NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-417-12
APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE RUSSELL DATED JULY 19, 2012, NO. T-1068-92	
STYLE OF CAUSE:	**THE PEEPEEKISIS BAND v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA**
PLACE OF HEARING:	Regina, Saskatchewan
DATE OF HEARING:	June 26, 2013
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	
CONCURRING REASONS BY:	
DISSENTING REASONS BY:	
DATED:	August 12, 2013

APPEARANCES:

Tom J. Waller	FOR THE APPELLANTS
Mark Kindrachuk Karen Jones	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Olive Waller Zinkhan & Waller LLP Saskatoon, Saskatchewan	FOR THE APPELLANTS
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT